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The Use of Foreign Precedents by Constitutional Judges

Edited by Tania Groppi and Marie-Claire Ponthoreau

In 2007 the International Association of Constitutional Law established an Interest Group on 'The Use of Foreign Precedents by Constitutional Judges' to conduct a survey of the use of foreign precedents by Supreme and Constitutional Courts in deciding constitutional cases. Its purpose was to determine - through empirical analysis employing both quantitative and qualitative indicators - the extent to which foreign case law is cited. The survey aimed to test the reliability of studies describing and reporting instances of transjudicial communication between Courts. The research also provides useful insights into the extent to which a progressive constitutional convergence may be taking place between common law and civil law traditions. The present work includes studies by scholars from African, American, Asian, European, Latin American and Oceania countries, representing jurisdictions belonging to both common law and civil law traditions, and countries employing both centralised and decentralised systems of judicial review. The results, published here for the first time, give us the best evidence yet of the existence and limits of a

transnational constitutional communication between courts.

Tania Groppi is Professor of Public Law at the University of Siena.

Marie-Claire Ponthoreau is Professor of Constitutional Law and Comparative Law at the University of Bordeaux.

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The Constitution of Spain

A Contextual Analysis

Victor Ferreres Comella

This book provides a critical introduction to the principles and institutions that make up the Spanish Constitution, which was enacted in 1978. It first explains the process of transition from Franco's dictatorship to democracy, in order to understand the historical circumstances under which the Constitution was framed. After offering a theory to justify the authority of the Constitution over ordinary laws, the book proceeds to explain the basic principles of the Spanish political regime, as well as the structure of its complex legal system. Later chapters focus on various institutions, such as the Crown, Parliament and the Government. A specific chapter is devoted to the territorial distribution of power between the State, the regions and local government. The last two chapters deal with the constitutional role of courts, and the protection of fundamental rights. The book includes some reflections on the challenges that lie ahead and the constitutional reforms that may need to be considered in the future.

Victor Ferreres Comella is Professor of Constitutional Law at Pompeu Fabra University in Barcelona and a Visiting Professor at the University of Texas at Austin.

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The Constitution of Mexico

A Contextual Analysis

José María Serna de la Garza

This book provides an overview of Mexico's political evolution since it became independent from Spain in 1821, and its current constitutional arrangements, principles and structures. The aim is to explain this evolution as the result of struggles between the interests and ideologies of different groups within Mexican society, each with a different political vision of how the State should be organised. Chapter 1 reviews Mexico's constitutional trajectory, and explains why democracy, republicanism, federalism, separation of state and church, protection of fundamental rights and the Nation's ownership of mineral resources first became constitutional principles. Chapters 2, 3, 4 and 5 deal respectively with democracy and the electoral system, and the legislative, executive and judicial branches of federal government. Chapter 6 introduces the institutional structure of Mexico's federal system, while Chapter 7 discusses the rules, principles and institutions for the protection of human rights. Chapter 8 examines the constitutional regime of Mexico's economy. The conclusion explains how a series of factors has combined to produce a gap between the formal Constitution and what can be seen as the living Constitution; bridging that gap presents Mexican politics and society with one of its great contemporary challenges.

José María Serna de la Garza is a Researcher at the Institute of Legal Research and Professor at the Law School, both of the National University of Mexico.

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The Constitution of France

A Contextual Analysis

Sophie Boyron

The centrepiece of this work is the French Constitution of 1958, portrayed by the author as an innovative hybrid construct whose arrival brought the constitutional stability that had eluded France for centuries. But the creation of the 1958 Constitution was not an isolated act; it represents part of an evolutionary process which continues to this day. Even though it is codified, the constitution of the Fifth Republic has evolved so markedly that some commentators have dubbed the present institutional balance the 'Sixth Republic'. It is this dynamic of the constitution which this book seeks to explain. At the same time the book shows how the French constitution has not developed in isolation, but reflects to some extent the global movement of ideas, ideas which sometimes challenge the very foundations of the 1958 Constitution.

Sophie Boyron is a senior lecturer in law at the University of Birmingham.

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Transconstitutionalism

Marcelo Neves translated by Kevin Mundy

Transconstitutionalism is a concept used to describe what happens to constitutional law when it is emancipated from the state, in which can be found the origins of constitutional law. Transconstitutionalism does not exist because a multitude of new constitutions have appeared, but

because other legal orders are now implicated in resolving basic constitutional problems. A transconstitutional problem entails a constitutional issue whose solution may involve national, international, supranational and transnational courts or arbitral tribunals, as well as native local legal institutions. Transconstitutionalism does not take any single legal order or type of order as a starting-point or ultima ratio. It rejects both nation-statism and internationalism, supranationalism, transnationalism and localism as privileged spaces for solving constitutional problems. The transconstitutional model avoids the dilemma of 'monism versus pluralism'. From the standpoint of transconstitutionalism, a plurality of legal orders entails a complementary and conflicting relationship between identity and alterity: constitutional identity is rearticulated on the basis of alterity. Rather than seeking a 'Herculean Constitution', transconstitutionalism tackles the many-headed Hydra of constitutionalism, always looking for the blind spot in one legal system and reflecting it back against the many others found in the world's legal orders.

Marcelo Neves is Professor of Public Law and Legal Theory at the University of Brasilia. He has previously taught and studied at the European University Institute in Florence, the Johann Wolfgang Goethe University in Frankfurt, the London School of Economics, and at the universities of Bremen, Fribourg and Flensburg.

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Current Problems in the Protection of Human Rights

Perspectives from Germany and the UK

Edited by Katja S Ziegler and Peter M Huber

While the legal systems of the United Kingdom and Germany differ in

essential respects, the current process of 'constitutionalisation' is well recognised on both sides of the Channel. 'Constitutionalisation' manifests itself in the evolution of a constitution and the influence of existing constitutional principles on the ordinary law. Human rights law provides one of the best examples of this process, and the aim of this book is to provide a comparative UK-German perspective on recent developments. First, it addresses human rights questions which arise in both jurisdictions in a similar way such as the tension between liberty and security, absolute rights such as human dignity and the prohibition of torture, and the question how conflicts between human rights are to be resolved and conceptualised. A second theme considers the impact of human rights on different areas of law, in particular administrative law, criminal law, labour law and private law generally. Finally, a third theme focuses on the intersection of national, supra- and international human rights law, in particular after the entry into force of the EU Charter on Fundamental Rights. The book thus reveals convergent and divergent answers to similar problems, examines differences in the impact of human rights on the legal systems under consideration, and traces parallel and distinct debates over and sensitivities about, human rights as well as sensitivities that arise in multi-layer situations in the UK and Germany.

Katja S Ziegler is Sir Robert Jennings Professor of International Law at the University of Leicester.

Peter M Huber is Justice of the Federal Constitutional Court of Germany and Professor of Law at Fakultät für Rechtswissenschaft, Ludwig-Maximilians-Universität München.

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