Index

abortion 247–9
abuse of power 2, 10, 68, 70, 86, 145, 160, 161, 164
balance: speed of state intervention and limiting 169
balance between branches 182
checks and balances 152
circular process 167–8
controlled not eliminated 170
detailed and specific rules 90
efficacy analysis 147
fragmentation 151, 166
National Human Rights Institutions (NHRIs) 206, 210
natural tendency 171
abusive constitutionalism 34
access
to information 184, 189
to justice 19, 33
Aden Abdihaji & 67 Others v. Malawi, MHRC Amicus Curiae 225–7
administrative justice 155
administrative law 63, 156
adoption 228–31
Africa 57, 90, 186, 228
Burundi 90–92
Kenya 217
Malawi Human Rights Commission (MHRC) see separate entry
pre-colonial 1
South Africa see separate entry
Tanzania 217
Aguas Blancas case 250–251
AIDS/HIV 64–5, 70–71
alternative dispute resolution (ADR) 185–7
American Insurance Ass’n v. Garamendi 122
amicus curiae 183–4, 219, 222, 225–6, 227, 228, 229, 230, 231–2, 234–5
animals 67
anticorruption commissions 37, 46
arbitrators 156
Aristotle 1
association, freedom of 221–5
asylum seekers 225–7
attorneys general 37, 99, 132, 134, 216–17, 247, 252
auditors 10
auditors-general 4, 185, 189
austerity 33
Austin, J. 159
Australia 33
emergency measures during financial crisis 96–7
Australian Conservation Foundation v. Commonwealth 219
authoritarianism 34, 171
Bank Markazi v. Peterson 139
Bentham, J. 159
Blackstone, W. 158
Bond v. United States 210
Bowsher v. Synar 120, 130–131, 132
Brazil 9
corruption investigation 100
impeachment of President Dilmah Roussef 99–100
Brexit 109–10
Buckley v. Valeo 129–30, 132, 133
Burundi: presidential term limit and Constitutional Court 90–92
business 141
see also corporations
Calderón, Felipe 246
Canada 33, 57
Human Rights Commission 192–3
Carpizo, Jorge 243
central banks 155
European 173

255

David Bilchitz and David Landau - 9781785369766
Downloaded from Elgar Online at 12/09/2018 01:49:08AM
via free access
changes to constitutions
Malawi 221–5
Mexico 251–2
procedures 34–5
unamendable provisions 35, 223–4
unconstitutional constitutional
amendment doctrine 6, 18, 35, 37, 52–5, 88, 223–4
Chavez, Hugo 34
checks and balances 38, 86, 88, 89, 106, 113, 146, 147, 168, 179
component of separation of powers
149, 150, 152–3, 155
court task to settle dispute
concerning 108
dominant political party 13
federal and unitary states 172
Mexico: autonomous constitutional
agencies 242
National Human Rights Institutions
(NHRIs) 206, 210, 215, 228, 233, 235
no-confidence motion 111
overlap between functions 68
political party competition 140
presuppose tension 104
slow down process 169
third consecutive presidential term
35
US Constitution 2
children
inter-country adoption 228–31
Chimango, Louis 225
Ciccone, Madonna Louise 228–31
Civil Liberties Committee v. Minister of
Justice and another (CILIC case)
219–20, 222, 232, 233, 234
civil society groups/organisations 141, 180, 191, 221, 228
Colombian Court 42–3, 46, 48
court: political improvement model
46, 47, 48, 49, 50
see also non-governmental
organisations
classical theory of constitutions 5
Clinton v. New York 119–20
collective rights 7, 8
Colombia 9, 105, 123, 169, 171
Commissions and checking
institutions 42–3, 48
Court: constitutional realization
model 39–45
Commissions and checking
institutions 42–3
information or selection 43–4
theory of prioritization 44–5
Court: political improvement model
48, 49, 50
emergency delegated decree power
45
equity 51
fiscal impact action 53–5
fiscal sustainability 53–5
insider strategies 45–6
legislative behavior 46
outsider strategies 46
presidential power 45, 52–3, 54
public debate 50
states of emergency 45
virtuous and vicious circles 50–52
delegation of powers 118
democratic dysfunction 36
socioeconomic structural injunction
cases 39–45
healthcare 40, 41–4, 46, 49, 50–52
internally displaced persons
(IDPs) 39–44, 46, 48, 49, 50
social state of law 53–4, 55
unconstitutional constitutional
amendment doctrine 35, 52–3
Commonwealth NHRIs Best Practices
211
comparative constitutional law 19, 22, 35
comptrollers 155
conceptual architecture of separation
of powers 25, 145–74
basic components 149, 150–6
checks and balances 150, 152–3, 155
distinct functions 150, 151, 152, 155
harmonious collaboration 150, 154–5
tripartite division of government
150–151
eternal return 149, 167–70
nation-state, cosmopolitan utopia
<table>
<thead>
<tr>
<th><strong>Index</strong></th>
<th>257</th>
</tr>
</thead>
<tbody>
<tr>
<td>and supranational structures</td>
<td>149–50, 170–173</td>
</tr>
<tr>
<td>nature and reason: victimizing state and individual as victim</td>
<td>149, 156–66</td>
</tr>
<tr>
<td>capricious will/prudent will</td>
<td>166</td>
</tr>
<tr>
<td>omnipotent/limited</td>
<td>166</td>
</tr>
<tr>
<td>unity/fragmentation</td>
<td>166</td>
</tr>
<tr>
<td>Cooper v. Canada</td>
<td>192–3</td>
</tr>
<tr>
<td>corporations</td>
<td>15, 16, 67</td>
</tr>
<tr>
<td>see also</td>
<td>business</td>
</tr>
<tr>
<td>corruption</td>
<td>15, 18, 20, 21, 31, 32, 36, 154–5</td>
</tr>
<tr>
<td>anticorruption commissions</td>
<td>37, 46</td>
</tr>
<tr>
<td>investigations</td>
<td>46, 109</td>
</tr>
<tr>
<td>reform</td>
<td>167</td>
</tr>
<tr>
<td>structural factors</td>
<td>57–8</td>
</tr>
<tr>
<td>Council of Europe</td>
<td>Venice Commission 112</td>
</tr>
<tr>
<td>courts</td>
<td>see judicial branch/courts</td>
</tr>
<tr>
<td>courts and expansion of executive power</td>
<td></td>
</tr>
<tr>
<td>checking expansion</td>
<td>103–7</td>
</tr>
<tr>
<td>deference</td>
<td>103–4</td>
</tr>
<tr>
<td>fundamental rights</td>
<td>103</td>
</tr>
<tr>
<td>protecting independence and integrity</td>
<td>103, 104–5, 106–7</td>
</tr>
<tr>
<td>retaliation</td>
<td>104</td>
</tr>
<tr>
<td>review of legislation</td>
<td>106</td>
</tr>
<tr>
<td>in-house legal opinion</td>
<td>113</td>
</tr>
<tr>
<td>procedural obstacles</td>
<td>87–8</td>
</tr>
<tr>
<td>reasons to turn to courts</td>
<td>88</td>
</tr>
<tr>
<td>role of courts</td>
<td>87, 107–13</td>
</tr>
<tr>
<td>game master</td>
<td>107–9</td>
</tr>
<tr>
<td>guidance to other branches</td>
<td>109–12</td>
</tr>
<tr>
<td>no remedy when legislative process complete</td>
<td>108–9</td>
</tr>
<tr>
<td>typology of cases</td>
<td>89–90</td>
</tr>
<tr>
<td>access to executive office and term limits</td>
<td>90–92</td>
</tr>
<tr>
<td>competence conflicts within dual executive</td>
<td>92–5, 107, 112</td>
</tr>
<tr>
<td>delegated legislation</td>
<td>95, 107</td>
</tr>
<tr>
<td>disqualification of contenders from elected office</td>
<td>98–101</td>
</tr>
<tr>
<td>emergency powers</td>
<td>96–8</td>
</tr>
<tr>
<td>executive powers over judiciary</td>
<td>101–3</td>
</tr>
<tr>
<td>impeachment and criminal prosecution</td>
<td>98–101</td>
</tr>
<tr>
<td>judicial review of inherent executive powers</td>
<td>95–6</td>
</tr>
<tr>
<td>criminal prosecution of highest elected officials</td>
<td>98–101</td>
</tr>
<tr>
<td>cultural, religious and linguistic communities</td>
<td></td>
</tr>
<tr>
<td>South Africa: CRL Rights</td>
<td></td>
</tr>
<tr>
<td>Commission 4, 181, 185, 188, 192, 203</td>
<td></td>
</tr>
<tr>
<td>Dames &amp; More v. Regan</td>
<td>122</td>
</tr>
<tr>
<td>De Gaulle, Charles</td>
<td>96</td>
</tr>
<tr>
<td>death penalty</td>
<td>227–8</td>
</tr>
<tr>
<td>delegated legislation</td>
<td>95, 107, 117–19, 155</td>
</tr>
<tr>
<td>Democratic Alliance v. South African Broadcasting Corporation</td>
<td>197, 200</td>
</tr>
<tr>
<td>democratic institutions</td>
<td></td>
</tr>
<tr>
<td>decreases in centrality and legitimacy of</td>
<td>15–18</td>
</tr>
<tr>
<td>distrust of</td>
<td>5–6, 10</td>
</tr>
<tr>
<td>dysfunction</td>
<td>36–8</td>
</tr>
<tr>
<td>design, constitutional</td>
<td>3–4, 5, 18, 21–2, 101, 209</td>
</tr>
<tr>
<td>expansion of rights</td>
<td>7–8</td>
</tr>
<tr>
<td>new accountability institutions</td>
<td>9–11, 18, 21, 37</td>
</tr>
<tr>
<td>thick and flexible constitutions</td>
<td>5–7, 36–7</td>
</tr>
<tr>
<td>transformative constitutionalism</td>
<td>8–9, 38, 39</td>
</tr>
<tr>
<td>dignity</td>
<td>66–7, 71, 226, 227</td>
</tr>
<tr>
<td>discrimination</td>
<td>184, 189, 191, 192</td>
</tr>
<tr>
<td>disqualification of contenders from elected office</td>
<td>98–101</td>
</tr>
<tr>
<td>distributive justice</td>
<td>69</td>
</tr>
<tr>
<td>Eastern Europe</td>
<td>5–6, 57</td>
</tr>
<tr>
<td>Economic Freedom Fighters v. Speaker of the National Assembly</td>
<td>198–200, 201</td>
</tr>
<tr>
<td>Ecuador</td>
<td>35, 170</td>
</tr>
<tr>
<td>education, right to</td>
<td>154–5</td>
</tr>
<tr>
<td>efficiency</td>
<td>68–9, 145</td>
</tr>
<tr>
<td>Egypt</td>
<td>106</td>
</tr>
<tr>
<td>El Salvador</td>
<td>170</td>
</tr>
</tbody>
</table>
The evolution of the separation of powers

election disputes, judicial review of 98–101

electoral courts or commissions 10, 18, 37, 86
Mexico: Federal Electoral Institute 240
South Africa 181
emergency powers judicial review of 96–8
environment 7
equality 8–9, 53, 171, 172
gender
South Africa: Commission for Gender Equality (CGE) 4, 181, 184, 185, 188, 191, 192, 203
see also inequalities
Erdogan, Recep Tayyip 112
European Union 12, 13, 15, 173
Brexit 109–10
European Council: representative of Poland 92–5
executive branch 9–10, 20, 21, 68, 79, 81, 83, 147, 153–4
Colombia 36, 41–2, 45, 46, 52–3
distinguishing between legislature and 89
expansion of power of 4, 11–15, 22
courts and 24, 85–113
functional specialization 38–9
Mexico 237, 238, 239
Poland 92–5
powers over judiciary 101–3
South Africa 65–6, 86, 98, 101–3
United States see presidential power under United States
equity, freedom of 72, 250
federal systems 86, 171–2
financial crisis 13, 16
emergency powers 96–7
food, right to 47, 76–8
fourth branch 37, 212
South Africa see fourth branch: Chapter 9s under South Africa
see also individual institutions
Fox, Vicente 244
framework constitutionalism 6
France 96
Free Enterprise Fund v. Public Company Accounting Oversight Board 133–5
Freedom Front v. South African Human Rights Commission and Another 192
fundamental rights 47–8, 95, 103, 128, 145, 169
agents responsible for realising 67
conflation of separation of powers and content of 59–60
problems with 69–71
South African Constitutional Court 61–6
dignity 66–7, 71
negative and positive obligations 67–8
private entities and 17
reconceiving separation of powers and content 83–4
rights and obligations
differentiating between 72–3
problematic conflation of 73–6
separation of powers and 76–80
separation of powers, role of judiciary and substance of 80–83
see also human rights commissions; socioeconomic rights
funding 207
judicial branch/courts 101, 104, 105
South Africa: Chapter 9s 181, 189, 202–3, 204

Germany 34, 122
Basic Law 9
generality in legislation 128
Constitutional Court
effective opposition 111
delegation of powers 118
Ghana 86, 96
Glenister I 108–9
Glenister II 109
global south
intertemporal theories of judicial role in see separate entry
theory of separation of powers 18–22
see also individual countries
globalization 15
Grootboom 62–3, 184, 194–5, 196
Index

Hamdi v. Rumsfeld 122
hate speech 192
healthcare 7
  Colombian Court
    structural orders 40, 41–4, 46, 49, 50–52
  South African Court 61–2, 64–5, 73–4
historical context 18
HIV/AIDS 64–5, 70–71
Hlobo case 101–3
Honduras 35
housing, right to 7, 48–9, 82–3
  Grootboom 62–3, 184, 194–5, 196
human rights commissions 10–11, 37, 86, 206–8
  Canada 192–3
  enforcement 207
  SAHRC 196
  funding 207
  SAHRC 203
general framework 208–13
  state party treaty reports 210–211
  independence 201, 207, 210, 212, 214–15, 236–7, 241, 243
Malawi Human Rights Commission (MHRC) see separate entry
Mexican Commission on Human Rights (CNDH) see separate entry
South Africa (SAHRC) 4, 181, 182–5
  amicus curiae 183, 184
  appointment of Chairperson 201
  complaints-handling and investigations 184–5
  complementarity of Constitutional Court and 182–3
  findings or recommendations 196
  independence 201
  interpretive and advisory function 192–3
  lack of clarity on role 194–6
  litigation 183–4, 194–6, 217
  locus standi in Equality Courts 184
  promoting rights 187, 188
  research and monitoring 189–90
restorative justice 185
shaping policy and legislation 191
under-resourced 203
sui generis 212, 214, 215, 233–4
Human Rights Watch 245, 246
Humphrey’s Executor v. United States 129, 132, 134
Hungary 14–15, 17, 88, 106
Huq, A.Z. 209–10
impeachment 98–101, 129, 131, 132, 135, 153, 238, 240
India 9, 57, 105
democratic dysfunction 36
Supreme Court 35–6
  emergency powers 96
  political improvement model 47, 49, 50, 52
  indigenous rights 19, 33
  inequalities 9, 18–19, 21, 142–3
  gender 191
see also equality
I.N.S. v. Chadha 118–19
Inter-American Court of Human Rights (IACtHR) 243, 244–5, 251, 252
internally displaced persons (IDPs) 39–44, 46, 49, 50
International Court of Justice (ICJ) 122
international human rights law 226–7
  minimum core 44
see also human rights commissions;
socioeconomic rights
international law 159, 229
intertemporal theories of judicial role in global south 21, 23, 31–56
  constitutional realization model 38–45, 55
  capacity 41, 42–3, 44–5
  information or selection 53–4
  legitimacy 41–2
  theory of prioritization 44–5
  democratic dysfunction 32–3, 36–8, 52
  constitutional fragility 34–6
  political improvement model 45–55
  anticorruption approach 46, 47–8
The evolution of the separation of powers

United States see Supreme Court under United States

jus cogens 227

Kaczynski, Lech 92–3
Kafantayeni v. Attorney General, MHRC Amicus Curiae 227–8
Kajoloweka, Ex parte 233
Kenya 217
Keserue v Keserue 230
King v. Burwell 143
Kiska, Andrej 101
Kruger v. President of the Republic of South Africa and Others 98

Laski, Harold 159
Latin America 9, 11, 17, 57, 147 see also individual countries
Le Brun, Charles 161
legal anthropology 159
legislative branch 9–10, 68, 79, 81, 83, 153–4
Colombia 36, 41–2, 43, 45–6
constitutional review of legislation 106, 119–20, 123–8, 136–9, 169
debated legislation 95, 107, 117–19
design of 169–70
distinguishing between executive and 89
expansion of executive power 11–15, 86, 107
functional specialization 38–9
funding of judiciary 101
Mexico 237, 238, 239, 240
policymaking 37
public trust 15–16
South Africa 65–6
oversight of ‘fourth branch’ institutions 181–2

United States see Congress under United States

Lincoln, Abraham 128
lobbying 16, 115
Locke, John 1, 68, 146, 164, 208, 212
Louis XIV 157, 161
Lula da Silva, Luiz Inácio 99
McCabe, Ex parte 136, 137–8
Madison, James 68, 89, 134, 152
Madonna Louise Ciccone 228–31

Ireland 57
Israeli Supreme Court
delegated executive rulemaking 95
indicted or convicted politicians in cabinet 99

Johnson, Andrew 128–9
judicial branch/courts 9–11, 17–18, 19, 22, 68, 153–5, 169
activism 18, 36, 39–56, 106–7, 168
appointments 101, 104, 105
courts and expansion of executive power see separate entry
dominant-party system 13, 20, 21, 36, 46, 47, 48
enforcement 101, 104
executive powers over 101–3
expansion of executive power 13, 14–15
funding 101, 104, 105
‘good governance courts’ 18, 20–21
inter-temporal theories of judicial role in global south see separate entry
Mexico 237, 238, 239–40
reform 167–8

socioeconomic rights 7–8, 20, 22, 33, 39–45, 46, 48, 49, 50–5
competency 59, 60, 81
indeterminacy 60
legitimacy 41–2, 57, 59, 81
separation of powers and content of 23–4, 57–84
thick and flexible constitutions 6–7
unconstitutional constitutional amendment doctrine 6, 18, 35, 37, 52–5, 88, 223–4

United States see Supreme Court under United States

Kacynski, Lech 92–3
Kafantayeni v. Attorney General, MHRC Amicus Curiae 227–8
Kajoloweka, Ex parte 233
Kenya 217
Keserue v Keserue 230
King v. Burwell 143
Kiska, Andrej 101
Kruger v. President of the Republic of South Africa and Others 98

Laski, Harold 159
Latin America 9, 11, 17, 57, 147 see also individual countries
Le Brun, Charles 161
legal anthropology 159
legislative branch 9–10, 68, 79, 81, 83, 153–4
Colombia 36, 41–2, 43, 45–6
constitutional review of legislation 106, 119–20, 123–8, 136–9, 169
debated legislation 95, 107, 117–19
design of 169–70
distinguishing between executive and 89
expansion of executive power 11–15, 86, 107
functional specialization 38–9
funding of judiciary 101
Mexico 237, 238, 239, 240
policymaking 37
public trust 15–16
South Africa 65–6
oversight of ‘fourth branch’ institutions 181–2

United States see Congress under United States

Lincoln, Abraham 128
lobbying 16, 115
Locke, John 1, 68, 146, 164, 208, 212
Louis XIV 157, 161
Lula da Silva, Luiz Inácio 99
McCabe, Ex parte 136, 137–8
Madison, James 68, 89, 134, 152
Madonna Louise Ciccone 228–31
Index

Malawi Human Rights Commission (MHRC) 26, 208, 211, 214, 233–5
courts 215–16, 234
child rights 228–31
crossing floor in Parliament and freedom of association 221–5, 234–5
*locus standi* 216–20, 232–3, 234
mandatory death penalty 227–8
refugee rights 225–7
women's rights 231–3, 234
framework 213–15
functions of 214
independence 214–15
state party treaty reports 211
*Marbury v. Madison* 104, 136
margin of appreciation 63
*Mazibuko v. City of Johannesburg* 65–6, 70–71, 74
*Medellin v. Texas* 122–3
media 34, 48
Mexican Commission on Human Rights (CNDH) 26, 236, 240, 243–54
accountability 237, 242, 254
independence 236–7, 241, 243
origins and evolution of 243–5
in practice 245–6
Supreme Court of Justice (SCJ) and 246, 254
challenging CNDH’s recommendations 252–3
investigatory power of SCJ 249–52
power to file actions of unconstitutionality 247–9
Mexico 21
autonomous constitutional agencies 236–7, 240–242, 254
Mexican Commission on Human Rights (CNDH) see separate entry
separation of powers principle 241
constitutional text 237
doctrinal understanding 237–9
judicial interpretation 239–40
militant democracy 34, 37, 46–7
military operations abroad 87–8, 96
military service, exemption from 95
*Miller v. Secretary of State for Exiting the European Union* 109–10
monopolies 17
Montesquieu, Charles Baron de 1–2, 68, 146, 152, 164, 179, 208–9, 212, 254
*Morrison v. Olsen* 131–3, 134
Mpinganjira, Brown 221
Mushwana, Mabedle Lourence 200–201
*Myers v. United States* 129, 131, 132
nation-state 15
cosmopolitan utopia, supranational structures and 170–173
*National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 184
National Human Rights Institutions (NHRIs) see human rights commissions
national security 85, 97
*Nixon v. General Services Administration* 126–7
Nkurunziza, Pierre 91
no-confidence motion 86, 110–112
non-governmental organisations (NGOs) 67, 99, 212, 232–3, 252
see also civil society groups/organisations
non-refoulement 226–7
ombudspersons 10, 37, 86, 155, 185
Colombia 42
Malawi 214, 215
Mexico 236, 254
open or secret ballot and no-confidence motion 86, 110–112
organized crime 108–9, 246
outsiders/outsider movements 17–18, 20
*PAC* case 219, 221–2, 224–5, 234–5
Pakistan 96
*Pape v. Commissioner of Taxation* 96–7
Paris Principles 187, 188, 211, 212, 217, 233
path dependence 44
Peña Nieto, Enrique 246
pharmaceutical drugs 17
*Plaut v. Spendthrift Farms* 139
Poland 17
conflict between President and Prime Minister in foreign affairs 92–5, 107, 112
police 108, 193, 243, 250
political parties 17, 140, 242, 254
constitutional courts: sanction or ban anti-democratic 34, 46–7
dominant 13, 20, 21, 36, 46, 47, 48
global south 20, 21
Malawi: crossing floor of Parliament and freedom of association 221–5
weak 13–14, 46, 48
polycentric issues 59
positivism 159
president and prime minister, competence conflict between 92–5, 107, 112
*Presidential Reference case* (Malawi) 222–4
privatization of public power 16–17
Procuraduría General de la Nación (National Inspector General): Colombia 42
procurators 10
prosecutors 37, 243
public ministry (*ministerio público*) 155
Public Protector (PP): South Africa 3, 181, 185, 197–202
public trust/distrust 5–6, 10, 15–16, 17, 18, 20–21, 241–2
Pufendorf, Samuel 158
Putin, Vladimir 112
Rabin, Yitzhak 99
reasonableness approach: South African Constitutional Court and socioeconomic rights 63–6, 71, 74, 79–80
Israeli Supreme Court: ministerial appointments 99

*Rediffusion (Hong Kong) Ltd v. Attorney-General of Hong Kong and Another* 109
referendum amendment to French Constitution and formally unconstitutional 96
Brexit 110
constitutional tiers 35
entrenched provisions in Malawi Constitution 224
struck down: proposal to hold 52–3
refugees 225–7
*Registered Trustees of the Public Affairs Committee v. Attorney-General and another, Malawi Human Rights Commission (Amicus Curiae)* (*PAC* case) 219, 221–2, 224–5, 234–5
religion and politics 156–7, 161
restorative justice 185
rhetoric of terrorism 12–13
*Robertson v. Seattle Audubon Society* 138
Romania 106
Roussef, Dilmah 99–100
Russia 88, 112
*S v. Jordan* 192
Santos, Juan Manuel 53
secret or open ballot and no-confidence motion 86, 110–112
Slovak Constitution: appointment of Constitutional Court justices 101
social contract 157, 159, 163
socioeconomic rights 7–8, 22, 23–4, 33, 154, 210
Colombian Court fiscal impact action 53–5
fiscal sustainability principle 53–5
structural injunction cases 39–45, 46, 48, 49, 50–52, 53–4
global north 33
global south 19–20
separation of powers and content of 20, 23–4, 57–84
confabulation 59–66
differentiating between rights and obligations 72–3
minimum core approach 63, 64
Index

normative underpinnings 66–9
problematic conflation of rights and obligations 73–6
problems with conflating 69–71
reasonableness approach 63–6, 71, 74, 79–80
reconceiving 83–4
rights, obligations and separation of powers 76–80
role of judiciary 80–83
see also human rights commissions
Soobramoney v. Minister of Health (Kwazulu-Natal) 61–2, 73–4
South Africa 105, 106
Constitutional Court 69–70, 71–2, 80, 83–4, 123, 178–9
conflation of content of socioeconomic rights and separation of powers 61–6
dominant-party democracy 36, 46, 47–8
healthcare 61–2, 64–5, 73–4
housing 48–9, 62–3
no remedy when legislative process complete 108–9
no-confidence vote against President 86, 110–112
organized crime and corruption investigation body 108–9
presidential emergency powers 98
public/private line 16
reasonableness approach 63–6, 71, 74, 79–80
SAHRC and 182–3, 194–6
water allowance 65–6, 70–71, 74
Zuma prosecution and subsequent litigation 101–3
fourth branch: Chapter 9s 3–4, 21, 25–6, 177–205
appointment and selection of principals 181, 201
Auditor-General 4, 185, 189
challenges 194–203, 204–5
Commission for Gender Equality (CGE) 4, 181, 184, 185, 188, 191, 192, 203
CRL Rights Commission 4, 181, 185, 188, 192, 203
funding 181, 189, 202–3, 204
governance function 182, 195, 200, 204
independence and authority of 181–2, 193, 200–202
interpretive and advisory function 192–4, 204
lack of clarity on role 194–6
‘new’ separation of powers 179–80
oversight by legislature 181–2
President’s private residence, upgrades to 198–9, 201
promotional/public education mandates 188–9
Public Protector (PP) 3, 181, 185, 197–202
(quasi-)judicial functions and ADR 183–8, 204
recommendations, nature and enforceability of 196–200, 204
research and monitoring 189–90, 204
separation of powers: doctrine in context 178–9
shaping policy and legislation 191–2, 204
subpoena 196
under-resourced 189, 202–3, 204
healthcare 61–2, 73–4
provision of anti-retroviral drug 64–5
housing 48–9, 62–3
Independent Communications Authority of South Africa (ICASA) 193
‘Oilgate’ scandal 200–201
Pan South African Language Board 180
police 108, 193
private entities and fundamental rights 17
Public Service Commission 180
public trust 16
South African Reserve Bank 180

David Bilchitz and David Landau - 9781785369766
Downloaded from Elgar Online at 12/09/2018 01:49:08AM via free access
The evolution of the separation of powers

transformative constitutionalism 8–9
water allowance 65–6, 70–71, 74
spillover effects 49–50
Sri Lanka 106
Stanton, Edwin 129
superintendents 10

Tanzania 217
Temer, Michel 99, 100
term limits on presidency 90–92
terrorism-related rhetoric 12–13
transformative constitutionalism 8–9, 38, 39
transformative mediators 187
Treatment Action Campaign 64–5, 74
Trump, Donald 17
trust/distrust 5–6, 10, 15–16, 17, 18, 20–21, 241–2
Turkey 88, 106, 112
Tusk, Donald 92–3

Uganda 228
unitary states 171–2
United Communist Party of Turkey and Ors v. Turkey (ECtHR) 225
United Kingdom
Brexit 109–10
executive powers 87–8, 109–10
United Nations 191, 207
High Commissioner for Human Rights 244
High Commissioner for Refugees 225, 226
United States 17, 22, 24–5, 56, 114–44
Affordable Care Act 143
appointment and removal of federal officials 128–35
for-cause limit on removal 129, 132–5
Attorney General 132, 134
budget, federal 119–20, 131
Congress 114–16, 143–4, 147, 170
appointment and removal of federal officials 128–35
as central democratic institution 117–20
constitutional limits on presidential power and 121–3
due process and generality in legislation 123–8, 142
importance of separation of legislative and executive powers 139–43
jurisdiction of courts 136–7
legislative interference with judicial decisions 137–9
non-delegation doctrine 117–18, 141–2
Constitution: federal 2, 5, 118, 120, 141
Appointments 128, 129, 130, 133
Bill of Attainder 123, 126
Equal Protection 123
judicial power 137, 138
Constitution: states 6
cueing 116, 143
emergencies 97–8
habeas corpus 105, 137
indigenous rights 33
national security 97
presidential power 87, 97–8, 114–15, 116, 143–4, 147
appointment and removal of officers 104, 128–35
Congress and constitutional limits on 121–3
‘enemy combatants’ in war on terror 105, 122
executive orders: undocumented immigrants 123
federal budget 119–20
importance of separation of legislative and executive powers 139–43
special counsel 131–3, 134
structural injunctions 43
Supreme Court 2, 14, 114, 115–16, 135–6, 143–4, 210
appointment and removal of federal officials 128–35
Congress and constitutional limits on presidential power 121–3
due process and generality in legislation 123–8, 142
‘enemy combatants’ in war on terror 105, 122
federal budgets and Congress 119–20
importance of separation of
<table>
<thead>
<tr>
<th>Index</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>legislative and executive powers 139–43</td>
<td></td>
</tr>
<tr>
<td>legislative interference with judicial decisions 137–9</td>
<td></td>
</tr>
<tr>
<td>nomination of justices to 104</td>
<td></td>
</tr>
<tr>
<td>non-delegation doctrine: Congress 117–18, 141–2</td>
<td></td>
</tr>
<tr>
<td>presumptions in favor of judicial review 136–7</td>
<td></td>
</tr>
<tr>
<td>veto of agency action by Congress 118–19</td>
<td></td>
</tr>
<tr>
<td>voting, exclusions from 143</td>
<td></td>
</tr>
<tr>
<td>United States v. Klein 138</td>
<td></td>
</tr>
<tr>
<td>United States v. Lovett 126</td>
<td></td>
</tr>
<tr>
<td>Uribe, Alvaro 35, 52–3, 54</td>
<td></td>
</tr>
<tr>
<td>Vattel, Emer de 158</td>
<td></td>
</tr>
<tr>
<td>Venezuela 34, 88, 170</td>
<td></td>
</tr>
<tr>
<td>Venice Commission 112</td>
<td></td>
</tr>
<tr>
<td>water, right to 8, 65–6, 70–71, 74</td>
<td></td>
</tr>
<tr>
<td>Weimar Republic 34</td>
<td></td>
</tr>
<tr>
<td>Wilsa case 231–3, 234</td>
<td></td>
</tr>
<tr>
<td>women's rights 231–3, 234</td>
<td></td>
</tr>
<tr>
<td>Youngstown Sheet &amp; Tube Co. v. Sawyer 121–2</td>
<td></td>
</tr>
<tr>
<td>Zedillo, Ernesto 244</td>
<td></td>
</tr>
<tr>
<td>Zuma, Jacob 86, 101–2</td>
<td></td>
</tr>
</tbody>
</table>