1 Introduction to Comparative Constitutional Law

1. Introduction

Why comparative constitutional law?

First, like any comparative study of law, the international comparison of constitutional systems helps us better appreciate and understand our own system and to broaden our world view. If we were only exposed to our own legal system, we would run the risk of taking features of that system for granted. We might see our own system's design as the only 'natural' and possibly best state of affairs. Comparison allows us to critically assess a system, and to better see not only what a constitution says but, crucially, what it does *not* say on a particular subject. Thus, comparative constitutional law serves as an educational tool in an academic curriculum.

Second, comparative law can provide helpful material for constitution-building and constitutional engineering. When a country considers a constitutional reform, when it must interpret the wording of its own constitution, or when a newly independent country needs a completely new constitutional setup, international comparison helps courts and constitution-drafters to learn from other systems' achievements. It also helps them to avoid repeating their mistakes. This is comparative law as the lawyer's own laboratory: constitutional and legal systems seek to address similar issues and problems and may do so with different techniques and manners. These differences we can learn from, use for inspiration or take as examples of how not to do it.

Third, comparative constitutional law often proves crucial in the particular context of the creation and development of international organizations. The institutional design of the European Union (EU), even though it is not a state but set up as an international organization, nevertheless has much in common with domestic institutional setups. The Court of Justice of the EU and the European Court of Human Rights (established under the European Convention on Human Rights (ECHR)) routinely rely on comparative constitutional law to develop their case law. The Court of Justice of the EU refers to constitutional traditions common to the member states

when establishing general principles of European law; the European Court of Human Rights seeks to identify common ground between the contracting states in interpreting the meaning of certain provisions of the European Convention on Human Rights. When a transnational entity must develop law 'from scratch', a comparative survey of the law of its member states is a sensible start.

This is not to say that engaging in comparative constitutional law is entirely uncontroversial. One argument against it is that international comparison in the area of constitutional law is futile, since countries differ too much in history, culture, self-perception, population structure, etc. Thus, the constitutional law of different systems is riddled with idiosyncrasies and is not readily comparable. For similar reasons, constitutional transplants or constitutional borrowing from one system to another can be unworkable at best, and dangerous at worst. As regards international organizations, in particular the European Union, comparison between states may yield unreasonable expectations when results are applied to an entity that is manifestly *not* a state.

Yet another argument is directed against the use of comparative methodology to constitutional interpretation by judges. The debate is most heated in the United States, where the Supreme Court at one point took international consensus into account when interpreting the meaning of the US Constitution. In *Roper* v. *Simmons* (543 U.S. 551), decided in 2005, the Supreme Court partly relied on international practice to establish that the death penalty for juvenile offenders is 'cruel and unusual punishment' in the sense of the 8th Amendment to the US Constitution. Opponents of this approach argued, among other things, that the American people should not be subjected to foreign law on which they have had no influence.

When and if we are using comparative constitutional law, we must therefore always be aware of *why* we are using it. Depending on the context, we must be aware of the limitations and sensitivity of the exercise. Comparative studies do not have to be uncritical; cross-border exchange of ideas does not have to mean to simply copy-and-paste provisions from one constitution to another. The controversy of using international comparison in domestic constitutional interpretation depends on the system at hand; in the US it is much related to the controversy surrounding the role of judges in general. In most European countries, such controversy simply does not exist. Comparisons do not have to settle an issue of domestic law but may provide inspiration or (bad or best) practices to learn from.

In recent years the EU has set up 'Score Boards' (such as the Justice Score Board) to be able to compare judicial systems; furthermore, EU

policy documents are drafted containing other comparisons (with respect to economic indicators for instance) or even 'best practices'. These endeavours also constitute comparative exercises and may lead states to be inspired by one another's practices or to even copy them. In that respect the EU may also make use of its own concepts of democracy, rule of law and other constitutional values (Art. 2 TEU) as values that are common to the member states. The EU has also been given the power to supervise the compliance by the member states with these values (Art. 7 TEU). These features imply a constitutional discussion between the EU and member states, not only in the pre-accession stage, since compliance with these features is an accession requirement, but also as a continuous process between the EU and member states.

Relying upon comparative constitutional law also has to take into account the distinction between the law on the books and the law in action. Sometimes constitutional legal practice has evolved under a constitutional text that did not change; sometimes similar constitutional models show conflicting practices; political majorities in one system may be more prudent in exercising their powers to the full than political majorities in another system, who may use their power against political minorities; constitutional courts in different systems may exercise similar powers to set aside statutes for unconstitutionality, but that does not settle the issue of how these powers are being used: extensively or infrequently. In that respect we see different patterns and cultures. And then, what do such aspects tell us? Do they give insight into the courts' activity or into the quality of lawmaking, or both? Or do they indicate the range and scope of constitutional clauses that the constitution provides? And then again, we ought also to know how the courts' judgments are received and accepted as legitimate, to get a full picture of the working of constitutional law.

Earlier we referred to the concept of constitutional engineering. Constitutions and constitutional systems are not a neutral given. In Western contexts one could say they serve three purposes: to set up and maintain an effective state; to establish and respect democracy; and to abide by the rule of law. These three purposes may and do conflict: the rule of law may restrict democracy, for instance by binding the legislature to human rights. The balance sought between these three aspects is for the states themselves to decide and the balance may even shift over time. But a balance is necessary and an overriding priority given to one of them may distort the quality of a state. Many other features – such as judicial review, the election system, the offices to be elected, accountability mechanisms, the role, oversight and powers of parliaments and executives – serve the balance sought in any given system

between the effectiveness of a state, democracy and the rule of law. What is important is to recognize these purposes and to make explicit the choices to be made in that respect, and that is also where comparative constitutional law may help in identifying how and why constitutional systems have made their choices.

> Let us take a recent example to illustrate: the Covid-19 pandemic. Elections were postponed, political campaigns affected, freedom of movement limited, parliamentary activity put to the test, emergency situations invoked, freedom of demonstration severely hampered – limitations we would not accept in ordinary times, but that we may accept as necessary still. However, also under the assumption that parliaments may scrutinize and are involved in establishing them and that state measures may be tested by courts for their proportionality and indeed necessity, and also with the assumption that these limitations are only temporary and of limited duration.

Constitutional law and practice

This book is meant to serve the first purpose of comparative constitutional law: to allow us to better understand the constitutional system of our own country and that of other countries, to assess their advantages and disadvantages, and perhaps even to discover our own preferences, and to be able to underpin our preferences and points of view with arguments and empirical findings and experiences in other states. What is needed for good assessments, however, are criteria and points of reference, and above all, as we also noted, an insight into constitutional practice. Constitutional texts may be clear, but not fully apt to show us the constitutional and political practice. For that reason we refer frequently to practice and political application, and provide examples to that effect. Practice is relevant. But so is the evaluation of why one rule or practice may be better than another: how do we evaluate a rule or practice? Is a more democratic system better than a system which has built-in judicial control? Do we allow optimal protection of human rights which makes the state less effective in the investigation or prosecution of crimes? In other words, where do we draw the line between these conflicting interests? That requires insight into and knowledge of the constitutional rules, practices and empirical data, as well as analysis of how to balance constitutional values such as democracy, rule of law and effectiveness of the state in fulfilling its tasks. And in that respect opinions may and do differ.

We always have to make clear what our criteria are and how we define them. When we say that one system provides for more democracy, how do we define democracy and why is more by definition better? When we prefer

constitutional review exercised by all courts over constitutional review by one single constitutional court, how should we assess the different benefits and counter-arguments? The argument should indicate why one solution may be better, and for what reason and purposes. And when we debate electoral systems, we should not forget to make explicit what it is we want an electoral system to achieve: for instance, full proportionality or effective workable majorities? We also need to consider the election system in context with the government system, the role of political parties and possibly also traditional evolution and the acknowledgement of the people of their system as legitimate and overall fair.

The above constitutes furthermore an implicit feature of comparative constitutional law as it has been engaged with in this book. The systems picked for comparison are familiar and share aspects of constitutionalism, rule of law, limited government, representative democracy and respect for human rights. These familiarities make a comparison more worthwhile, since sharing basic values does not necessarily lead to identical systems, and the various systems have undergone different historical events and are shaped by varying political circumstances.

Comparing the countries selected in this book with the Chinese, Iranian or Russian constitutional models is less in line with my goals since these models may use identical concepts (elections, rule of law, parliament, human rights) but give these a different meaning. Elections may mean voting only for those candidates who have been selected or accepted by the government; courts may operate under the instructions of the government or the leading party; rule of law may only be understood to mean that state rules must be obeyed, rather that the government is under the obligation to follow its own rules; parliament may be constructed as mechanism to keep the leaders in power and to applaud and legitimize state action; leaders may be replaced less often as a result of public debate and after public parliamentary scrutiny and more often behind closed doors and in ways that are inscrutable by the press or the general public; and transparency of governance is certainly less respected.

There is also an academic reason: for a (constitutional) lawyer the study and comparison of democratic systems that operate within the rule of law and constantly try to balance competing interests and seek a proper relationship between the different branches of government is far more intellectually stimulating than the legal study of dictatorial, one-party or purely theologically motivated systems. The latter are not so much focused on rights and balancing interests, powers and institutions, but merely on clinging to power, suppressing (segments) of society, oppressing free speech, and debating and rejecting a transparent political process.