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Introduction

1.1. Terminology

This book examines the legal relations between political institutions and the courts in some European countries and in the United States. The author happens to be interested in this theme and, particularly, in the boundaries between judicial and political activities.

At first sight, it is a somewhat unlikely subject. There seems to be little that judges and politics have in common. The dry atmosphere of the courtroom cannot be compared to the vividness of a debate in – say – the House of Commons or the American Senate. Judges are normally represented as somewhat elderly gentlemen, who try to look as wise as they are supposed to be; a gown and (in the case of English judges) a wig will strengthen that impression. Politicians, by contrast, radiate a cheerful kind of optimism, illustrated by a happy smile or a determined look on their faces; the image they evoke is one of willingness to tackle any problem humankind may find in its way. Two different worlds, one would be inclined to say. However, appearances are deceptive. I hope to show that it is far from easy to determine the borderline between the scope of judicial and political activities. To complicate things further, differences between legal systems also concern the exact location of this borderline. What is 'political' in some systems, for example in English law, may be the kind of problem to be solved by the courts in a different system, for example, under the Constitution of the United States. Capital punishment provides an example: its introduction, or reintroduction, is decided by political institutions in the United States, in fact by the state legislatures. And traditionally, the solutions adopted in the fifty states have not always been the same. The countries of Western Europe, on the contrary, have a hard and fast rule of law: the European Convention on Human Rights prohibits the application of the death penalty, except in

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time of war.[1] Subject to that exception, capital punishment is a legal and not a political issue in Europe.

It is true that the very existence of this borderline between political and judicial activities has been denied by some academics, who consider that any judicial opinion, on whatever subject, must be considered as a 'political' statement. That theory, though presented as 'modern' and 'critical' in the early 1980s, has since lost its appeal. Professional lawyers usually preserve the distinction between legal and political arguments nowadays, in Europe as well as in the United States. And they are right: nothing is gained by giving the concept of the 'political' such a wide scope that it includes court rulings on matters like divorce or bankruptcy.[2] There may be a problem in certain cases, when political rather than legal arguments are put forward in court decisions; but this problem is not solved by denying the distinction between the two kinds of arguments. As we shall see in the course of this study, the problem is particularly important when legal rules on relationships between public authorities, or between those authorities and the citizens, are concerned, i.e. in the area of constitutional and administrative law.

At this point, a first question of terminology emerges. The part of the law governing the relations between courts and political institutions, such as governments and parliaments, is known as 'public law' in many legal systems. The term is, however, slightly confusing when used in a study which is not confined to one legal system. The problem is, in particular, that the expression 'public law' is not part of traditional legal usage among English and American lawyers. It is the ordinary name for constitutional and administrative law in Dutch (*publiekrecht*) and in German (*öffentliches Recht*). It is in this sense that the expression will be used in this book.

This little terminological problem illustrates already one of the recurring difficulties of comparative legal research. In different legal systems, dissimilar concepts may exist; and if the same expressions occur, they often have a different meaning, or at least a different scope.[3] Among French

[1] Art. 1-2 Protocol no. 6 to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

[2] See also Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, 1999), pp. 11–12.

[3] On problems of terminology in comparative legal research see David J. Gerber, 'Toward a language of comparative law', *AmJCompL* 46 (1998), 719; Geoffrey Samuel, 'Comparative law and jurisprudence', *ICLQ* 47 (1998), 817.

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lawyers, for example, the expression 'public law' (*droit public*) has a more restricted meaning than among their Dutch and German colleagues, as it refers only to administrative law and not to constitutional law. That is not the only complication. In the United States, the concept of 'constitutional law' is used in a narrower sense than in Great Britain: it covers only the areas of law concerning the constitution which have given rise to judicial decisions. The relationship between President and Congress has not been the subject of any important body of case law, and the result is that it is chiefly examined in American books on 'government' or 'political science' rather than in those on constitutional law. I see no reason to adopt such a limited view of constitutional problems in this book. The comparatist has the advantage, however, that the case law of the United States Supreme Court on some constitutional matters, such as civil liberties and equal protection, is prolific. That circumstance, in itself, is a good reason to include American constitutional law in the analysis of problems concerning the relations between courts and political institutions.

According to this view, public law covers a large area of every national system of law. A respectable library could be devoted to American constitutional law, or French administrative law, alone. Consequently, it is an impossible task for one author to have a thorough command of this large area in more than one system of law; but he can nevertheless try to explore it.

As a lawyer, he is then faced with an additional difficulty. Frequently, it is hard to examine constitutional developments without taking a look at historical, social and political backgrounds. It is not possible to understand American case law on equal protection without some knowledge of the history of slavery and of racial inequality and oppression. Similarly, the peculiar characteristics of the French constitution of 1958 can only be fully grasped when they are considered as part of an evolution triggered by the political events of May 1958 and the ensuing birth of the Fifth Republic. It is an inadmissibly narrow conception of constitutional law, as Justice Frankfurter once put it in one of his individual opinions, 'to confine it to the words of the Constitution and to disregard the gloss which life has written upon them'.[4] The present author shares this broad conception of constitutional law, but he is aware that this does not facilitate his task. He

[4] Justice Frankfurter, concurring, in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 US 579 (1952). Felix Frankfurter was judge in the United States Supreme Court from 1939 to 1962.

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feels, however, that he has hardly any choice: a true understanding of the role of the judiciary in its relationship to the political institutions can only be gained after a careful examination of the constitutional background.

1.2. Comparative approaches

If it is already hard to gain a good understanding of public law in one legal system, what then is the use of comparisons between two or more systems? In answer to this question, different theories have been developed, some of them less convincing than others.

There is first a utilitarian answer: by learning from others, you can improve the quality of your own legal system.[5] It is quite possible that a well-considered use of comparative materials may help to solve legal questions of a more or less technical nature, such as liability of the employer for damage caused to the employee during working hours, or the position of the mortgagee in case of bankruptcy of the debtor. Thus, many provisions of the new Civil Code of the Netherlands have been inspired by solutions found elsewhere, for example, in the German or Swiss codes. However, it is difficult to see how this approach could possibly work in the area of constitutional law. American constitutional law, interesting though it may be, is very much a product of American history; it is part of American culture and attuned to American society. Constitutions are not very suitable commodities for export. It is true that, in the years following the Second World War, Americans sometimes attempted to impose their own constitutional standards on some of the defeated countries, but this operation was not a great success. During the American occupation of Japan, rumour had it that the new Japanese Constitution had been drafted by the legal advisers to the supreme military commander; but however that may be, the interpretation of the Japanese Constitution has always been completely at variance with constitutional practice in the United States. Identical words don't have necessarily the same meaning in different legal cultures.

A second aim of comparative law is the purely academic interest. We tend to be curious about things we don't understand, and we will try to find an explanation. Pascal said long ago, half mockingly, that it was 'an odd kind of justice' ('plaisante justice') which found its boundaries in the course of a

[5] See K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn, trans. Tony Weir (Oxford 1998), no. 2–11.

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river or a mountain range: 'true on this side of the Pyrenees, false on the other'.[6] In an intellectual climate affected by rationalism, academics will feel that there must be a justification for differences of this kind; their job is simply to find it. Montesquieu, also struck by differences among legal systems, made a fair attempt at discovering the reasons. He referred to elements like climate, religion, previous experience, morals and manners, and methods of government.[7] It is what we now would call a speculative generalization, more interesting to philosophers and sociologists than to lawyers. It is clear, for example, that democracy imposes its own requirements on legal evolution; but it is far from clear why some nations have a democratic tradition and others have not.

A third, and more idealist, vision of comparative law considers it as a modest means of fostering mutual understanding among nations and so, ultimately, of promoting peace. In the early nineteenth century, when comparative legal research began to develop as a special branch of legal science, there was much optimism that it would bring peoples together. A Dutch lawyer and politician expressed the opinion that it would bring about a new and international constitution, based on general principles of law growing into 'a world force'.[8] The evidence, sadly, does not support the idea that a better knowledge of the law and culture of other nations or groups will promote better relationships. The experience of the last quarter of a century can indeed be interpreted as showing the opposite: the mass killings in former Yugoslavia took place between ethnic and religious groups which knew each other only too well. At any rate, we are too sceptical nowadays to believe in easy methods of strengthening the forces of peace in the world.

The fourth view is based on educational considerations. One can only come to an understanding of a system of law by confronting it with a different system. The particularities of one system become apparent when other systems are found to be without them. This is, of course, part of a more general truth: having lived in the Amsterdam area during my childhood, I only discovered how flat the country was when I made my first

[6] Pascal, *Pensées*, no. 60 in the Krailsheimer translation (Harmondsworth, 1995); ed. Brunschvicq no. 294.

[7] *L'esprit des lois* XIX, 4; in L'Intégrale edn (Paris 1964) p. 641. Also in: Montesquieu, *Oeuvres complètes*, Pléiade edn (Paris, 1951), vol. II, pp. 396ff.

[8] Jan Rudolph Thorbecke, in 1841, in his 'notes' on the Dutch Constitution (*Aantekening op de Grondwet*).

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trip to the Belgian Ardennes. This is the kind of experience which applies to the legal landscape as well as to the physical environment.[9] There is, however, a further perspective to the educational view of comparative law. The comparison shows us something about law and legal evolution generally. It allows us to develop ideas about the judicial interpretation of legal and constitutional provisions, about the use of broad and narrow notions and concepts, about the social and cultural factors influencing legal developments, about the relationship between law and politics, and half a dozen other fundamental problems. These problems can be analysed in the abstract – for example, on the basis of historical and sociological studies. They can also be concretized, by means of a study of constitutional practice, of case law on issues of constitutional and administrative law, and of the debates over those issues in various legal systems. This is, in the main, an empirical and inductive approach to important problems of public law and of the relationship between law, politics and administration.

It is this latter concept of comparative law which has provided the guideline for the composition of this book. Constitutional documents, statutes and legal principles are couched in words: for the lawyer, these words have their particular importance because of the possibility of human action they imply; they are, as one philosopher put it, 'guides to action'.[10] Often, this action follows its own course and develops its own dynamics; it may, therefore, give a meaning to the words the drafters of these words could not have imagined. The Constitution of the United States consists of words; but, as Justice Holmes once observed, these words 'have called into life a being the development of which could not have been foreseen by the most gifted of its begetters'.[11] We shall be trying to trace the processes which give rise to such developments in different legal systems.

1.3. Comparative methods

Much has been written about the 'methodology' of comparative law, and the debate is far from closed. Recently, a leading scholar wrote that this methodology is still at the experimental stage.[12]

[9] Zweigert and Kötz, *Introduction*, no. 2–IV.
[10] Karl Olivecrona, *Law as Fact*, 2nd edn (London, 1971), p. 252.
[11] *Missouri* v. *Holland*, 252 US 416 (1920). Oliver Wendell Holmes was judge in the US Supreme Court from 1902 to 1932.
[12] Zweigert and Kötz *Introduction*, p. 33. Further literature on page 32 of the work.

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An additional difficulty is that contributors to the debate on comparative methods are usually interested in matters of private law. In that area, centuries of legal debate have helped to create a certain system of classification; the influence of Roman law and canon law is perceptible in many countries, particularly (but not exclusively) on the European continent and in Latin America.[13] That may provide a basis for comparative research. No such basis exists in the field of public law, where internationally accepted concepts and standards are much more difficult to find. There are only few common traditions, and public law often has a much more national character than private law. The notion of 'contract' in English law covers approximately – though not exactly – the same relations as those indicated by the concept of contract in French, Belgian or Dutch law. In contrast, the American expression 'separation of powers' and its French counterpart 'séparation des pouvoirs' concern entirely different matters. In the United States, the concept embodies not only the independence of the judiciary, but also the mutual autonomy of the legislative and executive branches of government, each of them having its separate tasks, powers and responsibilities. It is a general constitutional guideline, a fundamental principle underlying the American constitutional fabric. By contrast, the French expression refers only to the obligation of the courts to refrain from interfering in government and administration. From the French Revolution onwards, a rigid distinction has been drawn between the judicial and the administrative. Thus, similar expressions sometimes refer to different problems.

However, comparative study of public-law problems also has its brighter side: the number of fundamental problems is smaller than in private law. That is especially true if we limit our attention to States which are characterized as 'liberal democracies' in the literature on political science.[14] These States actually share some political and ideological traditions, which can briefly be summarized as democracy, rule of law, human rights protection and open government. Each of those traditions implies some of the basic assumptions which determine the working of the constitutional order: the role of representative bodies in legislation; the independence of the judiciary; protection of citizens against arbitrary government acts; participation of

[13] See Peter Stein, *Roman Law in European history* (Cambridge, 1999), ch. 5.

[14] Examples: S. E. Finer, *Comparative Government* (London, 1982), ch. 11; Philippe Lauvaux, *Les grandes démocraties contemporaines* (Paris, 1990), ch. 1-1; Arend Lijphart, *Patterns of Democracy* (New Haven, Ct., and London, 1999), chs. 1 and 14.

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citizens in politics by free elections and public debate; autonomy in their own sphere of life. These States happen to have a similar economic order and an economic and social history with striking similarities: they were, until recently when these words went out of date, the 'Western', 'capitalist' and 'industrial' States, and most of them have been colonial powers. Within the scope of their basic assumptions, they encounter comparable problems. Questions arise, for example, as to the validity of legislation which violates human rights, or as to the rights of citizens to take action against irregular decisions by the administration. These questions do not arise in States under authoritarian rule: one-party States, States governed by a military junta, communist or fascist regimes. We shall restrict our inquiry to States of the liberal-democratic type.

Within this group of States I introduce a further restriction, by limiting my attention chiefly to the systems of public law of the United States, Great Britain, France and the Federal Republic of Germany. The reasons for this further restriction are mainly practical: materials are not always easily accessible, and my command of languages and appetite for reading have their own limits. The studies I actually did accomplish convinced me, however, that the comparison between American, British, French and German public law gives us the opportunity to discuss some basic problems concerning the relation between the courts and political institutions. I may, nevertheless, permit myself to make a few little excursions to places such as Italy, the Benelux countries and Canada.

If we take the basic assumptions of the liberal democracies for granted, further analysis will allow us to unearth a certain number of questions which are 'fundamental' in the true sense of the word: an answer to such questions *must* have been given before the system of public law could begin to operate. To give two simple examples: an Act of Parliament, a statute, is either unassailable or it can be struck down by the courts for violation of some higher law; Parliament and government either have their own independent powers or work together as interdependent bodies. The answers to such fundamental questions determine the way the system will be shaped. We can, therefore, try to invent two opposite answers to these questions, in order to create two extreme poles, linked by a continuum. For each question, some legal systems will be close to one of the two poles, but most systems find their place somewhere on the line between the two extremes. To study this, I shall use models: abstract solutions to general problems, sufficiently detached from reality to present the problem in a pure form,

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but close enough to reality to permit comparisons among actual systems of law.[15]

To put it another way, my method will consist in identifying some of the fundamental questions of public law in the four systems I propose to investigate; trying to find the opposing answers to each of these questions; and locating the four systems on the line between the two polar answers. The advantage of this method is that it can first give abstract answers, not encumbered by the compromises which characterize real life; but it then allows us to look into legal systems as they actually work and to measure the distance they keep from the abstract answers. The abstract model only serves as a yardstick for the comparison of the existing systems of public law; it does not express any value-oriented appreciation.

1.4. Legal approaches

The choice of method implies that certain subjects will not be discussed, although they might perhaps be considered as part of comparative public law and as having a link with our main theme, the relations between courts and political institutions.

First, I shall not seek to condemn or praise any legal system in particular, or any solution adopted in such a system. As far as possible, I shall refrain from assessing legal arrangements in terms of 'good' and 'bad'.[16] Assessments of that kind cannot be made without a profound knowledge of the relevant system of law and of the historical and social background. If 'native' lawyers have expressed their opinions, or even their moral judgments, it may be interesting to refer to these opinions and judgments, particularly when they are strongly held; but I shall not add my own appreciation. Some decisions of the US Supreme Court on the admissibility of abortion have given rise to a great political and moral debate in the United States; they also show something about the way the Court interprets the Constitution.[17] I intend to concentrate on the second aspect; the reader may benefit more from my reflections on the interpretation of constitutional provisions than from my

[15] See Claude Lévi-Strauss, 'Sens et usage de la notion de modèle', in *Anthropologie structurale deux* (Paris, 1973), ch. VI.

[16] See Philippa R. Foot, 'Approval and disapproval', in *Law, Morality and Society*, Essays in Honour of H. L. A. Hart (Oxford, 1977), ch. XIII.

[17] In particular: *Roe* v. *Wade*, 410 US 113 (1973); *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 US 833 (1992).

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opinions about abortion. More in general, I feel lawyers should be reticent about moral issues arising in legal systems other than the one they are used to. But, of course, Oscar Wilde was right in saying that 'one should not carry moderation to extremes'.

A second consequence of my choice of method is my view that constitutional provisions, rules of law, powers of institutions, should be examined in the framework of the legal systems in which they have developed. It is quite feasible to adopt a different perspective in studies of detail, by isolating a certain legal arrangement from its constitutional or legal environment. A study comparing the composition and the powers of the British Parliament with those of the American Congress might adopt such an approach.[18] It is, of course, interesting to know that a refusal of Royal assent to a bill passed by the British Parliament means that the bill will not become law, but that a veto of the American President can be overruled by Congress deciding by a qualified majority.[19] For the lawyer, this kind of information is not very helpful: he wants to know, rather, why the position of the President in the legislative process is so different from that of the British monarch. But he can arrive at this kind of understanding only by examining the position of the head of State in American and British constitutional law; and a true understanding of the presidential powers under the US Constitution cannot be gained without a thorough analysis of the American concept of separation of powers.

Most legal arrangements, however, cannot be isolated from their constitutional and legal background. A comparative study of such a famous institution as the French Conseil d'Etat would soon reveal that this body has no counterpart in countries like Britain or the United States. In these countries, the judicial tasks of the Conseil d'Etat are done by the ordinary courts, or by special 'boards' or 'tribunals', or not at all; the advisory functions of the Conseil d'Etat are scattered over a great number of persons and advisory bodies. These organizational differences reveal, however, a more profound problem: the tasks, powers and jurisdiction of a body like the Conseil d'Etat are not perceived in British and American legal thinking as necessarily belonging together. Therefore, the concepts used in the Anglo-American world lack the categories appropriate for defining the activities

[18] Example: Kenneth Bradshaw and David Pring, *Parliament and Congress* (London, 1972, paper 1973).
[19] Art. 1 section 7(2) US Constitution.

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