Introduction

The Editors

What is the purpose of comparative constitutional law? What is 'comparative' and what is 'constitutional' about it; and to what extent should the former be relevant to the latter?

The objects of constitutional law are constitutions. But what are 'constitutions'? From a purely *descriptive* point of view, constitutions simply reflect the institutions and powers of government; and comparative constitutional law here becomes an exercise in 'comparative government'.[1] From a normative perspective, on the other hand, constitutions 'order' societies according to particular political philosophies; they thus do not merely describe political societies but *prescribe* their actions.

Both the prescriptive and descriptive view come into sharp relief in the sphere of *comparative* constitutional law. For comparing constitutions requires us to consider differences (and similarities) in forms of government as well as the normative philosophies behind constitutional choices. This comparison will often lead us to take a step back from the primary objects of comparison – the constitutions themselves – so as to examine the social phenomena and normative concepts that form the elementary 'constituents' of our political imagination. The process and product of comparison are thus of equal importance. For only the two of them, joined together, will allow us to illuminate previously unseen elements of individual constitutions from the vantage point of a new – outside – perspective.[2] Legal comparisons here offer hermeneutic help: they allow us to see 'our' own constitution with different eyes and to locate its structural and normative choices by reference to alternative choices made in other constitutional orders. For example: anyone wishing to explain the French 'presidential' system may wish to contrast it to the United Kingdom's 'parliamentary' system; and which better way to contrast

[1] S.E. Finer, *Comparative Government* (The Penguin Press, 1970).
[2] M. Siems, *Comparative Law* (Cambridge University Press, 2014), 2–5.

American 'federalism' than to see it against the backdrop of the French 'unitary' state?[3]

Apart from this hermeneutic function, comparative constitutional law may also serve a 'constructive' function. This constructive or creative function often comes to the fore in times of political crisis or social transformation. For whereas a mature constitutional order tends to 'reflect the principles of the social order that it seeks to regulate',[4] this relationship is often inverted for new ones, as new constitutions are often designed to create new social orders.[5] What is the best way to proceed here? While a search for the 'ideal' constitution may often turn out to be quixotic,[6] a borrowing or refinement of 'real' constitutional principles from other States (or historical epochs) might sometimes be the best solution to accommodate for revolutionary changes or reformist adaptations. True, revolutionary changes tend to be relatively rare, yet constitutional reforms are surprisingly common in today's world. For the need for regular constitutional change has dramatically accelerated in recent decades during which the forces of globalization have 'integrated' many states into the world economy. And though the 'autobiographical' and 'idiosyncratic' characteristics of national constitutions remain worthy of note,[7] their special characteristics have

[3] For this comparative constitutional approach, see only A. de Tocqueville, *Democracy in America* (edited: P. Bradley, Vintage, 1954).

[4] W.G. Friedmann, *The Changing Structure of International Law* (Stevens, 1964), 3. The classical statement of this idea comes from none other than Montesquieu. In his *The Spirit of the Laws* (edited by: A.M. Cohler et al., Cambridge University Press, 1989), we thus read (ibid., 8): 'Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another. (...) They should be related to the physical aspect of the country; to the climate... to the properties of the terrain... to the way of life of the peoples... they should relate to the degree of liberty that the constitution can sustain, to the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners; finally, the laws are related to one another, to their origin, to the purpose of the legislator, and to the order of things on which they are established.'

[5] The classic example here may be the 1791 French Constitution, whose main purpose is to abolish the 'old' social order; see Preamble: 'The National Assembly, wishing to establish the French Constitution upon the principles that it has just recognized and declared, abolishes irrevocably the institutions that have injured liberty and the equality of rights'.

[6] In the words of Francis Bacon: 'As for the philosophers, they make imaginary laws for imaginary commonwealths; and their discourses are as the stars, which give little light, because they are so high.'

[7] S.E. Finer, V. Bogdanor and B. Rudden, *Comparing Constitutions* (Oxford University Press, 1995), 7.

partly been 'flattened' through a process of social symbiosis and legal adaptation.[8]

This process of constitutional symbiosis is not confined to States alone. Today, the very idea of what a 'constitution' is has migrated from the national to the supranational or international sphere. Of course, the days of the nation state are surely not yet counted, and yet the state-centred definition of what a 'constitution' is – a definition that became prevalent in the eighteenth and nineteenth century – has come to be challenged in the twentieth and twenty-first century by such legal phenomena as the European Union and the United Nations. But can we really speak of the European Treaties or the UN Charter as 'constitutions'; and, if so, to what extent have they taken ideas from the constitutional traditions of their Member States? The European Court of Justice certainly thinks so;[9] and even within the context of international law, 'constitutionalizing' forces have famously been identified.[10]

What, then, is the purpose of this (text)book? The idea behind this *Cambridge Companion* is to present the interested reader with the core elements of a – modern – comparative constitutional law course. While no match, in terms of size, to the 1,500-page American hornbooks,[11] we nonetheless hope that our collection offers a wide-ranging yet concise introduction to the subject; and we have thereby particularly tried to refer to more modern constitutional phenomena, such as the rise of independent fiscal institutions and various forms of 'multi-constitutionalism'.

[8] For this excellent point, see O. Kahn-Freud, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1 at 9: 'Would Montesquieu have written about cultural diversities the way he did, had he been able to anticipate that everywhere people read the same kind of newspaper every morning, look at the same kind of television pictures every night, and worship the same kind of film stars and football teams everywhere? Industrialisation, urbanisation, and the development of communications have greatly reduced the environmental obstacles to legal transplantation – and nothing has contributed more to this than the greater ease with which people move from place to place.'

[9] Cf. Opinion 1/91 (*European Economic Area*), [1991] ECR I-6079, [21]: '[T]he [EU] Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a [Union] based on the rule of law.'

[10] J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009).

[11] See only N. Dorsen, M. Rosenfeld, A. Sajó and S. Baer, *Comparative Constitutionalism: Cases and Materials* (West Publishing, 2016); as well as V. Jackson and M. Tushnet, *Comparative Constitutional Law* (Foundation Press, 2014). The former book comprises over 1,700 pages; the latter book is over 1,900 pages long!

Pedagogically, we have arranged our twenty-two chapters into several thematic parts: beginning with an exploration of the theoretical foundations (Part I) on which comparative constitutionalism builds and having revisited some important historical experiences (Part II), the core constitutional principles (Part III) and state institutions (Part IV) will be analysed before we finally investigate forms of transnational constitutionalism (Part V) that have emerged in our 'global' times.

Part I thereby aims to clarify the contours of comparative constitutional law by better defining the two core elements of the discipline, namely what is 'comparative' and what is 'constitutional' within comparative constitutional law.

Part II presents a (highly selective) number of State constitutions and their historical evolution. Complementing the generalist aspects of Part I, it is meant to offer concrete illustrations of five – diverse – constitutional orders; and we have primarily selected them as specific manifestations of particular constitutional structures or philosophies. The UK Constitution here embodies not only the quintessential 'unwritten' and 'descriptive' constitution, but it also establishes one of the oldest 'monarchical' states of the world. The French and the American Constitutions, by contrast, represent the prototypes of the modern 'normative' constitution, which are both based on the 'republican' distinction between 'constituting' and 'constituted' power. These three constitutional orders also offer an excellent contrast between pure 'parliamentarism' (the United Kingdom) and pure 'presidentialism' (the United States) with the French constitutional system lying in between the two extremes. The British and French constitutional orders are furthermore excellent expressions of unitary constitutional orders, whereas the American and Indian Constitutions are excellent examples of federal constitutional systems. The Indian Constitution is also a potent and powerful illustration of a vibrant Asian and post-colonial legal order, whereas the Chinese Constitution may today be characterized as 'the' paradigm case for a modern socialist constitution.

Part III analyses key structural principles of contemporary constitutionalism. The five 'ruling' ideas for us here are: (representative) democracy, the separation of powers, the rule of law, the protection of human rights and federalism. Each of these core ideas of modern constitutionalism emerged independently; yet there are also positive and negative correlations between them. For example, the democratic principle

arguably stands in clear tension with the separation of powers principle;[12] and it equally collides with the idea of fundamental rights removed from the democratic will represented by the majority. The rule of law, on the other hand, accords very well with both the separation of powers principle as well as the idea of fundamental human rights. The constitutional principle that undoubtedly stands mostly on its own is here federalism. For whereas the other constitutional concepts are 'unitary' concepts that determine who holds power among a number of (horizontal) institutions, federalism concerns the vertical division of powers between two levels of government. And this duplication of the constitutional levels within a 'compound' republic raises very interesting questions with regard to, for example, democracy but also the protection of fundamental rights.[13]

Part IV explores five governmental institutions that are the key players within most liberal democratic states. The democratic principle within modern constitutions indeed insists – first and foremost – on the existence of a 'parliament' as the representative of the 'people'. The idea that the legislative function belongs to parliament has become so engrained in our constitutional imagination that older forms of 'royal' legislation have nearly disappeared.[14] Following the separation of powers principle, the legislature ought to exist in isolation of the executive; and with the rise of the 'administrative State' in the nineteenth century,[15] many modern constitutions here further distinguish between 'governmental' and 'administrative' functions. To the list of 'parliaments', 'governments', 'administrations', 'courts' must of course be added as the institution charged with the judicial function; but we have also decided to add a fifth – emergent – branch: independent fiscal institutions (IFIs). Though IFIs have a longstanding presence in some constitutional systems, their rise to prominence in the wake of the global financial crisis suggests that

[12] In the provocative words of C.H. McIlwain, *Constitutionalism: Ancient and Modern* (Liberty Fund, 2008), 132: 'Political balances have no institutional background whatever except in the imaginations of closet philosophers like Montesquieu. When in modern times representative assemblies took over the rights and duties of earlier kings, they assumed a power and a responsibility that had always been concentrated and undivided.'

[13] On this point, see Chapter 2, dealing specifically with the question of a separate 'federal' constitutionalism.

[14] On the powers of the British 'crown' and its 'royal' prerogatives, see M. Sunkin and S. Payne, *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999).

[15] On this point, see Chapter 15 as well as G. Lawson, 'The Rise and Rise of the Administrative State' (1993–94) 107 *Harvard Law Review* 123.

they are coming to be seen as performing an essential extra-governmental (and extra-legislative) function in the regulation and monitoring of public finances.

Part V finally takes account of the fact that most state constitutions no longer live in splendid isolation (even if some pretend they do).[16] Our contemporary world is a global world; and today, many nation-states are deeply embedded in a wider network of transnational legal structures. Can we thus speak of transnational constitutionalism; and if so, what are its horizontal and vertical dimensions? Transnational constitutionalism may be found in a number of places, and the rise of international organizations – like the United Nations and the World Trade Organization – here only represent the most general and universal phenomena. Regional transnational structures can be found in the context of the European Union and the 'Commonwealth of Nations'. The European Union represents the most developed form of supranational constitutionalism – a constitutionalism that has extensively 'borrowed' from the constitutional traditions of federations, like the United States and Germany.[17] But more often, constitutional 'transplants' take place horizontally between state legal orders; and the various informal and formal instances of constitutional borrowing and transplants will be discussed in our last chapter.

We are acutely aware that this *Cambridge Companion* has left some very important topics untreated. African and Latin American constitutionalism would have deserved some special treatment;[18] and the re-emergence of theocratic constitutions might have equally deserved a special chapter.[19] The post-communist constitutions within Central and Eastern Europe would have offered a fascinating case study in both

[16] See T. Cottier and M. Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7 *Max Planck Yearbook of United Nations Law* 261.

[17] See for example R. Schütze, *European Constitutional Law* (Cambridge University Press, 2015), Chapter 2. For the failed attempt of a 'reverse' borrowing, see *Printz* v. *United States*, 521 US 898 (1997), where Justice Scalia held (ibid., 921): 'Justice Breyers's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.'

[18] For an excellent treatment of the latter, see R. Gargarella. *Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution* (Oxford University Press, 2013).

[19] For a modern example of a theocratic constitution, see only A. Schirazi, *The Constitution of Iran* (Tauris, 1998).

constitutional design and transitional regimes,[20] while the rise of authoritarian regimes in the world – whether it be Turkey or North Korea – could have provided a contrasting tonic to liberal triumphalism.[21] And yet: each introduction to a subject must make some 'hard choices'; and the choices we have made will of course be revaluated in a future second edition.[22] Last but not least: in order to help students with the various jurisdictions and materials within this *Cambridge Companion*, we would like to draw attention to the existence of a companion website. The latter can be found under www.masterman-schutze.eu, and here students will not only find links to all the relevant cases and readings mentioned in each of the chapters but can also use a range of extra materials designed to complement this book.

[20] See for example W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-Communist States in Central and Eastern Europe* (Springer, 2008).

[21] For an overview here, see T. Ginsburg and A. Simpser (eds.), *Constitutions in Authoritarian Regimes* (Cambridge University Press, 2014).

[22] For any suggestions in this respect, please feel free to contact us via email; or, more traditionally, by post.