

Comparative Constitutional Law – an Indispensable Tool for the Creation of Transnational Law

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The continuing importance of the study of comparative constitutional law – A European perspective – The Venice Commission and international monitoring of national constitutional systems – Authoritarian tendencies and the European Constitutional Heritage – Interpretation and application of constitutional provisions depends on the context – Comparative law as a common endeavour of judges, lawyers, and scholars

Increasing attention is being paid to the study of comparative constitutional law, thanks both to the expansion of transnational constitutional law and to the increasing relevance of the legal value of national constitutional identities. Other phenomena, such as the international monitoring of national constitutional systems, reflect, and simultaneously further contribute to, the evolution of cultural and political discussion on the matter. As recent academic contributions demonstrate, the field of comparative constitutional law remains open to debate. Some years ago, in an essay devoted to doctrinal constructivism in the field of constitutional law,¹ Armin von Bogdandy formulated a strategy for responding to the challenges facing European constitutional scholarship, in which he emphasised the increasing importance of ‘comparative constitutionalism in the European legal arena’. Recently, Mark Tushnet discussed the diminishing relevance of the traditional boundaries (subject matter, discipline, and geography) of ‘comparative law as a scholarly field’. The blurring of those boundaries has made it impossible to distinguish comparative law from the field of law in general.² An analytical

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¹A. von Bogdandy, ‘The past and present of doctrinal constructivism: A strategy for responding to the challenges facing constitutional scholarship in Europe’, 7 *ICON* (2009) n. 3, p. 364–400, in particular p. 394 and p. 397.

²M. Tushnet, ‘The Boundaries of Comparative Law’, 13 *EuConst* (2017) p. 13.

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comparison of these two authoritative positions offers an opportunity to reflect upon current discussions on the importance of the study of comparative constitutional law. I shall attempt here to expand upon the subject by framing it within the European context.

A EUROPEAN PERSPECTIVE

One could justifiably wonder whether the differences between von Bogdandy and Tushnet derive from differences in the geographical and cultural areas in which the two authors frame their research and writings. It is evident that von Bogdandy's approach takes a European perspective and is especially concerned with the growing formation of a European legal order which can give – according to his research hypothesis – new currency to the project of the *ius publicum europaeum*: 'a solidified European context for discussion and reception', the doctrinal dimensions of which apparently go beyond the existence of the EU legal system. However, there is also an operational dimension to the discussion. Comparative law studies can make an important contribution to the identification of the basic features of European law held in common by the Member States of the Union and which bind them as well the governing bodies of the Union. Legal literature has taken note of these developments with the introduction, as a term of reference within the European debate, of the concept of the so-called European Constitutional Heritage.

This concept, which 'refers to a collection of principles', is at the basis of the collective constitutional cultures of Europe, even if its interpretation and application in the various national constitutional orders differs.³ Within the European polity, the integration of the constitutional experiences of the concerned states is achieved by means of a constitutional discourse which 'must be conceived of as a conversation of many actors in a constitutional interpretative community'.⁴ It involves in particular European and national judges. But the concept not only facilitates the consideration of the shared constitutional doctrines of the European States, it also has practical – and not merely cultural – relevance. It can be useful to remember that the origins of current thought on this concept are naturally linked to the ascent of the European Court of Justice's fundamental rights case law. For many years, the Court has undeniably been engaged in investigation into the common constitutional traditions of the various EU Member States.⁵

³ D. Rousseau, 'European Constitutional Heritage: a Condition for European Constitutional Law', 2 *The Federalist*, XXXIX (1997) p. 57-60.

⁴ J.H.H. Weiler, 'European Neo-constitutionalism: in Search of Foundations for the European Constitutional Order', XLIV *Political Studies* (1996) p. 517 at p. 532.

⁵ See, for instance, ECJ 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft GmbH/Einfuhr und Voratstelle fuer Geteide und Futtermittel*.

The relevance of European constitutional traditions has even been recognised by the constitutional courts of the newer EU Member States. For instance, in its Lisbon decision the Polish Constitutional Tribunal confirmed ‘the solemn character of constitutional traditions, which are common to the member states’.⁶ And the implications of such judicial activity have not been lost on the constitutional and ordinary legislatures of the states concerned.

Alessandro Pizzorusso⁷ rightly suggests that the European Constitutional Heritage can be identified with the use of comparative law techniques of research and construction, which in turn define the relevant features of the internal legal orders of the Member States. Not only judges and legislators are interested in the use of the concept. International bodies adopt a similar approach when they monitor Member State compliance with their fundamental principles and values. The Venice Commission’s advisory mandate entails setting up a dialogue with the states that are members of the Council of Europe, and monitoring the implementation of the provisions of the Council’s legal system aimed at ensuring compliance with the fundamental principles and values this institution was created to guarantee.⁸

This is a well-known effect of the principle of conditionality.⁹ Commentators recognised its importance in the years after the Berlin Wall fell, when former communist and soviet States first started seeking admission to the Council of Europe, and later membership of the European Union. The Venice Commission played a crucial role in advising and supporting democratic transitions in Central and Eastern Europe. Other European bodies were involved in the process too. The institutions of the Council of Europe are allowed to deny accession requests or impose sanctions if its monitoring body finds that a Member State’s actions breach accepted norms. In the context of Organization for Security and Co-operation in Europe, the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe supports and promotes democracy and the rule of law by observing elections, reviewing legislation and advising governments on the development of their democratic institutions. In both cases – Council of Europe and the Organization for Security and

⁶M. Wendel, ‘Comparative Reasoning and the making of a Common Constitutional law’, 11 *ICON* (2013) p. 981. But, for example, in its decision n. 22/2016 (XII. 5) concerning the rights of migrants and their treatment, the Constitutional Court of Hungary recognised that the protection of constitutional identity rests with the ECJ and, at the same time, vindicated its power of guaranteeing the Hungarian sovereignty and traditional identity against measures adopted by the governing bodies of the European Union: *I-CONnect*, December 2016.

⁷A. Pizzorusso, *Il patrimonio costituzionale europeo* (Il Mulino 2002) p. 16.

⁸S. Bartole, ‘Conditionality and Living Constitution’, in G.G. Harutyunyan (ed.), *New Millennium Constitutionalism: Paradigms of Reality and Challenges* (Njar 2013) p. 157.

⁹J.T. Checkel, *Compliance and conditionality*, Arena Working Papers WP 00/18, 1.

Co-operation in Europe – the functioning of the system implies the elaboration of guidelines of constitutional engineering and the establishing of yardsticks for the evaluation of the treatment of rights and freedoms based on the national traditions of European constitutionalism. The Commission of the European Union does the same when it supervises the implementation of the *acquis communautaire* by candidate states, or the reforms Member States must implement to comply with obligatory norms.¹⁰

THE CONTINUING IMPORTANCE OF COMPARATIVE CONSTITUTIONAL LAW

If we keep the European dimension of von Bogdandy's perspective in mind, we can better understand the conclusions Mark Tushnet reached in his contribution. When he considers the general expansion of the field of law in light of the 'inevitable globalization of constitutional law',¹¹ his research focuses on the end result in a process which is not limited to Europe and is characterised by a progressive blurring of the geographical boundaries which have traditionally defined the field of comparative law research. However, since this is an ongoing progress, we do not believe that studying the varying national constitutional experiences has become irrelevant. In our view, the process towards the globalisation of constitutional law requires a comparative methodological approach. Even within the framework of the EU, geographical boundaries still exist¹² and we must take them into account if we want to understand the unavoidable and difficult balancing act involving the states' residual sovereignty and their basic constitutional features, on the one hand, and the exigency of the formation of the transnational (or international)¹³ law of the Union, on the other. In this context, lawyers deal with provisions in the Treaty on the European Union that safeguard the constitutional identity of the Member States or that demand compliance with the common principles and values whose observance is a *conditio sine qua non* of continued membership. Both require a comparative approach. The identification of the constitutional identity of a state implies a comparison with other states, and their common traditions are identified by surveying the

¹⁰ See, for instance, U. Sedelmeier, 'Pre-accession conditionality and post-accession compliance in the new member States: a research' in W. Sadurski *et al.* (eds.), *Après enlargement: legal and political responses in Central and Eastern Europe* (Robert Schuman Centre 2006) p. 145.

¹¹ M. Tushnet, *The Inevitable Globalization of Constitutional Law* (Harvard Law School Public Law & Legal Theory Working Papers Series Paper No. 09-06).

¹² '... both normatively and institutionally, EU law remains intertwined with the legal systems of Member States': K. Tuori, 'Transnational law: on Legal Hybrids and Legal Perspectivism', in M. Maduro *et al.*, *Transnational Law Rethinking European Law and Legal Thinking* (Cambridge University Press 2014) p. 21.

¹³ On this terminological question see Tuori, *supra* n. 12.

multiplicity of traditions that exist in the states concerned. If we abandon a comparative constitutional perspective when considering European law, we run the risk of favouring a monistic approach at the risk of losing the advantages offered by the pluralist approach suggested by Miguel Maduro.¹⁴

The advent of a common, global legal space characterised by an absence of traditional boundaries will likely depend on the progressive expansion of the effects of globalisation. The expansion of the EU may be considered – at the regional level – as the first, constituent, step in a long process. We may be observing a transition from the fragmentary experience of the various national legal orders to a global legal space constructed from the raw materials of national experiences – as we see happening today in Europe. Therefore, a comparative methodological approach is still important and productive, and not only for the sake of scientific research and knowledge. The comparative methodological approach might even prove more immediately practical and operationally useful than in the past, as demonstrated by the European experience. The European perspective provides a constructive point of view from this side of the Atlantic that is possibly more conducive to the study of the regional phase within a larger process. Superregional effects probably appear more frequently on the radar of researchers who approach the phenomenon from a different perspective.

AUTHORITARIAN TENDENCIES AND THE EUROPEAN CONSTITUTIONAL TRADITIONS

Since 1989 and the fall of the Berlin Wall, the monitoring functions exercised by international institutions have gained in importance in the context of what has been defined, in a seminal article by Bruce Ackerman,¹⁵ as ‘the rise of world constitutionalism’. Monitoring bodies now also exercise advisory functions, which should facilitate the spread of constitutionalism into new areas. At the end of the twentieth century, the former members of the Warsaw Pact engaged in the process of accession to the Council of Europe, and later to the EU. It was therefore necessary to ascertain whether they were in compliance with the fundamental principles and values of those European supranational institutions. Their sovereignty was never in danger as they had agreed to accept external advice and monitoring from the competent bodies as part of the accession package; it was not imposed.¹⁶ In order to fulfil their monitoring task, the bodies developed

¹⁴ M. Maduro, ‘Three claims of constitutional pluralism’, in M. Avbely and J. Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) p. 67.

¹⁵ B. Ackerman, ‘The Rise of World Constitutionalism’, 83 *Virginia Law Review* (1997) p. 771.

¹⁶ This aspect was not fully considered by M. Tushnet, ‘Some Skepticism About Normative Constitutional Advice’, 49 *William & Mary Law Review* (2008) p. 1473.

a 'yardstick' to measure adherence to the European Constitutional Heritage, which assumed normative relevance as soon as it became binding through operation of the principle of conditionality. A dialogue has been maintained with the authorities concerned to avoid any hint of authoritarianism.

This led, little by little, to the burgeoning of transnational (or international) constitutional law, operating under the aforementioned principle of conditionality. However, its relevance to the Member States of both the Council of Europe and the EU is threatened by the emergence of authoritarian tendencies, a backlash against liberal democracy supposedly justified by the primacy of state sovereignty and security, as demonstrated recently in Russia, Hungary and Poland.¹⁷

Conditionality is sometimes no guarantee of satisfying results. After admission to the Council of Europe or the EU, certain states flouted recommendations: Poland has not yet fully acknowledged recommendations to reform its constitutional court made by the governing bodies of the Council of Europe and the EU on the basis of opinions adopted by the Venice Commission, and Hungary has only partially accepted similar remarks on its judicial organisation.¹⁸ The attitude of States that do not accept the prevailing norms or their sources put the credibility and usefulness of the comparative approach in defining the European Constitutional Heritage in peril. But even in these cases, comparative legal analysis and interpretation may yield positive results from an historical perspective. A complete evaluation of recent developments is only possible through exhaustive examination of the authoritarian aspects of the mentioned constitutional reforms in light of historical European traditions and the constitutional principles and values of the other European States that inspired the ongoing development of supranational institutions.

THE IMPORTANCE OF INTERPRETATION AND APPLICATION OF CONSTITUTIONAL PROVISIONS

Use of the comparative approach yields determinative suggestions for the identification of the basic elements of the relevant European legal doctrines in

¹⁷ A. Cooley, 'Countering Democratic Norms', 26 *Journal of Democracy* (2015) p. 49.

¹⁸ An important element to understand the overall situation is the interpretation of the behaviour of the institutions of the EU. While the case of Hungary is still on hold after a resolution of the European Parliament adopted in July 2013, the European Commission both in July 2016 and in December 2016 invited Poland to reform the contested legislation concerning the Constitutional Tribunal. In both the cases the competent bodies have not yet considered the possible application of Art. 7 TEU. These developments bring into question the nature of the transnational law at stake. If the adoption of the follow-up sanctions depends on the political decisions of the European governing bodies, it could be reasonable to classify it as soft law. But in other cases, we are in the presence of law which grants recourse to the judiciary. See recently on this point, W. Sadurski, 'That other anniversary', 13 *EuConst* (2017) p. 417.

the frame of constructivism, as mentioned by von Bogdandy in his contribution. Comparison of the various legal orders also contributes to a better understanding of the national identities at stake – and of their differences. Although knowledge of the written constitutional and legislative provisions of the State concerned matters when compliance with the European Constitutional Heritage is being monitored, its effective interpretation and application in light of the moral and philosophical traditions of constitutionalism are equally relevant, a point correctly appreciated by Tushnet. Giovanni Bognetti¹⁹ emphasised the importance in comparative constitutional law studies of knowledge of the concrete application and interpretation of the constitutional provisions concerned. The same exigency is present in the field of constitutional monitoring. If we want to grasp the reality of constitutional experience we must examine the socially effective result of the way the written texts are understood, the norms that emerge through their interpretation.²⁰ This is not necessarily an approach based on a realist theory of the law, because even a formal take cannot avoid considering the concrete application of interpretations of legal provisions. The Kelsenian design of the *Stufenbau* of normative sources construes the practical judicial or administrative interpretation and application of constitutional and legislative texts as the last stage in the epiphany of the creation of law.²¹ Comparative analysis only makes sense if we develop its doctrines while taking the concrete practical use of constitutional and legislative provisions into account.

The experience of the Venice Commission with organisational models of the judiciary clearly demonstrates that its approach is especially pertinent to the exercise of monitoring functions. The Commission frequently remarks that the judicial organisation needs to be kept separate from the other powers of State. The Mediterranean model of autonomous judicial councils has been proposed to the new democracies of Central and Eastern Europe as an institutional tool that could ensure the independence and neutrality of the judiciaries.²² However, the Commission added that in countries where a judiciary dependent on the executive is long-standing tradition, this arrangement will also suffice as long as the relevant practices respect judicial independence and neutrality.²³ It is evident that in this

¹⁹ G. Bognetti, *Diritto costituzionale comparato Approccio metodologico* (Stem Mucchi Editore 2011).

²⁰ O. Weinberger, 'Die Norm als Gedanke und Realität' [*The Norm as Thought and Reality*], 20 *Osterreichische Zeitschrift für öffentliches Recht* (1970) p. 203.

²¹ See H. Kelsen, *Reine Rechtslehre* (F. Deuticke 1934), Ch. V, § 31 c-e.

²² See on this choice critical remarks in M. Bobek and D. Kosar, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', 15 *German Law Journal* (2014) p. 1257, and B. Iancu, 'Perils of Sloganised Constitutional Concepts Notably that of "Judicial Independence"', 13 *EuConst* (2017) p. 582.

²³ CDL – PI(2015)001. However, it is convenient to remember that, for example, in the UK, normative provisions and administrative practices were recently reformed to avoid difficulties connected with their problematic application.

case the Venice Commission does not limit its analysis to the relevant written constitutional and legislative provisions, but also thinks ahead by taking their concrete interpretation into account. It explores whether their application is inspired by the constitutional principle of judicial independence.

Is the credibility of (hard) law being vanquished by soft law according to a contraposition postulated more than 30 years ago?²⁴ Soft law does not impinge upon the construction of legal theory insofar as it is similar to, or overlaps²⁵ with, well-known venerable concepts 'such as gentlemen's agreements, comity, non-binding agreements, or – in English constitutional law – constitutional Conventions'. Moreover, after the contributions of Ronald Dworkin on the subject, the graduated effects due to the regulation of norms are a frequently-studied phenomenon.²⁶

In conclusion, recent experience suggests that it is not sufficient to develop a scientific theory, but that one should also consider its practical application as a means of verifying the theory's development. Political and moral doctrines, as well as the historical experiences of constitutionalism, must be integrated in comparative constitutional law's studies and researches. For instance, the history of constitutional development in Europe allows us to distinguish between contributions of different states to the spread of constitutionalism by geographical area. Some states have, since the very beginning, been at the centre of the development and implementation of constitutional doctrines while other countries have remained – for varying political and social reasons – at the periphery of those developments or taken part in them in an ephemeral and occasional way. This is why Western European constitutional experience weighs so heavily upon the European Constitutional Heritage.²⁷ Political movements in certain European states have contested this orientation by appealing to ancient national traditions to interpret the doctrines of constitutionalism, but they run the risk of citing historical anachronisms.²⁸ Events in certain countries might be worthy of some attention although, for various reasons, they cannot be construed as landmarks of European constitutional tradition. This is the case, for

²⁴ See R. Baxter, 'International Law in "Her Infinite Variety"', 29(4) *International and Comparative Law Quarterly* (1980) p. 549 and P. Weil, 'Towards Relative Normativity in International Law', 77 *American Journal of International Law* (1983) p. 413.

²⁵ A. Peters and I. Pagotto, 'Soft Law as a New Mode of Governance: A Legal Perspective', New Modes of Governance Project.

²⁶ R. Dworkin, *Taking Rights Seriously* (Bloomsbury 1977) p. 22, distinguishing principles from rules because they do not require an application in an 'all-or-nothing' fashion.

²⁷ S. Bartole, 'Standards of Europe's Constitutional Heritage', 30/II *Giornale di storia costituzionale/Journal of constitutional history* (2015) p. 17.

²⁸ As is suggested by – as far as I can understand his position by reading the abstract of his contribution – E. Jarasiunas, 'The Prehistory of Constitutionalism: the Sources or the Archetype', 118(4) *Jurisprudence* (2009) p. 21.

example, with the Polish Constitution of 1791, which was never applied.²⁹ Constitutionalism in that country only took root following the sad experiences of the twentieth century and the fall of the soviet regime. Historical traditions cannot be invoked to explain the recent constitutional crisis, although the Polish authorities may think they do. The continuing relevance and development of the Magna Carta in the United Kingdom are entirely missing in the case of the Hungarian *Bulla Aurea*,³⁰ which was interpreted during the twentieth century as consistently awarding the nobility tremendous privileges. It disregarded the basic principle of equality of treatment and non-discrimination – it failed to recognise the dignity and rights of the individual. Therefore, the *Bulla* does not credibly create precedents for contemporary Hungarian constitutional choices. Recently, the Venice Commission declared that the traditional Russian and Ukrainian institution of the *Prokuratura* (office of the public prosecutor) is not in compliance with the guidelines that safeguard human rights and the rule of law.³¹ Moreover, doubts arose about the compatibility with the principles of the European Constitutional Heritage of the references in the Russian Constitution (Article 131) to traditions of that local government, whose social orientation Alexander Herzen appreciated.³²

A COMMON ENDEAVOUR

The examples given above all concern the organisation of the powers of state, which are closely monitored by the supranational institutions for compliance with relevant principles, such as those which are at the basis of the rule of law policies adopted by the Parliament and Commission of the European Union.³³ Judges are especially concerned with safeguarding human rights and fundamental freedoms. Even in this field, also after the adoption of the EU Charter of Fundamental Rights, comparative constitutional law is still relevant. The Court of Justice and

²⁹ B.M. Palka, 'La Costituzione Polacca del 3 maggio 1791: tra tradizione e modernità', 6 *Historia Constitucional (revista electrónica)* (2005) p. 285.

³⁰ E. Balogh, 'La formazione della Bolla d'oro e il suo contenuto istituzionale nella storia costituzionale e giuridica ungherese', in L. Besenyei *et al.* (eds.), *De Bulla Aurea* (Valdonega 1999) p. 129.

³¹ CDL-AD(2009)048. The Commission shares the opinion of the Consultative Council of European Prosecutors that constitutional history and legal tradition of a given country may justify non-penal functions of the prosecutors, but considers the Ukrainian and Russian historical model of the *Prokuratura* not in conformity with the European standards and Council of Europe values: it reflects a non-democratic past, it is overly powerful and does not offer judicial guarantees comparable with those offered by similar institutions.

³² Look at the review of A.M. Kelly, *The Discovery of Chance: The Life and Thought of Alexander Herzen*, in *NYRB* (2016) p. 24.

³³ Communication from the Commission to the European Parliament and the Council (COM (2014) 158 final/2) and European Parliament Resolution of 25 October 2016 (2015/2254(INL)).

other courts continue to rely on comparative studies in order to give content to the rights and principles by which the authorities and Member States of the EU must abide. This arrangement is permanently in flux inasmuch as it is potentially affected by conflicting claims of supremacy of national versus European laws. Miguel Maduro, as quoted above, rightly emphasised that while ‘the EU claim of supremacy forces national courts to reconstruct even their national constitutional law (...) national constitutional claims also shape how EU law is developed and sensitive to national constitutional traditions.’³⁴

This implies that judges and lawyers taking part in these developments participate in the creation of law, in some way completing and integrating the written law of the relevant Treaties and national constitutions and legislation. Within this overall framework, we are witnessing a progressive convergence of the different national legal orders – even between civil law and common law, as Tushnet correctly remarks. For instance, the principle of *stare decisis* resonates through the decisions of civil law judges, particularly when they concern the development of normative innovations, or when they are duty-bound to respect the decisions of supranational judges such as the European Court of Justice and the European Court of Human Rights.

Scholars and other legal professionals – even those not fulfilling formal legislative or judicial functions – have traditionally played a significant role in the creation of legal orders beyond the existing states, finding inspiration in the states’ common legal heritage, and this is still the case. Contributions by constitutional and legislative authorities are sometimes lacking or insufficient. This especially when there is a dearth of political initiative, or when intervention is limited to grandiose proclamations or the invocation of general principles, effectively leaving room for the other *dramatis personae* to develop the work in progress.

European history may illustrate this. The contribution made by lawyers and scholars to the formation of international and transnational constitutional law in light of the spread and acceptance of commonly-shared principles and values reminds us of the contribution to the development of the *Jus commune* – in a different economic and social context – by jurists, judges, notaries, and professional lawyers, and especially by scientists and legal academicians of the Middle Ages, who directly took part – as Paolo Grossi suggests³⁵ – in the reception of Roman law, which itself knew no geographical or political borders. And we must not forget the importance of Savigny’s concept of the lawyer’s *Beruf* for legislation and jurisprudence, which envisaged the formation of a common legal unity by taking a novel approach to the traditional legal experiences of the German States of the time.³⁶

³⁴ Maduro, *supra* n. 14, p. 74.

³⁵ P. Grossi, *L'Europa del diritto [The Europe of Law]* (Editio Laterza 2007) p. 48.

³⁶ F.K. Von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1814).