

Teaching Comparative Constitutional Law: Methodological Challenges

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1 Introduction

The Maastricht Law Faculty is known for stressing the value of international comparison throughout its curriculum. This equally applies to the field of constitutional law. Apart from including comparative elements in the study of domestic constitutional law, the Faculty offers courses on comparative constitutional law specifically, at both bachelor and master level. While these courses are quite popular and well-evaluated, we continue to meet a recurring challenge of finding the didactically optimal way of introducing comparative constitutional law as a subject of its own. Essentially, the two competing approaches are (1) comparison on a country-by-country basis, and (2) thematic comparison subject by subject. A related question concerns the optimal way of matching available textbooks and other literature to the chosen teaching method. In the following paragraphs, we shall outline the practical implications of the different approaches and our experiences with them, as well as our experiences with prescribing literature. In addition, we shall submit the comparative constitutional law textbook that Maastricht staff have written themselves to broader reflection.

2 International Comparison in Studies of Domestic Law

It is a relatively straightforward exercise to include comparative elements in studies of the constitutional law of a law faculty's home system. Thus, where a course on Dutch constitutional law at a Dutch university devotes attention to the legislative process in the Netherlands, it may devote attention to the legislative process of other countries as well. Apart from the other benefits of engaging in comparative constitutional law, the exercise helps students to better understand and appreciate their own system. For example, an aspect of the law that is tightly regulated in their system might in other systems be mentioned implicitly at best; conversely, international comparison may reveal what their own constitution does *not* say on a particular subject. A practical example is, in the context of the legislative process, the possibility for one chamber of parliament to overrule the other, and the right for a chamber to propose amendments to bills. In the Netherlands (as in the US), both chambers must agree in order for a bill to become law; yet that is not the case in all systems. Meanwhile, the Dutch Constitution (and the French one even more so) regulates precisely who may propose amendments to bills and when; other constitutions (including the US Constitution) mention this only in passing. As a matter of didactics, the logical consequence in this setting is that comparison takes place subject-by-subject, not country-by-country. After all, one starts out with one's own constitutional law and takes a look across the border for each area discussed, usually to look at systems which feature different solutions. To stay with the example of the legislative process, the Dutch system might be compared with a system where one chamber of parliament may, at least usually, overrule the other (such as the UK, Germany or France).

3 Comparative Constitutional Law as a Separate Subject

The deeper methodological challenge arises when comparative constitutional law is introduced as a subject on its own. The subject is then to a large extent divorced from the domestic background. Practically, this means that for example exchange students may easily participate in the course along with nationals of the faculty's home country, and gain knowledge and insights that are of universal value. In addition, comparative constitutional law as a separate subject can be used to teach undergraduate students, irrespective of their nationality, in a broader curriculum. Maastricht's European Law School program teaches European, international and comparative law in English from the very first day, already at bachelor level. The program is designed to satisfy the labor market's increasing need for lawyers who are used to think and work in an international, cross-border setting. Whereas a traditional curriculum might include comparative elements in the study of domestic law, comparative constitutional law as a separate subject requires course planners to make a fundamental choice. Essentially, and notwithstanding hybrid solutions, the choice is between a thematic and a country-by-country approach. In a country-by-country approach, selected jurisdictions are covered one by one, and the same range of themes is discussed for each of them. Gradually, and with each new system discussed, students learn to distil differences and similarities from the sequence of systems. A thematic approach, meanwhile, takes subject-areas as a starting point (e.g., lawmaking, government-parliament relations, and human rights) and considers each selected area in a number of selected jurisdictions.

4 Advantages and Drawbacks

The greatest advantage of a thematic approach is that it allows for a discussion of aspects of constitutional law in greater depth. Since the object of comparison is defined and delimited from the outset, students can concentrate on the relevant part of foreign law only. The drawback, or rather the precondition, however, is that students must have a basic understanding of foreign constitutional systems to begin with. If they do not have such an overview, they risk considering aspects of law in isolation from their immediate context and thus fail to fully understand the relevant aspects themselves. To return to the above example of the legislative process, the possibility for the National Assembly to override the Senate in France cannot be understood without being aware of the historical foundations and institutional design of the French Constitution: national or popular sovereignty; the history of French unicameralism, bicameralism and, in the late 18th century, a brief period of tricameralism in France; the election process and rationale of the Senate; the government's dominant role in lawmaking, etc. This means that a thematic approach to comparative constitutional law as a separate subject is by definition more advanced, because it presupposes at least basic familiarity with the individual systems discussed. A country-by-country comparison, meanwhile, can be introduced much more easily. A student will be able to follow such a course if he or she has a sufficient understanding of his or her own system, and learn about other systems in due course. The drawback here is that, depending on the time available, comparative insights emerge only gradually and there might not be enough time to actually

weave the systems together at the end. The risk is then that, during exams, students answer comparative questions in a country-by-country manner, which of course misses the point of comparative law. After all, the main aim is not to become an expert on individual foreign systems, but to understand commonalities and differences *across* systems. The Maastricht Law Faculty has made the strategic choice of teaching comparative constitutional law at bachelor level on a country-by-country basis, and to apply a thematic approach to comparative constitutional law courses at master level. Of course these courses are not necessarily followed by the same students: bachelor graduates might opt for different courses or another university for their master; master programs attract students from other universities. Generally, however, this division is well received. Another and perhaps more pressing question is what type of textbook to prescribe for each approach.

5 Choice of Literature

The quality of available literature greatly affects the quality of a course. Typically, textbooks on (comparative) constitutional law largely reflect the didactical divide between thematic and country-by-country approaches. Tim Koopmans' *Courts and Political Institutions* (Cambridge University Press 2003) is an ideal example of a thematic textbook. It discusses the role of the judiciary as opposed to the government and the legislature in different constitutional systems. The style is erudite and, one might say, essayistic: it has a coherent narrative and takes the reader to a journey across diverse systems. It is ideal for a course which takes a thematic approach. Yet again, it has the same drawback as the course for which it is suited: it presupposes prior knowledge and is therefore appropriate for a relatively advanced level. It could be prescribed at the end of a country-by-country course, or in a course which lists a country-by-country course as a prerequisite. The same holds true for other thematic publications on specific areas of constitutional law: in the case of federalism, for example, Michael Burgess' *Comparative Federalism* (Routledge 2006) is a volume comprising chapters on issues rather than individual countries. At the opposite end of the scale we may find edited volumes, such as *Constitutional Law of 15 EU Member States* edited by Lucas Prakke and Constantijn Kortmann (Kluwer 2004) or, again on the area of comparative federalism, *A Global Dialogue on Federalism* edited by John Kincaid and Alan Tarr (McGill-Queen's 2005). Such volumes typically contain country chapters, each chapter devoted to one jurisdiction. The advantage of this format is that the individual chapters can be prescribed one by one in a country-by-country course. The drawback is that the value for comparative studies proper depends on the extent to which the editors have been able to weave the individual chapters together. Some edited volumes contain rather elaborate introductory and concluding chapters by the editors themselves, and succeed in committing the authors to a common style, chapter structure and choice of topics; other volumes are rather loose collections of heterogeneous essays. A hybrid model has been adopted by Aalt Willem Heringa and Philipp Kiiver in their volume *Constitutions Compared - An Introduction to Comparative Constitutional Law* (Intersentia, 2nd ed. 2009). Here each chapter is devoted to a particular aspect of constitutional law (federalism and decentralization, election systems, the legislative process, government-parliament relations, the role of judges). Each chapter starts out with an elaborate comparative overview, but is then followed by more detailed country chapters on that specific aspect.

Country chapters cover the US, Germany, the UK, France and the Netherlands, which in their diversity help illustrate broader concepts of constitutional law. The book's format is in a way similar to the American casebook *Comparative Constitutional Law* by Vicki Jackson and Mark Tushnet (Foundation Press, 2nd ed. 2003), except that *Constitutions Compared* is a relatively slim volume designed to provide an accessible overview at a beginners' level. The format is user-friendly, especially for thematic approaches because it allows students to consider the details of individual systems as an illustration of the comparative overviews. In pure country-by-country courses, however, students would have to read a cross-section of the book (e.g., the American sub-chapter in each thematic main chapter). Alternatively, they might consider first reading the entire book, from the first page to the last, and then return to the individual chapters as they are discussed in class. While this would be feasible in the case of *Constitutions Compared*, it would be less so (and is not meant to be done) in the case of *Comparative Constitutional Law*.

6 Points for Discussion

We are curious to see how other faculties approach the choices that have to be made when teaching comparative constitutional law. In which order are systems or themes discussed? How is cross-country comparison combined with country-by-country studies? Is comparison taught as a separate subject at all? Which literature is being prescribed, and how is it made to fit the didactical approach in the course itself? We are certain that exchange of ideas will help us all to meet the challenges of teaching comparative law, and to keep improving the quality of our curriculum to the benefit of students and teachers alike.