

The Challenge of Conducting Comparative Research

Maartje de Visser*

S. Galera (ed.), *Judicial Review – A Comparative Analysis inside the European Legal System* (Council of Europe Publishing 2010), 330 p., ISBN 978-92-871-6723-1

Judicial review is the hobbyhorse of many a constitutional lawyer. At first sight, thus, given its title, the book may appear to warrant a place on oak-panelled bookshelves and in classrooms filled with students eager to find out more about one of the classic themes in public law. However, first impressions sometimes disappoint and, regrettably, such is also the case with this book. Before elaborating on my reasons for this assessment, let me say a few words on the book's structure.

This edited volume is the result of a research project supported by the Rey Juan Carlos University, and its president has written the foreword explaining some key concepts and drawing conclusions. The 'European legal system' featured in the title is taken to comprise two elements: on the one hand, the national legal traditions and regional European tradition elaborated in the context of the Council of Europe ('European law') and, on the other hand, European Union law in its full glory, i.e., encompasses all three pillars, in pre-Lisbon speak. This second component is considered less homogeneous and less developed than the first component. This appraisal informs the conclusions, which find that 1) the reduction of European law into EU law 'necessarily means the reduction of the essential guarantees of our legal tradition'; that 2) such a reduction is inevitable given the tools available under EU law (primacy, direct effect) when measured against the more modest instruments invested in the Council of Europe; while in the end (3) this reduction might not be such a bad thing in light of the emergence of a global public law, to which the legal principles and values established by the Council of Europe will doubtless make an important contribution.

There follow four parts. The first part, entitled 'Preliminary', opens with a historical narrative by Bruno Aguilera. He traces the origins of judicial control over public power from the Roman emperors to the world wars and suggests the

*Maastricht University.

emergence of a common European constitutional order. Aguilera submits that this is in part due to the process of integration in the context of the EU, which warrants research into the influence of EU law in the formation of European public law. Chapter 2, by Rainer Arnold, examines European constitutionalism after the Second World War. This contribution identifies three levels of constitutional law in Europe (national constitutions, the basic provisions of the EU legal order and the European Convention on Human Rights) and correctly points to their interdependence and mutual influence. Arnold sees these processes in particular for what he calls the dynamic elements in European constitutions: fundamental rights, the rule of law, constitutional jurisdiction and vertical power differentiation. In the end, this may have consequences for national identity as created by constitutional law: 'If culture and its legal dimensions are more and more influenced by foreign law, and if the mutual impact of the various constitutional law levels in Europe is increasing, national identity will be complemented or, in part, replaced by a European identity' (p 46). The second part makes up the bulk of the book. Called 'the European legal tradition' it features six country reports that discuss the constitutional framework, the organization of the government and public administration and judicial review of their activities. The national legal traditions surveyed in this fashion are those of the Czech Republic, France, Romania, Spain, Sweden and the United Kingdom. A seventh country report deals with Hungary and adopts a different approach, by examining the Hungarian constitutional court and its stance towards EU law and the ECHR. The last chapter in this part examines the same elements for the Council of Europe. Part three is devoted to the European Union legal order, with each of its chapters dedicated to one of the pre-Lisbon three pillars. The reason to use this division and commence each chapter with a description of the relevant actors and legal instruments available under the old pillars 'is because both the case-law and the academic analysis on these issues inevitably refer to the former structures which have been worked on for nearly 20 years'. The chapters all contain, in their second part, a critique of the state of judicial protection within the EU, focusing on the restrictive test for standing for individuals in actions for annulment (first and third pillar) and the exclusion of the ECJ's jurisdiction to review the legality of certain European acts (second pillar). Part four of the book is called 'The European legal system: a complex legal order' and comprises two chapters, both written by the editor Susana Galera. In the first, she inquires whether the standards for judicial protection within the European Union are equivalent to those recognized by the Council of Europe. In holding this not to be the case, Galera relies on instances where the ECJ has deviated from Strasbourg case-law, the inability for individuals to directly access the Court of Justice to challenge incorrect national implementation acts and the danger for judicial independence posed by some of the Commission's competences in the

field of competition law (e.g., the limited control by national courts over search warrants issued by the Commission). The last chapter briefly remarks on the wider legal environment and the rise of global administrative law in particular. The argument here is that both the experiences within the EU and the Council of Europe deserve serious consideration in the further development of public law in the global era.

My critique of the book is twofold and corresponds (roughly) to its nature as an edited volume and its methodology of using country reports. As to the first, there is a certain lack of common focus that ties the individual contributions together. While the book purports to deal with judicial review, the chapters reveal a varied interpretation of the term. In the first two chapters, this is taken to denote both judicial review of the constitutionality of legislation as well as judicial review of administrative action; six of the country reports, however, focus exclusively on the latter, while the Hungarian country report solely addresses the former. The chapters on the EU seem to oscillate between the two categories, with the concluding chapters also discussing rules of administrative procedure. The upshot is that the book at times reads more as a book about comparative administrative law than as a book about European constitutional law. The omission of a clear definition of the central concept also limits the usefulness of the book in identifying convergence or mutual influence between the various levels. Related to this last point, it is surely timely to consider the national *and* the EU *and* the Council of Europe legal systems when discussing a topic such as judicial review in comparative perspective. Too often, books tend to focus only on the interaction between the national level and either the EU or the ECHR or on relations between the two European courts, an approach that is increasingly unsustainable in the light of the upcoming accession of the EU to the Convention, the EU Charter of Fundamental Rights and the implications of the ECHR's *Bosphorus* judgment. Having aroused the reader with its potential, the book makes only minimal use of its triangular approach, beyond having chapters dedicated to each of the three levels. The country reports only sporadically mention the influence of EU law or the case-law of the ECHR on the respective domestic legal order or conversely, identify instances where national concepts have travelled to the European level. The EU chapters contain virtually no references to national laws or traditions, which could perhaps be explained by the grouping of the national level with the ECHR as one part of the 'European legal system', but this is of course by no means justified: fundamental rights as they result from the 'constitutional traditions common to the Member States' constitute one of the sources for EU general principles of law, and national courts have a paramount role to play in providing judicial protection within the context of EU law. Also, while the EU system is criticized in the last part of the book for its deficient access to the ECJ and divergences from Strasbourg

case-law, there is no discussion of the impact of the Charter of Fundamental Rights or accession to the ECHR on these matters. Finally, the chapters in parts 2 and 3 commence with lengthy descriptions (up to half of the total number of pages of the contribution) of the organization of the political system and the territorial organization of the state. The reason for doing so is unclear (and therefore its relevance), as the sections dealing with the scope of, and access to, judicial review do not refer back to the detailed enumerations of the powers of the president or the elections for local councils as relevant factors in this context. One explanation could perhaps be found in the comment made by Arnold in chapter 2, that vertical power differentiation (in the sense of strengthening local autonomy) is a particularly dynamic process, taking place all over Europe, leading to the emergence of convergent general principles. To be sure, this is an interesting observation and one that warrants thorough comparative research, but this book – at least according to its title – has a different objective. Many of these faults might, perhaps, have been avoided by a more engaged editorial hand. Indeed, the book would have benefited greatly from an introductory or concluding chapter explaining the division into four parts, overarching themes and interrelations, and the choices made in deciding on the sample of countries to be examined as well as the reasons for them.

Turning to the methodology of using country reports as the source for information about national legal traditions, this is a tried and trusted method in doing comparative law. There are sound reasons for doing so: national contributors will be able to access and understand the relevant materials, they should be familiar with the wider legal, political and historical context (factors not to be underestimated in particular when it comes to comparative *constitutional* law) and thus able to represent the genus of their system correctly. At the same time, there are also pitfalls to avoid and this book has fallen into three of those. It is crucial not to presuppose knowledge about the domestic system on the part of the foreign reader. For instance, in the Czech and Spanish country reports, the discussion on judicial review of administrative acts features judgments by both the ordinary (administrative) courts and the constitutional court, without a clear explanation about the relationship between these courts. Now, one may conjecture that the remedy of constitutional complaints is an important factor here, but this is not specified and may not immediately come to the mind of a reader from a country that does not provide for this remedy or even for a constitutional court. Similarly, in the French country report one reads (p 80) that ‘In French administrative law, there exist two types of normative act: regulations and decisions’ followed by ‘The government issues two types of administrative acts: regulations and ordinances (...) An ordinance is a regulation until parliament passes an act of authorization’. This simply requires more explanation to make these seemingly contradictory

distinctions intelligible. Secondly, the key to any comparative endeavour is to make sure that one is actually comparing the same thing so as to be able to draw meaningful conclusions. How to do so is a question that has occupied many eminent scholars engaged in the debate about the methodology of comparative law and takes on added salience for the researcher looking at the legal system under scrutiny from the outside. For the country report method, the use of a questionnaire for the national contributors is a popular device and I will refrain from commenting on the challenges this may pose for the drafting of a good questionnaire. While the table of contents for each of the country reports in this book suggests a broad similarity in approach, there are considerable differences in focus in the actual texts. As mentioned earlier, the Hungarian report focuses almost exclusively on the case-law of the constitutional court, often in criminal matters, whereas the French contribution makes virtually no reference to the constitutional council. The Romanian and Swedish chapters discuss the influence of EU and ECHR law on their domestic administrative law, with the former noting a 'commitment to European principles of administrative law and a willingness to go forward in shaping national administrative law practice in accordance with such principles, which is commendable' (p. 109). Conversely, many of the other reports are silent on the impact (if any) of European law on their national legal system. This leaves the reader to wonder what the reason is for this difference: is it because a certain actor is not in existence in the country under examination, is it perhaps in existence but not relevant to the present inquiry or is there yet another explanation? These first two points take on added force when considering the final difficulty often associated with the country report methodology: who does the comparing? This book sadly joins a long list of other country-report books that leave this task to the reader. To be sure, national reports are valuable in and of themselves because they make information available that might not otherwise be accessible (or not as easily). Still, a chapter that synthesizes the various country reports and enumerates differences and similarities (and the reasons for these!) seems required to be able to speak of a book with a *comparative* analysis.

Finally, the book is not always reader-friendly. Many of the contributions appear to have been translated and this has resulted in convoluted sentence structures and syntax errors. Consider as an example, 'The process of recognising fundamental rights in the European Union has produced a huge volume of legal literature, of which it is advantageous to this discussion to refer to a recent European judgment which clearly describes and summarizes this process' (p. 281). Footnoting, in particular references to primary materials, in a number of the country reports is sparse. Within the same chapter, there is frequent verbatim repetition of sentences or points made earlier, with the worst example of this practice can be found in Chapter 11, where a lengthy paragraph on page 238 is astonishingly reproduced

on page 239. Something similar may be said about Chapter 13: four of the eleven pages are a literal rendering of various Treaty articles. These points, considered individually, could perhaps be dismissed as minor, but taken together and on the scale they appear, the reader is left with a growing and unnecessary feeling of irritation.

To sum up, the book contains some interesting ideas, notably in its first chapters, but their execution leaves much to be desired. Pity.

