Preface

Comparative constitutional law is no longer emerging as an area of research and study. It is there and has established itself. An array of impressive handbooks and textbooks, intense debates about theory, method and substance, access to funding for research, as well as increased student interest and an uncontested status in legal education testify to a solid and vibrant discipline. Critical approaches certify the emergence of counter-disciplinary spirit. No more Cinderella Complex caused by a lack of recognition in academia and a marginalized status in legal education.

Rather than imitating the format and style of standard textbooks, the ‘Comparative Constitutional Studies’ presented here follow a different path and try a different approach to make this area of research, study and teaching attractive for the classroom setting and elsewhere. The book starts from the basic assumption that almost every constitution has an interesting story to tell. Therefore, reading and comparing constitutions should be geared towards finding and conveying these narratives, at times uncovering and decoding them – or at least pointing out where, under the textual surface, one may come upon context. If this is cherrypicking, then that is exactly one of the methodological principles guiding these comparative studies.

I prefer to call it paying attention also to other-constitutions. Unlike textbook hegemons (from Philadelphia, Tokyo, Bonn, London, Paris and on a good day Pretoria), other-constitutions are typified by Haiti’s 1805 Constitution, almost forgotten, until recently systematically disregarded, like other documents spurned by the discipline’s mainstream and classified as also-rans. Haiti 1805 is a cenotaph to remind constitutional lawyers, comparative or not, that they have to look very closely at Western colonial history and neo-colonial theories and practices as well as the dominant apologetic style.

All the constitutions of all the world from all times can hardly be presented, let alone compared in a meaningful way. Not even today’s constitutions will be covered here, that is invited into the comparative conversation. Encyclopaedic comprehensiveness was never intended, which does not justify oversight, neglect and lacunae. Instead, readers are
encouraged to read on and study more – go from Haiti 1805 to Haiti 1801, scratch the varnish of shiny documents, look out for items that have fallen by the wayside, fill the countless gaps, correct the innumerable misreadings – and treat this quasi-textbook as a workbook, written to stimulate a transnational, comparative constitutional conversation.

‘Between Magic and Deceit’ indicates another departure from standard textbook writing. Constitutions, I claim, can adequately be read and understood only as ambivalent documents that reflect social conflicts and experiences and encapsulate political visions and anxieties. Therefore formalism and positivism have to be kept at bay. Comparative constitutional students are invited to practise some realism, demonstrate a modicum of critical spirit and look at the dark side of self-congratulatory reports handed down by framers and reproduced, not always innocently, by normative theories.

Comparatists are inclined to see themselves as neutral readers of the documents they analyse and compare. They are invited to recognize that there are no sidelines from where objective or neutral comparison could be possible. So they might as well bring themselves into the comparative space and turn the comparative practice on their position and perspective vis-à-vis the foreign. How can we still refer to ‘Western’ constitutions? How can we speak about the ‘Global South,’ the ‘Third World,’ ‘Developing Countries’ etc. and not become instantly aware of the logic of coloniality? By coping with these and other questions we the comparatists may learn to cope with strangeness and foreignness as ‘dialogical subjects’ who move from dichotomies to hybridity, to irritate the routines of complacency and to disrupt unitary projects of constitutional ‘families and traditions’.

This book did not fall from the heaven of authorial imagination, which may exist. It germinated over the years as the result of presentations at conferences and conversations with colleagues and friends. The network sustained – against many odds – by the Harvard Institute for Global Law and Policy, directed by David Kennedy (who knows why I had to write this book) and supported by his competent staff led by Kristen Verdeaux, provided valuable occasions to put forward some of the ideas here assembled. The chapter on transfer and ‘odd details’ was discussed at the VRÜ association of Law and Politics in Africa, Asia, Latin America. I thank Mika Yokoyama and Hajime Yamamoto for inviting me to present the theory and method of constitutional comparison in Kyoto. My generous hosts Giovanni Marini and Maria Rosaria invited me to discuss parts of this project at several summer schools organized at the University of Perugia. As always I have to thank the co-editors of Kritische Justiz for critical comments on previous versions of some of the chapters.

The long and winding development of a project into a book was immensely supported by Nina Malaviya, Helena Lindemann, Claudia Baumann, Cara Röhner and Felix Hanschmann. During the final phase, Karin Henke, Eric von Dömming and Maximilian Pichl supplied helpful information, too many books and a bibliography. It was a privilege to be supported, once again, by the excellent Edward Elgar team, notably Tara Gorvine and Stephen Gutierrez, who encouraged me to write this book, as well as Erin McVicar, Catherine Cumming and Carolyn Fox, who very competently and thoroughly edited the manuscript.

During the last months of the production, as Alfred Grosser chaire-holder I enjoyed the intellectual companionship and administrative assistance at the École de Droit of Sciences Po in Paris and the generous support of the Fritz Thyssen Foundation in Cologne (Germany).