Introduction: Mapping the Emerging Field of Constitutional Advice

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Chapter 1
Introduction: Mapping the Emerging Field of Constitutional Advice

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1.1 Constitutional Advice as an Underexplored Scholarly Field

The topic of the current volume of the *Yearbook* is constitutional advice. This topic has been relatively underexplored by legal scholarship, much like the place of cities in constitutional law, which readers may recall was the focus of the previous edition. We prefer a broad understanding of constitutional advice as encompassing the seeking and rendering of advice on constitutional topics, including the study of the processes and institutions that enable and contextualise such advice. This understanding immediately calls to mind two interrelated questions, viz. what is meant by 'advice', and what may be considered to be 'constitutional topics' that the advice relates to.

In order to grasp the meaning of *advice* in the constitutional field, a better understanding of *law* is helpful as it anchors the kind of advice that is of interest for present purposes. While political, economic or social factors undoubtedly shape the design and operation of constitutional law, the advice that takes centre stage in this volume is firmly grounded in the law. Law has been described as a semantic system of rules, together with institutions and decisions, which are to guide human behaviour and the organised responses in the event of non-compliance with these rules.[1] It is to be found in (overlapping) communities whose members share a stabilised expectation of reciprocity when it comes to adhering to these rules.[2] A constitution is understood as the law that regulates such expectations in a given legal order.[3] Institutions, such as courts, are important to the law, as they assess to what extent there has been compliance with the normative expectations created by legal rules.[4]

Law is clearly a deeply normative project, which regulates a community by requiring obedience from its members and by providing for institutional enforcement. This is particularly true for constitutional rules. Ever since the end of the Second World War, the edifice of constitutional law has been an expanding one, and one which has become progressively more 'legal' in the sense of binding norms coupled with institutional enforcement. The political and symbolic character of constitutions has often been surpassed in importance by the status of constitutions as the supreme law of the land. Consider, for instance, Tim Koopmans' definition of constitutionalism as 'bipolar' in that courts are increasingly called upon to control the exercise of public power by executives and legislatures.[5] Unsurprisingly, the phenomenon of constitutionalism as positive law, and not simply positive or political morality, has been the object of increased study and development by scholars.[6] Yet such endeavours do not provide a complete picture of the range and depth of constitutional processes within and across modern-day legal communities.

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[1] Hirsch Ballin 2020, p. 13.
[2] *Ibid*.
[3] *Ibid*.
[4] *Ibid*.
[5] Koopmans 2003, pp. 248-251.
[6] Consider the work on courts with constitutional jurisdiction, such as Sadurski 2014.

A fuller understanding of such processes today must contend not only with constitutional *laws*, but also with the realm of constitutional *advice*, which may precede and is often instrumental in fashioning, enforcing and reviewing such laws. The rendering of professional, academic and institutional advice on topics of constitutional law is one which is characterised by a burgeoning practice which, somewhat curiously, has not always been matched by serious and wide-ranging scholarly attention.[7] This third volume of the *Yearbook* is therefore dedicated to developing our understanding of constitutionalism through the prism of advice, as opposed to the usual emphasis on the binding character of the rules which may undergird such advice or be the culmination thereof.

Advice, in principle, does not amount to a constitutional course of action which an actor is enjoined to follow, or must complete in an imperative sense. Rather, advice can be understood as 'a subsidy of information and ideas' on a constitutional topic, to borrow the description by Tom Ginsburg – a contributor to this volume (see Chap. 2) and one of the leading scholars to have studied this vast topic.[8] Advice by its very nature implies that a decision-maker is not bound to accept it; it rather serves to inform the decision-maker's choice. This is not to deny that tension can exist between the rendering of advice on the one hand, and the expectation or need to follow it on the other. We read, for instance, in Maija Dahlberg's chapter (Chap. 8) that although the Swedish Law Council's opinions are non-binding, they are *de facto* clearly important.

Against this backdrop, it may at first glance be confusing to make sense of Mark Tushnet's description of the phenomenon as 'normative advice'.[9] He however does not intend to imply that a decision-maker is bereft of choice and therefore formally bound to heed advice. Instead, 'normative advice' should be understood as 'normative recommendations' drawn by scholars from accumulated information regarding constitutions about what will work in particular circumstances.[10] On this reading, 'normative advice' is not a contradiction in terms and proves to be compatible with the notion of constitutional advice for current purposes.

To the extent that scholarship has addressed the topic of constitutional advice, this has typically been done in the context of constitution (re-)making projects in particular.[11] This form of constitutional advice is discussed, among others, in the chapter by Ginsburg (Chap. 2) and in the chapter by Marian Yankson-Mensah and Marialejandra Moreno Mantilla (Chap. 7). By definition though, advice can cover a much wider ambit, as the contributions to this volume illustrate. Advice may also be given, or required, in relation to the implementation and reform of constitutions broadly conceived. This also means that there may be advice worthy of study that relates to the unwritten constitution, for instance the operation of conventions, customs and behavioural practices.[12] In a related vein, there are relevant aspects of the 'small-c' constitution pertaining to the regulation of public law organs, or the connection between such organs and their decisions in relation to the individual, such as in the case of fundamental rights where instances of advice-guiding can be identified. Think for instance of (unsolicited) opinions by equality or human rights commissions on proposed or existing legislation. For those interested in the study of constitutional advice, we therefore advocate a generous understanding of constitutional law to properly appreciate the content range across which advice can function and apply.

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[7] For a selection of scholarship on the topic, see Vermeulen and Jasiak 2018; Appleby and Olijnyk 2017; Ginsburg 2017; De Visser 2015; Tushnet 2008.
[8] Ginsburg 2017, p. 20.
[9] Tushnet 2008, p. 1473.
[10] Tushnet 2008, p. 1474.
[11] *E.g.* Ginsburg 2017; Tushnet 2008.
[12] On the distinction between codified and uncodified constitutions, see Barendt 1998, pp. 26-34.

1.2 Analytical Remarks on the Study of Constitutional Advice

Approaching any topic, especially one as understudied as constitutional advice, necessitates an analytical framework. While it is beyond the scope of this introductory chapter to suggest such a framework, several general remarks can be made in providing guidance when it comes to classifying and studying the topic.

A first remark on constitutional advice concerns the *actors*: who gives advice, viz. who is the advisor, and to whom is this advice given, viz. who is the advisee? With regard to both advisors and advisees, a distinction can be made between national actors on the one hand and international and transnational actors on the other. Most of the studies included in this volume focus on the role of national actors when giving and receiving constitutional advice, as illustrated among others in the chapters by Paul van Sasse van Ysselt (Chap. 4) on the Netherlands, Pernille Boye Koch on Denmark (Chap. 3) and Constantinos Kombos on Cyprus (Chap. 6).

In analysing the various national actors, it becomes apparent that courts and councils of state in the mould of the French Council of State play a prominent role in giving advice on constitutional topics. Indeed, several of such institutions have been given a primary and explicit mandate to render legal assistance to other state bodies on constitutional matters. When it comes to distinguishing and characterising, Van Sasse van Ysselt shows us in his chapter on the Netherlands that there are many other actors or institutions with the task of giving constitutional advice to the Dutch government in its functions as executive and/or as co-legislator, as well as to parliament. Besides the Council of State as the general legal advisor to the Dutch government, there are for example the National Ombudsman and the Netherlands Institute for Human Rights. Other bodies also exist with a more specialised mandate, such as the Authority on Data Protection and the Election Council. Furthermore, there are different permanent advisory bodies of the government and parliament which are independent, established by law and whose functioning is evaluated every four years, such as the Advisory Council on International Affairs, the Netherlands Scientific Council for Government Policy, the Council for Public Administration and the Health Council. Although not all of the opinions of these advisory bodies and institutions are equally relevant from a constitutional perspective, many of them concern at least some constitutional aspects.

As Koch shows in her chapter, constitutional advice does not necessarily come from independent and impartial actors, strictly speaking. Denmark has no body that is specifically tasked with assessing proposed legislation for compliance with constitutional law and international human rights. In practice, the responsibility for verifying the constitutionality of bills rests with the Legal Department of the Ministry of Justice. Notwithstanding professional standards, the civil servants who work there are obliged to work loyally for the government in office. From an institutional perspective, their assessments therefore lack independence and impartiality. Examples such as this one, make it clear that the status of advisors, and the way in which this affects the content of advice, deserves separate examination.

Kombos' chapter, which deals with constitutional advice in Cyprus, also approaches the topic from the perspective of the separation of powers. In Cyprus, almost all advisory power is concentrated in a single actor, the Attorney-General. As Kombos explains, this is the result of historical developments, not constitutional design. The constitutional intention was to have a duality of the office, whereby the posts of AG and deputy AG would be filled by a person from the Greek and a person from the Turkish community. Following the withdrawal of Turkish officials from their offices in the 1960s, both offices are now occupied by Greek-Cypriots, so that the bicommunal principle originally intended to be the main mechanism for checks and balances has been neutralised. According to Kombos, the Cypriot fixation on the AG regarding constitutional advice, which extends not only to the executive but also, in fact,

to the legislative branch, is problematic in terms of transparency, pluralism, impartiality and legitimacy. It is against this background that he makes proposals for reform.

Apart from the national context, sources of advice beyond and free from a particular domestic realm can also be identified. In this regard, one can generally speak of transnational actors who furnish advice of a constitutional nature, most often to national actors in various jurisdictions. Although sometimes used as synonyms, for present purposes a distinction can be drawn between international actors and other transnational actors. International actors are understood as organs of international law, like the United Nations or the World Trade Organization, both of which have been active in dispensing 'guidance' to states on questions of constitutional design; whereas the term 'transnational' denotes all other actors operating beyond national jurisdictions irrespective of how they are constituted. Transnational actors, on this reading, also include actors not constituted by international law as such, for instance individuals, NGOs, foreign development agencies and law firms.[13] Drawing a distinction between international and other transnational actors in this way is useful given the wide and increasingly diverse range of constitutional advice-givers beyond the national realm. When it comes to transnational advice in relation to constitution-making in particular, Tushnet has expressed considerable doubt about the added value of 'external observers' in guiding the 'reason and choice' of constitution drafters.[14] Instead, he emphasises the importance of 'on-the-ground political circumstances' in making constitutions, concluding that advice might only be beneficial on occasion.[15] Whether one agrees with his scepticism about advice as such or not, it does reinforce the idea that while important decisions may physically be taken close to home, the content thereof may not be the product of an exclusively domestic deliberation process that has only featured the views and concerns of domestic stakeholders.

A second important remark concerns the *range of topics* regarding which advice can be furnished. As in the case of national advice, transnational advice covers a broad range of constitutionally related topics, ranging from domestic constitution-making to the protection of fundamental rights. In the domain of constitution-making or reform to be more precise, mention should be made – in addition to the organisations mentioned earlier – of the Commission for Democracy Through Law, better known as the Venice Commission. This Commission, which is an advisory body of the Council of Europe, provides constitutional advice to its members on a variety of topics, from the making and amending of constitutions to the design of electoral and other 'small-c' legislation, while it can further furnish *amicus curiae* opinions to requesting courts.[16] On fundamental rights, there is amongst others the European Union Agency for Fundamental Rights, which is an independent international actor established in 2007 by EU law.[17] The Agency is tasked with providing 'assistance and expertise' to other EU bodies and Member States in order to 'fully respect fundamental rights' when taking 'measures' or formulating 'courses of action within their respective spheres of competence'.[18] Interestingly, the example of this Agency shows that transnational advice does not always need to be directed at national actors, as other EU bodies can be supplied with advice, too. More recently, the European Commission has also started to render constitutional advice to the Member States, in the form of specific Opinions and Recommendations under the

[13] The contemporary examples mentioned or discussed by Ginsburg 2017, pp. 17-23, would fit this category.
[14] Tushnet 2008, p. 1493.
[15] Tushnet 2008, p. 1495.
[16] See Vermeulen and Jasiak 2018; De Visser 2015. For an example of the Commission's work, see the first opinion rendered recently on the Netherlands, Venice Commission, Opinion 1031/2021 on the Legal Protection of Citizens, Doc. CDL-AD(2021)031-e (15-16 October 2021). See Leijten 2021 on this opinion.
[17] For a critical introduction and analysis of the Agency, see Von Bogdandy and Von Bernstorff 2009.
[18] Art. 2 of the Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

Rule of Law Framework in the case of Member States experiencing a decline in the rule of law, and also more generally and indirectly through its annual Rule of Law Report.[19]

In their chapter on the Oversight Board (Chap. 9), Matija Miloš and Toni Pelić provide an instructive analysis of an embryonic transnational actor that does not amount to a typical organ of international law, but one whose prominence is likely to grow in the coming years: the Facebook Oversight Board. This Board has begun to issue decisions that engage with international fundamental rights norms, and Miloš and Pelić predict that its decisions may in turn have an impact on national understandings of free speech norms. This, they argue, justifies conceiving of organs like the Facebook Oversight Board – and one could surmise, similar supervisory structures in other large multinational corporations – as performing an advisory function. More generally, they suggest that a conceptual frame that casts the relationship between multinationals and domestic legal orders in an advisory light helpfully focuses attention on how the former may help shape, in a non-binding manner, interpretations of classic constitutional norms at the national level. Their contribution, then, shows the value of interrogating the interplay between national and transnational regimes, including those that have not conventionally been featured in studies of constitutional law and advice between the global and the local.

A third remark in studying advice concerns the *timing* of its request and delivery. While constitutional review by the courts is often conducted *ex post* in many systems and instances, constitutional advice is usually provided before legislation is formally enacted. In his contribution (Chap. 5), Toon Moonen signals that advisory bodies like the Belgian Council of State have a characteristic that compensates for their lack of power or final authority and that makes them uniquely well-placed to weigh in on matters: they namely come into action early in the decision-making process. At a time when deliberation is still on-going and nothing is (politically or legally) carved in stone yet, taking the first bite of a constitutional issue as an advisor can decisively set the stage for its final determination, sometimes even many years later.

The contribution by Koch confirms the importance of the right timing for the effectiveness of constitutional advice, by giving a 'negative' example of advice that arguably comes too late. The Danish Institute for Human Rights advises on the compliance of Danish legislation with human rights, but the hearings take place only after bills have been presented to parliament. These bills are often the result of prior political agreements, especially in the case of controversial topics. Once the bills are presented in parliament, there is often no political will to revise the carefully crafted compromises made between the different political parties. Thus, depending on the circumstances, advice on constitutional matters may come too early or too late.

In her contribution (Chap. 8), Dahlberg makes a novel comparison of *ex ante* constitutional review of legislative bills in the Finnish, Swedish and French systems, and more particularly in relation to transparency. She compares the legally binding review carried out by the French Constitutional Council with the non-binding review carried out by the Constitutional Law Committee of the Finnish Parliament and the Swedish Law Council. This exercise leads her to formulate several comparative conclusions that provide general food for thought. While all three systems of review for instance try to maintain a certain distance from politics, the reality is that a close relationship between law and politics is inevitable. When it comes to transparency, the conclusion is that reflections may differ widely within a system depending on whether transparency is measured in terms of legal argumentation or from a procedural perspective. Dahlberg identifies, among other things, deficiencies in both these

[19] See Stremler 2021.

areas in the case of Finland, points out some peculiarities when it comes to argumentation in Sweden and notes that procedural openness is lacking in France.

Finally, it must be remarked as explained above, that advice on constitutional topics is in principle non-binding, as opposed to the consequences attendant on the enactment of new legislation or the typical outcome of regular judicial review. The question about the *effects* of advice is deeper though than the formal distinction between norms that are binding and non-binding suggests. What influences the legitimacy of advice, and under what circumstances is such advice adopted? Or, if advice is not adopted, what was its impact on the decision-making process? For instance, did advice stimulate dialogue between the participants, and so strengthen deliberative democracy? Did advice encourage the participants to better consider their reasons for not adopting advice, or only adopting it in part?

Van Sasse van Ysselt claims that the advisory opinions issued by the Dutch Council of State are considered to be authoritative. At the same time the effectiveness of (some of) its advice is sometimes discussed or at least hard to verify. This corresponds with the view of Mentko Nap (see Chap. 10) who studied the effectiveness of the opinions of the Dutch Council of State from a dialogical perspective. As Nap concludes, the Dutch Council of State's legislative advice provides a countervailing power in debates on the constitutionality of proposed legislation. On the other hand, his chapter also reveals shortcomings in how the Council of State participates in constitutional dialogues. His findings lead him to conclude that the Council of State's legislative advice is precarious in its degree and method of addressing issues of constitutionality. These inadequacies make it troublesome for the legislature to unquestioningly rely on its primary advisor when testing bills against the Constitution. In his view, constitutional dialogue theories can be used by the Council of State as an inspiration for recommendations on how to be an effective and persuasive advisor on constitutional interpretation.

The fact that the Council of State's advisory analysis is not binding does not mean that a government or legislature can simply decide to ignore it. As Moonen states in his contribution on the Belgian Council of State, this advisory body is a node in a network and performs a signalling function towards other actors, notably the courts. Often, the Council of State has already put forward conclusions with regard to the points of law a court may later be asked to adjudicate. When there is a relevant advisory opinion of the Belgian Council of State available for the Belgian Constitutional Court to consider, the findings of the Court mostly correlate with those of the Council of State. The Court also mostly refers to the advisory opinions. However, Moonen believes that the Constitutional Court could do more to make it clear to its audience which part of the advisory opinion has actually played a role in its considerations, and to be explicit about when and why it (dis)agrees. Judicial bodies may reasonably disagree about the outcome of a constitutional question, so there is no reason to leave it to the reader to figure that out.

Yankson-Mensah and Moreno Mantilla in Chap. 7 undertake a comparative analysis of the connections between constitutional advice and transitional justice in two transitional societies: Ghana and Colombia. In doing so, their chapter critically analyses the effects of constitutional advice in these countries and examines how their different approaches to transitional justice have impacted constitutional and transitional processes. As they describe, the constitutional advice during the constitution-making process in Ghana was limited to the interests of an autocrat, which made the process undemocratic and created more polarisation in Ghanaian society. In Columbia, by contrast, the transitional process was much more inclusive, with the involvement of both civil society and international institutions, but this also made advice-giving subject to different competing interests, thereby complicating the process. The authors conclude that there is a need to coordinate and recognise non-formal constitutional

advisers in transitional societies in order to enhance the constitution-making process and to guarantee the efficiency of the transitional justice mechanisms.

1.3 The Challenge of Constitutional Advice: Reckoning with Ubiquity?

Modern-day constitutions, however they manifest, are increasingly used to regulate legal processes and inform political debates. By way of example, consider the increasing reliance on judicial review in many jurisdictions in vindicating constitutional guarantees, notably those laid down in the bill of rights. The recent *Urgenda* case law in the Netherlands is a good example of judges using fundamental rights to hold political institutions to account for the failure to give adequate effect to commitments to combat climate change through a solid emissions policy.[20] Such cases, dealing with issues that have far-reaching sustainability and inter-generational consequences, are not the exception either, as the pending case on climate change against 33 countries before the European Court of Human Rights shows, among others.[21]

When issues of such importance are on the table, the constitutional as well as societal stakes become very high. Consequently, the responsibility resting on decision-makers confronted with such questions turns into a particularly heavy one. In debating and answering these and other questions on interpreting and applying constitutional norms, the role of advice becomes particularly salient to ensure that laws are made in a manner that takes due account of the relevant constitutional imperatives and possibilities. The same can be said about advice in the complex field of constitutional reform and drafting, when we see that the pace and volume of amendments or overhaul has increased manifold since the last century. It is in this context that scholarship, as evidenced by the rich contributions to this volume, needs to be brought into play to grapple with the dimensions of constitutional advice as outlined in Sect. 1.2.

This requires scholars to look beyond the law and binding legal norms to more diffuse forms of normative guidance. In the concluding chapter to the volume, Willem Mingelen and Jerfi Uzman (Chap. 11) give a first impetus to this when it comes to advisory opinions issued by courts. Taking a broad, functional approach, they conceptualise judicial advice-giving as a communicative act by which courts contribute to the process of law-making on the basis of judicial authority and persuasion. In order to capture the rich variety of this form of constitutional advice, the authors develop a framework on the basis of three variables: the functions advice may play in the process of law-making, the types of advice involved, and the different institutional modes of judicial advice. On the basis of such an inventory, further research could be carried out into the subtle links between the objectives, content and effectiveness of the judiciary's advisory services.

Reckoning with the reality and relevance of constitutional advice also entails studying novel questions about the nature of constitutional advice itself. For instance, does 'advice' remain an appropriate moniker if the recipient habitually heeds the guidance provided, thereby potentially creating a constitutional custom or expectation of the advice binding that recipient, despite its formal non-binding character? And, returning to the first distinction introduced in Sect. 1.2, while advice in the national context is often a function of a formalised legal order with its own institutions and rules, the question about the nature of advice in the transnational

[20] District Court of The Hague, judgment of 24 June 2015, ECLI:NL:RBDHA, 2015:7196; Court of Appeal of The Hague, judgment of 9 October 2018 (ECLI:NL:GHDHA:2018:2610); Supreme Court, judgment of 20 December 2019 (ECLI:NL:HR:2019:2006). English translations of the judgments can be accessed at: https://www.rechtspraak.nl/Bekende-rechtszaken/klimaatzaak-urgenda (last accessed 30 June 2021). See Van der Schyff 2020.

[21] ECtHR Case No. 39371/20 (*Duarte Agostinho and Others v. Portugal and Others*). See Henri 2020.

arena is still very much debated. Consider for instance Ginsburg's work on the question whether advice beyond the state has come to constitute a distinct Transnational Legal Order as such.[22] As he asks, has transnational advice developed into 'a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions'?[23]

The study of these and related questions will not only help us to understand and improve the rendering of constitutional advice in given instances and so strengthen the rule of law, but its academic study will also help us to better chart and improve the field of advice as a topic in its own right.

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[22] Ginsburg 2017.
[23] Halliday and Shaffer 2015, p. 5. Also cited in Ginsburg 2017, p. 7.

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