Theories and Methods of Comparative Constitutional Law 1

The long tradition

Comparative law has a rich tradition. It has been used as a method to understand the workings of states and politics, and the nature of societies. In this function, it can be found throughout the canon of legal and political philosophy. For example, a comparative approach was used by Plato in "The Republic" and by Aristotle in "Politics", in which he reviewed over 150 constitutions of Greek and other city-states to identify the best form of government.

Famously, Aristotle compared the constitutions of his time and presented a classification in books III and IV of his 'Politics' (cf. Aristotle ca. 330 B.C.). His concept of 'constitution' is substantive, i.e., does not require a written document, but focuses on the way a (city) state is actually organized (Aristotle ca. 310 B.C.*: [III (1278 b9, 1289 b15, 1290 a8-9)]). He distinguishes 'true constituions' aiming at the good life for the citizens and 'perversions' aiming at the good of the rulers (Aristotle ca. 310 B.C.*: [III (1279 a17-21)]). Further distinguishing between the number of rulers, he arrives at the following classification:

	'True Constitutions'	'Perversions'
One:	Monarchy	Tyranny
Few	Aristocracy	Oligarchy
Many	Polity	Democracy

His favoured form of government, polity, combines elements of oligarchy and democracy to accomodate both the freedom of the poor and the wealth of the rich (Aristotle ca. 310 B.C.*: [IV (1293 b34], 1294 a17)]). A democratic feature is its assembly open to all citizens, an oligarchic one the election of some to high office. In books VII and VIII Aristotles then goes on contrasting Plato's 'Republic' with his own view of the ideal (city) state.

Another historical reference point for comparative constitutionalism is the drafting of the U.S.-Constitution, in particular the presentation of it in 'The Federalist' (A. Hamilton/J. Madison/J. Jay 1787-1788*).

Comparative reasoning can also be found in such classic works as Thomas Hobbes' "Leviathan", John Locke's "Two Treatises of Government" and Alexis de Tocqueville's "Democracy in America".

Most of post-World War II history associates comparative constitutionalism with waves of new constitutions being drafted and adopted by the de-colonialization on the one hand, and the opening of East Europe on the other.

Today, the field of comparative law is quite diverse. It includes the study of macro-level systems such as public international law and European Union law. It also

includes the study of micro-level systems such as common law and civil law approaches, Islamic law, and indigenous legal systems. Despite this diversity, the goal of comparative law remains constant -- to provide a basis for critical comparison between legal systems.

The modern History of Comparative Law

Comparative legal studies - and there are many, and many are interesting - usually started with a focus on civil law, "Privatrecht"[1].

- first conference was held in 1900
- the “Societe de legislation comparee” was founded in Paris in 1869[2].

“comparative law” or Rechtsvergleichung or droit comparee implies a desire for the one global legal order[3]

- goal to ease international trade, families, marriage, travel (International Private Law, codes, GATT, WTO rules)
- goal to universalize what *we* think is right (difficulties more daunting in con law than in private law (CompCon at 3)
- may be philosophically based on Kelsen: Grundnorm – or natural law theories etc.
- mere curiosity toward other countries?[4]

often, comparative law sought dominance - the one above all law, the supreme law of the world. It focused on de lege lata research[5], being descriptive, universalist, and attempting unification, which lead to practical consequences in the field of international (e.g. contract) law or national (e.g. US trade) law.

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[1] The reason is not entirely clear to me. Was international trade an incentive? The facilitating of property transactions? Is it of any significance that a lot of scholarship came from Germany which claims to have the best - in terms of systematic - civiol law code in this world? However, I will use those works with regard to their purpose and methods as far as they seem transferable, and as far as they are actually employed. E.g. Zweigert/Kotz, Einfuhrung in die Rechtsvergleichung (INtroduction to Comparative Law), are treated as THE scholars in the field although they do not say much about constitutions.

[2] Viktor Knapp, Comparison And The Global Problems of Law, 59 Revista Juridica U.P.R. 749 (1990) (historical survey of goals of comparative law); Roman Tokarczyk, ibid, 951.

[3] The term is problematic since it is used by those who seek the one body of comparative law, just like civil law, or public law, or any other. See for discussion from this perspective Roman Tokarczyk, Some Considerations on Comparative Law, 59 Revista Juridica U.P.R. 951 (1990), and much earlier Ferdinand F.Stone, ibid, 325 fn.1 ("Dissatisfaction with the phrase "comparative law" is so widespread as to need no citation.").

[4] The hope for scholarships, or jobs, is a reason offered quite often by students and - less explicit - scholars. To be a feminist renders this motif senseless, to be male buys into gender privilege.

[5] Viktor Knapp, ibid.

Then, the influence of sociological approaches to law shifted the focus to micro- or macro-comparison[6] with regard to the social and economic sources of law, legislation, and the social effects of law. Differences were acknowledged, and the fight for dominance continued. The cold war injected a split into the world of advanced interest, and the debate about the comparability of socialist and capitalist systems has not yet been won by either side, although the dominance is clearly attributed to the West[7].

the growing awareness of international law and human rights as goals and problems in contemporary legal developments – the debate between universalism and relativism, e.g. in the case of Islamic constitutionalism - reversed the shift back to the unifying trend which started the movement. "Comparative Law should study legal problems of individual states from the perspective of the global legal principles in the national legislations."[8] This might lead to "legal imperialism"[9], if it is accompanied by ignorance for people, and for diverse realities.

The History of Comparing Constitutions

Constitutional comparative studies are a relatively new field of research, and especially so in the United States[10]. → CompCon 6. For a long time , there has been no extensive and certainly no exhaustive writing in the area, and rarely ever were method, or purpose stated. Also, comparison often focused on two or three mayor systems alone[11].

What would you focus on? → assignment plan for class

The first studies focused on systems of governance. They started to approach constitutional questions regarding judicial review[12]. It might seem easier to some to

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6 See Zweigert/Kotz, Einfuhrung in die Rechtsvergleichung....

7 Viktor Knapp, ibid.. See also the critique of Inga Markovits with regard to the treatment of differences between East and West Germany, ibid....,

8 ibid., 752 (the last paragraph of his essay implies the superiority of western law. Again, its dominance not difference.)

9 See Schmidhauser, ibid. (review of the literature)

10 Compare the introduction of Symposium: Conference 53 S.Cal.L.Rev. ...(1980) to the early and groundbreaking works of Mauro Cappelletti, or Rene Cassin et.al.

11 E.g. the leading casebook - of how many - contains one "substantial" comparison of abortion law doctrine taking a purely theoretical approach. Cappelletti, Mauro, Comparative Constitutional Law: Cases and materials. Inidanapolis 1977. Other books do not contain a lot of comparative analysis, but descriptions of various national legal features e.g. Comparative Constitutional Law, Festschrift in honour of Professor P.K. Tripathi, ed. by Mahendra P. Singh, Delhi 1989; a recent and more comparative attempt: special issue of 55 Law and Contemporary Problems 1 (1992), or Symposium: Conference 1980. See also Aharon Barak, Judicial discretion, who cites to cases from various contries to make a methodological point, which also has to be based on some distinction between method and result, or substance.

12 E.g. Mauro Cappelletti, Judicial Review in the Contemporary World, 1971 (studies j.r. out of philosophical interest as the point of convergence of natural law and positivism)

analyse a so-called formal, or structural problem, since only material, or substantive issues are said to invoke the difficulties of dealing with the values and characteristics of different cultures. Some assert compatibility of such institutions more easily than, for example, of individual rights[13]. Such studies separate structure and form from content, and rest on a deemphasizing understanding of the aspects and implications of structures on the content of a given culture. A political system might give - comparatively - more power to elected - or appointed, lifetime or term-serving - judges, and the selection of those judges might be interesting in terms of class, gender, race, political affiliation, educational options, and the like. The accessability of a political system (especially by minorities) might make a tremendous difference as to the necessity of judicial review. Access to the courts might be interesting with regard to the costs of litigation, but also with regard to the numbers of lawyers, the time it takes to get a judgment, or the language spoken in court. The structural reality of a political system is a political reality of power, and therefore of importance to people subjected to it.

Why constitutions?

- Constitutional law is last resort[14]: it is the stage of final control of elected representatives by judges[15], and therefore quite often hosts the most obvious clash between legislature and judiciary
- constitutional law shapes and confronts all other law. Any case arising in the constitutional field is a case of some other legal nature, and poses a constitutional question on the side[16].

Comparative Constitutionalism

More encompassing approaches understand constitutions as a structural framework with more technical and more substantive rules, which do however depend on one another. Such approaches – as in CompCon – undertake comparative analysis also for

- Adoption or rejection → CompCon 4, Canada vs US in cases of equality, hate speech
- Analogical reasoning is crucial → CompCon 4

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13 Generally Roman Tokarczyk, ibid, 963.

14 Usually, the last legal resort is thought to be criminal law perceived as the immediate state intervention and strictest measure available; see BVerfGE 39, 1 (German abortion decision). This deemphasizes the impact of constitutional law on life, see below ....

15 This might be the reason why especially in comparative constitutional law so many studies adress judicial review as the crucial problem of modern democracy.

16 This is the normal state of affairs in the US legal system with the judiciary power on every level to adjudicate constitutional questions, while in Germany, constitutional issues have to be referred to the Federal Constitutional Court automatically. However, there is a significantly greater impact to be seen if one looks at decisions of federal constitutional courts in both countries.

- Skepticism towards the relevance of text alone (against rigid textualism) → compCon 4-5

Functions and Aims

Difference between observer and participant → CompCon 5

To interpret a constitution – to write a constitution → Scalia in Printz

To understand a constitution as a manifest of national identity – to understand it as a norm of living together in a compex world (contract) → CompCon 8-9

Status ?

Legal science

Academic discipline

Part of every legal research

Part of cultural studies

Part of the practice of law