

# Methodological Challenges in Comparative Constitutional Law

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## INTRODUCTION

My talk today, *Methodological Challenges in Comparative Constitutional Law*, has two parts. The first part focuses on the relationship between the purposes of comparison and the methodological challenges of comparison. The second part asks whether there are particular methodological challenges in comparative *constitutional* law as compared with other comparative legal studies.

## GOALS OF COMPARATIVE CONSTITUTIONAL STUDIES

In this part I address four goals of comparative study, although there are many others.

### *Developing Better Understanding of Other Systems*

The first goal is simply to develop a better intellectual understanding of one or more other systems. For this purpose, the challenges include time, the need to develop expertise, language barriers, and the need to understand the broader context—both legal and social—in order to develop that expertise. All of these challenges are about the risks of getting it wrong or getting it too simple.

We all know, some of us through experience, that *bilingualism* is difficult to achieve; *bilegalism* is even harder. Each of these risks raises

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another kind of challenge for scholars and that is what we might call the “opportunity costs” of maintaining expertise in more than one system. What will we give up in order to develop this expertise? For judges, who I also want to think about, is there a risk of their losing what Karl Llewellyn might have called a “situation sense” about their own constitutional system if they spend a lot of time developing expertise on others?

*Developing Better Understanding of One’s Own System*

A second kind of goal for comparative constitutional study is to enhance one’s capacity for self-reflection on one’s system, in order to develop a better understanding of it. In this regard, we have all of the challenges I set out initially, plus the following. Many of us will have experienced that delightful moment of saying, “something I thought was really necessary in a constitutional systems is not. Look at how well country ‘X’ functions with a very different approach.” This illustrates a lifting of the sense of false necessity. But it turns out that deciding what are true and what are false necessities is quite a challenge.

For example, the United States has what is called the “case or controversy” doctrine, which limits, inter alia, who can bring cases to federal courts and what can be decided.<sup>1</sup> For example, legislators who vote against a law because they think it is unconstitutional do not as such have standing to bring a case before a court.<sup>2</sup> However, other constitutional systems in other democracies have abstract review of laws; they may let objecting legislators challenge the constitutionality of statutes. So an American may look at this and say, “We do not need to have this doctrine of standing.” Hold on, how do you know? Consider possible differences, taking just one factor to illustrate: In the United States, the federal courts are very powerful and very independent. The judges are appointed (essentially) for life. Maybe in the United States, something like the case or controversy limitation is necessary to limit the occasions when these very powerful and politically unaccountable judges can intervene in the process. Our federal judicial appointment system is not like that in many other countries, such as Germany and France, which have fixed terms for their constitutional court judges. The point here is not to decide whether in the United States the “case or controversy” doctrine is a “true necessity”; rather, the point is that

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1. See, e.g., *Allen v. Wright*, 468 U.S. 737, 750-52 (1984) (discussing the “case or controversy” requirements of U.S. CONST. art. III, § 2).

2. See generally *Raines v. Byrd*, 521 U.S. 811 (1997) (discussing limitations on legislator standing).

determining what are true and false necessities may turn out to be very complicated indeed; so we need to add this to the list of challenges.

*Identifying “Best Practices”*

A third purpose of comparative constitutional study goes beyond simple self-reflection to understand your own system, and aims at reflection to develop a better understanding of what are the normatively preferable best practices—what Professor Donald Kommers might refer to as general political truths about well-designed constitutions.<sup>3</sup> Now, there are at least three additional challenges in pursuing this goal.

First, implicit in this inquiry is the idea that one can agree on or develop a notion of the normative good, or of just results. I am not suggesting that it is impossible to do so, but I am suggesting that doing so is part of the challenge.

Second, not only does this inquiry require a normative baseline of the good or just, it also depends on implicit notions of causality, that is, of the relationship between law and/or legal structures and good and/or just results in society. This is very complicated, and I commend to you, if you have not already seen it, a short piece by Ran Hirschl in the *American Journal of Comparative Law*, about the challenges of comparative constitutional study, including questions of case selection.<sup>4</sup>

This leads me to the third challenge in research to identify best practices, which is a more technical and methodological one, of how to select cases for purposes of doing causal analysis of comparative constitutional law. Again, I commend Professor Hirschl’s paper. Let me suggest that sometimes I am driven to the (perhaps illogical) thought that maybe comparative constitutional study can help us figure out what to **avoid** in constitutional design, but may be less useful in establishing strong causal connections with very positive results because the processes of causality (and the relationships between law and society) are so complex and interdependent.<sup>5</sup>

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3. See Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685, 691-95 (1976).

4. See Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).

5. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J. concurring) (arguing that “contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government,” but that it does suggest “that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them”). Whether inferences as to negative effects really can be more easily drawn than inferences about positive effects is complex, as issues of causality arguably may arise in both settings.

*Responding to Doctrinal or Textual Questions*

A fourth kind of goal is that sometimes we study comparative constitutional law because domestic constitutional doctrine or constitutional text asks a question that is comparative in nature. For example, in Europe, the caselaw of the European Court of Justice resorts to the common constitutional traditions of the Member States to help protect fundamental rights.<sup>6</sup> You might think, at first glance, that commonality is kind of an easy empirical question. You just look, and see. But what I want to suggest is that it is not so easy. Determining what is common has both normative and empirical elements. More relaxed standards for what counts as a common tradition will, in certain contexts, reduce the space for diversity and for localized democratic decision making about differences. More narrow criteria for commonality, by contrast, will allow more space for diverse practices. So the question whether to adopt a narrow or broad definition of commonality of constitutional tradition is fundamentally normative in this context; and the research design for determining common traditions has these important normative implications.

Another doctrinal example is worth noting. Canada, South Africa and a number of other countries have what are sometimes called “limitations clauses”; in Canada the limitations clause found in Section 1 of the Charter of Rights and Freedoms is also referred to as a “salvage” clause.<sup>7</sup> The idea is that if a law or a practice is found to intrude on protective rights, nevertheless the law may still be constitutional if (using the Canadian language) it can be “demonstrably justified in a free and democratic society.”<sup>8</sup> Well, how does one determine what is demonstrably justified in a free and democratic society? This is the question under the Canadian Charter and I think it directs us to a comparative inquiry about the practices of free and democratic societies. But this comparative inquiry faces all of the challenges I discussed above—and translating from what is demonstrably justified in one free and democratic society to another may not be so easy a matter. For example, limitations that may be “demonstrably justified in a free and

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6. See Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT’L J. CONST. L. 618, 623-24, n.26 (2006).

7. See *R. v. Morgentaler*, [1988] S.C.R. 30, 73 (Dickson, C.J.) (stating that Section 1 can “be used to ‘salvage’ a legislative provision which breaches” substantive provisions of the Charter).

8. Canadian Charter of Rights and Freedoms § 1, being Schedule B Part 1, Constitution Act, 1982, R.S.C. 19 85, Appendix II, No. 44 (“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”).

democratic society” with a history of Nazism may not be quite so readily “demonstrably justified” in societies without that history.

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So some challenges in comparative constitutional study are shared, and some depend on the purposes for which comparisons are made. There are many other ways of talking about the purposes of comparative constitutional study. Some purposes of comparison are for their use by judges, apart from scholars. I have suggested, in other work,<sup>9</sup> that in deciding whether and when to use comparative materials in constitutional interpretation, at least three kinds of factors are relevant. The first is *the nature of the domestic issue*. Some constitutional issues are going to be decided within very well settled fields of domestic discourse. Or they may concern a particular provision of a constitution that is historically and transnationally quite distinct, like the United States’ Second Amendment about guns. Second, for judges, the *nature of the transnational source* will affect its relevance. International law might have a salience in some cases that comparative law does not; on the other hand, sometimes comparative constitutional law might have more persuasive value than international law (for reasons we do not have time to get into but which I explore elsewhere).<sup>10</sup> Third, judges need to consider the *comparability of contexts* (which I have noted earlier); and on these issues the courts are going to be very dependent on the infrastructure of knowledge that we, as scholars, develop.

#### DISTINCTIVE CHALLENGES OF CONSTITUTIONAL COMPARISON

In the balance of my talk, I hope to elicit your thoughts about what (if anything) is distinctive about constitutional comparisons as opposed to other kinds of legal comparisons. The reason I particularly invite your input is because this proved to be a much harder task to think through than I had initially thought it would be.

Limitations of time and resources, limitations of language and contextual understanding, are challenges that apply to any kind of comparative legal study. They are not unique. They can arise whether you are looking at contract law or tort law or constitutional law in a comparative setting. I have thought about three other possibly distinctive challenges in comparative constitutional law: first, the complexity of the historical context and the interdependence of constitutional provisions

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9. See VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 161-83 (2010).

10. For discussion, see *id.* at 168-78.

one on the other; second, the tendency in constitutional law and theory to conflate the normative and positive; and third, the expressivist aspects of constitutional law.

*Complexity of Historical Context and Interdependence of Constitutional Provisions*

Constitutions are made and then interpreted in complex and distinctive historical contexts. Moreover, many of a constitution's provisions are interdependent on others, designed to create an overall system or balance. So, when I discussed with you functional claims about causal relationships between aspects of a constitutional system in the context of the "case or controversy" requirement, I broadened the lens of comparison, and suggested thinking about it in the context of how the judges are appointed and tenured. On federalism issues, for another example, I have written that it is hard sometimes to do comparisons because federal bargains are always historically contingent and arise out of particular deals struck by particular holders of power in society at one time.<sup>11</sup> Moreover, a constitution's federalist features are interdependent because federal systems look for overall balances. But on reflection, I am not sure whether or to what degree these characteristics are distinctive about constitutional law. Substantive contract law's practical meaning, for example, may depend on the broader legal context, including the procedural rules for litigation, such as who pays attorneys fees, or the practical availability of lawyers or of other means of dispute avoidance or resolution. So this claim of possible distinctiveness bears further analysis and reflection.

*Conflating Normative and Positive Claims*

The second feature I considered that might be distinctive is the tendency to conflate normative with positive claims about what is and is not constitutional. At least in constitutional systems like the United States, where the Constitution is deeply entrenched (meaning, it is pretty hard to change by amendment, and thus the system depends heavily on interpretation), there is a fairly strong tendency in both judicial opinions and in the theoretical literature to confound and mix up and conflate normative claims about what the Constitution should be understood to mean, and positive claims about what the courts are now doing or what the Constitution does require. This feature, I think, might be a distinctive one, but I do not know if it is true for all constitutional systems, or even for all that depend strongly on interpretation, and there might be other

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11. See *id.* at 227-30.

areas of the law where this tendency to conflate also exists. Questions thus exist here as well for further research and reflection.

*Expressivism and Constitutions*

So let me come to a third possibly distinctive feature of constitutional law that may affect comparative methodology, and that is the expressivist role played by constitutions and constitutional law. Now, the appeal of cross-national functional analysis is great. Professor Mark Tushnet and I organized most of a coursebook around essentially a set of functional questions;<sup>12</sup> and it is certainly possible, at a mid-level between high theory and concrete detail, to identify functions that are performed by almost all constitutions. All constitutions deal with allocation of governmental powers, for example. All constitutions deal with the composition and structure of government. Constitutions are supposed to be functional, and so situating research in a functional problem-oriented analysis makes sense.

But constitutions also serve as a form of public law that is particularly situated to express, or help constitute, or (possibly even) influence national identity. If we listen to some constitutional preambles (which I love to read) you can hear this. Iraq's Constitution asserts in its preamble, "We are the people of the land between two rivers, the homeland of the apostles and prophets, . . . pioneers of civilization. . . . Upon our land the first law made by man was passed. . . ."<sup>13</sup> This is a claim about who the people are. The preamble of the Constitution of China reads like a tract on national history and the accomplishments of a collective people.<sup>14</sup> The French Constitution proclaims its commitment to the declaration of rights of man and proclaims France an indivisible, secular, democratic and social republic.<sup>15</sup> The German Basic Law (its constitution) asserts Germans' responsibilities before God and man.<sup>16</sup> The Irish Constitution invokes the "Most Holy Trinity."<sup>17</sup>

These are not claims about function and purpose; these are claims about identity and self-expression. The point here is the degree to which the expressive components of constitutions may complicate our efforts to do comparative analysis at the functional level.

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12. VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2d ed. 2006).

13. PERMANENT CONSTITUTION OF THE REPUBLIC OF IRAQ, preamble (2005).

14. See XIAN FA preamble (1982) (P.R.C.).

15. 1958 CONST. art. 1.

16. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (federal constitution), Preamble, May 23, 1949 (F.R.G.).

17. IR. CONST., 1937.

I do want to resist, however, efforts to posit functionalism as an opposite to expressivism. Good comparative analysis tries to reconcile rather than choose between them. My own effort at reconciliation leads me to think that there is a kind of contextualized functionalism, which requires: (1) a willingness to question whether functions, concepts, or doctrines that appear similar may in fact be quite different in different societies; (2) an attention to how seemingly separate institutions or legal practices are connected to, and influenced by, others; and (3) a commitment to be open to noticing how legal rules or doctrines may be affected by the identitarian or expressivist aspects of the constitution.

I am going to stop speaking now because I do not want to run over my time. I thank you for your attention and look forward to further discussion.