

Comparing Constitutions and International Constitutional Law: A Primer

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Abstract

While comparing constitutions belongs to the ubiquitous activities of constitutional lawyers and political scientists, the *methodology* of comparison is not very developed in constitutional law. No doubt, intercultural dialogue is required to handle rich substantive comparisons. But such dialogue is hindered by divergent constitutional traditions rendering it difficult to even find an entry point for comparisons. The **text-oriented approach** is suggested here as an entry method and the **dialectical approach** as the overall method of comparison.

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I. Standardized Constitutionalism

1. Towards International Constitutional Law

While comparative law at large is still a study in ongoing diversity, constitutional law has so strongly converged already, that comparisons lead to recognizing a body of 'International Constitutional Law'. International standards have evolved over the last decades by ongoing development and synchronization of constitutional provisions in politically related nation states. The European Court of Justice relies on a 'constitutional consensus' among the member states of the European Union. Beyond Europe, International Constitutional Law evolves by more specific requirements for good governance – both in political organization and basic rights. Legal standards do not establish a formalized constitution claiming supremacy over the national legal systems, but already some international organizations and courts legislate and adjudicate in ways that cannot easily be evaded by nation states.¹ Therefore, both the (formal) establishment of international organizations and courts (UN, WTO, ICJ) as well as the (informal) synchronization of constitutional provisions among nation states tends to establish what can be called 'International Constitutional Law'. Comparing constitutions is one of many aspects in analyzing its content.

2. The History of Comparing Constitutions

Famously, ARISTOTLE compared the constitutions of his time and presented a classification in books III and IV of his 'Politics'. His concept of 'constitution' is substantive, i.e., does not require the form of a written document, but focuses on the way a city state (polis) is actually organized.² He distinguishes 'true constitu-

¹ Cf. ROBERT UERPMANN, Internationales Verfassungsrecht, in: JuristenZeitung 2001, p. 565-573 (566 ff.).

² ARISTOTLE: Politics, ca. 330 B.C., III (1278 b9, 1289 b15, 1290 a8-9).

tions' aiming at the good life of all citizens and 'perversions' aiming only at the good of the rulers.³ Further distinguishing between the number of rulers, he arrives at the classification displayed in this table:

ARISTOTLE counts democracy among the perversions because in his view, it only promotes the interest of the poor rather than the common good.⁴ His favored form of government, polity, combines elements of oligarchy and democracy to accommodate both the freedom of the poor and the wealth of the rich.⁵

| Rulers | True Constitutions | Perversions |
|--------|--------------------|------------------|
| One | Monarchy | Tyranny |
| Few | Aristocracy | Oligarchy |
| Many | Polity | Democracy |

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 Aristotle then goes on contrasting Plato's 'Republic' with his own view of the ideal city state.

Nowadays we tend to compare constitutions without the preconception of an ideal form of government. Instead, the more general ideals of contemporary constitutionalism are those of freedom and equality. Accordingly, the constitutional history of post-World War II associates comparative constitutionalism with waves of liberation as witnessed by the era of decolonization and the opening of East Europe. While sharing similar values, these developments are no longer measured against formal classifications as in ARISTOTLE'S work. Rather, we tend to be open towards different types of state organization without assigning particular value to a single model.

3. The Concept of Constitutions

There are at least two distinct meanings of 'constitution' – a formal and a substantive one. In the substantive sense, any organized way of conducting the operations of a state or other entity make up its 'constitution'. In the formal sense, a constitution is a written document containing legal rules and principles claiming

³ ARISTOTLE: Politics (Fn. 2), III (1279 a17-21).
⁴ ARISTOTLE: Politics (Fn. 2), III (1279 b5-10).
⁵ ARISTOTLE: Politics (Fn. 2), IV (1293 b34], 1294 a17).

priority over other rules and principles. Combining substantive and formal features, JOSEPH RAZ has described a "thick sense" of the constitution that fits the contemporary use of the word in most cases. He defines 'constitution' as an entity with the following seven features:⁶

1. it is *constitutive* of a legal system;
2. it is *stable*, at least in aspiration;
3. it is *written*;
4. it is *superior* law;
5. it is *justiciable*;
6. it is *entrenched*, i.e., more difficult to change than other law;
7. it is expressing a *common ideology*.

In this mostly accurate account, the fifth element, requiring that conflicting ordinary law be invalid or inapplicable, is questionable, since a number of traditional constitutions (e.g., the Swiss Constitution) do not rely on judicial review by a Supreme Court. Still, justiciability in a less demanding sense is required, lest the superiority of the constitution becomes indeterminate.

II. Comparing Constitutional Texts

Jurisprudence of Constitutional Law does not generally acknowledge textual analysis of constitutional documents as a satisfying method. Comparing legal texts (macro-comparison) is only seen as a first, though necessary, step towards in-depth analysis of single features (micro-comparison).⁷ Contextual background information about statutes and case law, political reality and history is necessary to really understand the meaning of the words.

1. Criticism Towards Comparing Texts

What is so difficult about comparing constitutions by textual analysis? First of all, constitutional documents are highly **incomplete**. They therefore only hint at the actual practice in a legal system, i.e., its working constitution or "governance".

⁶ JOSEPH RAZ, On the Authority and Interpretations of Constitutions. Some Preliminaries, in: Larry Alexander (ed.): Constitutionalism. Philosophical Foundations, Cambridge 1998, p. 152-193 (153 f.).

⁷ GIUSEPPE DE VERGOTTINI, Diritto Costituzionale Comparato, 4th ed. 1993, p. 64; SAMUEL E. FINER/VERNON BOGDANOR/BERNARD RUDDEN: Comparing Constitutions, Oxford 1995, p. 1.

Incompleteness also results from the fact that constitutional documents cannot reveal everything about extra-constitutional organizations and processes (churches, pressure groups, media activity, army tradition) even though they often carry an impact on constitutional practice.⁸ No constitutional text, therefore, can be an entirely complete and realistic description of the working constitution.

Secondly, constitutional documents can be **misleading** where constitutional practice has departed from the procedure suggested by the text.⁹ Some bodies of constitutional law – e.g., in the United States of America and also in Switzerland until 1999 – chiefly entail the study of Supreme Court decisions rather than textual interpretation of the constitutional document itself.¹⁰ Interpretation by the courts not only permeates the "original meaning" or "framers' intent", but extends the constitutional text towards new subjects unanticipated by its authors.

Thirdly, constitutions are **indeterminate** regarding different possible interpretations of specific provisions in the very same text or even different schools of interpretation among the scholars of constitutional law.

Fourthly, constitutions can be **ineffective**. Text and practice differ greatly where the rule of law (more comprehensively: the Rechtsstaat) is not strictly enforced or the constitution suspended or dishonored. The constitution thereby changes its character from rule to symbol.

Finally, written constitutions are **unnecessary** in the sense that a state is perfectly viable without one. The working constitution of Great Britain is the unique remaining example.

2. Textual Analysis as a Starting Point

With all the imperfections of textual analysis, the text of constitutions is still a starting point for grasping the content of constitutional order. It emphasizes the contemporary focus of a given socio-political system. In FINER'S picturesque characterization: "A constitution resembles a sharp pencil of light which brightly

⁸ SAMUEL E. FINER/VERNON BOGDANOR/BERNARD RUDDEN: *Comparing Constitutions*, Oxford 1995, p. 2.

⁹ Cf. U.S. const. Art. 2 Sec 1 [2] about presidential elections.

¹⁰ E. ALLAN FARNSWORTH, *An Introduction to the Legal System of the United States*, 2nd ed. New York 1983 p. 131.

illuminates a limited area of a country's political life before fading into a penumbra where the features are obscured".¹¹ Textual analysis does not assume a world development towards an ideal constitution,¹² but it does accept the international communities' tendency towards trying new instruments of constitutional law and abolishing others. Constitutional texts are necessarily incomplete, but they tend to encompass a description of the most fundamental elements of the actual political order. The constitutional text might be misleading at times, but a revisable text tends to get adjusted to political reality by amendments. Some written constitutions are ineffective and none are necessary to the very existence of a state, but certain parts of certain constitutions are obeyed most of the time, thereby transcending the state of mere fiction or decoration. What happens after the end of a presidential term or after dissolution of parliament is often readily available in and predictable by the constitutional text.

3. The Fifth Method of Interpretation (Häberle)

As a technique to understand the meaning of legal texts, comparative interpretation has been assigned the status of a "fifth method"¹³ beyond the classical canon of literal (grammatical), systematic, historical and purposive (teleological) interpretation.¹⁴ By outlining typological similarities, textual analysis opens new ways of comparative interpretation. Sometimes (e.g., in the European Union) merging integrative processes into a unified interpretation of constitutions¹⁵ and sometimes leading to general theories about constitutional concepts.¹⁶ By outlining typological differences, textual analysis contrasts competing approaches, e.g., western-style individualist human rights order versus religious state organi-

11 SAMUEL E. FINER/VERNON BOGDANOR/BERNARD RUDDEN: *Comparing Constitutions*, Oxford 1995, p. 2.

12 FUKUYAMA, FRANCIS: *The End of History and the Last Man*, New York 1992.

13 HÄBERLE, PETER: Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als "fünfter" Auslegungsmethode, in: *JZ (Juristenzeitung)* 1989, p. 913 ff.

14 CARL FRIEDRICH VON SAVIGNY, *System des heutigen römischen Rechts*, vol. 1, 1840, p. 213 ff. (although still without the teleological/purposive element).

15 PETER HÄBERLE, *Gemeineuropäisches Verfassungsrecht*, in: *EuGRZ (Europäische Grundrechtezeitung)* 1991, p. 261 ff.; PETER HÄBERLE, *Die Entwicklung des heutigen Verfassungsstaates: Paradigmen, Verfassungsthemen, Textstufen und Tendenzen in der Weltstunde des Verfassungsstaates – Der polnische Entwurf 1991*, in: *Rechtstheorie* 22 (1991), S. 431 ff.

16 Cf. e.g. FLEINER-GERSTER, THOMAS: *Prolegomena zu einer allgemeinen Theorie des Föderalismus*, in: W.R. Schlupe et al. (eds.), *Recht, Staat und Politik am Ende des zweiten Jahrtausends. Festschrift für Arnold Koller*, 1993, S. 83 ff.

zations, communist conceptions, or law-and-order regimes. The incorporation of International Human Rights into national constitutions has led to strong standardization. Apart from being incorporated, international human rights norms also influence national legal systems by their validity as domestic law.¹⁷

4. Text-Stages-Analysis (Häberle)

Constitutional text analysis has gained some support in the form of Text-Stages-Analysis,¹⁸ i.e., a comparative analysis of a specific topic (micro-comparison) acknowledging the historical dimension of constitutions.¹⁹ This method relies on the assumption that advances in constitutionalism will eventually be expressed in the documents themselves, making the texts a valuable starting point for studies. Text-Stages-Analysis is at a disadvantage when proving its relevance for the actual constitutional status of a country: references to the text – or worse: counting the frequency of occurrence of certain provisions – cannot reliably indicate what is effectively valid as a constitutional rule or principle.

III. Methods of Constitutional Comparison

Since the formal character of textual comparisons does not sufficiently inform us about the actual difference or similarity in content, more substantive approaches have to be pursued in addition to the text analysis as an entry method.

1. Substantive Comparison

Most contemporary studies rely not on the constitutional texts, but on constitutional practices as exemplified by political and judicial decisions in the respective countries. At its best, substantive comparative studies may eventually generate hypotheses about the structures of governance and their effects in different set-

¹⁷ MARTIN SCHEININ, *International Human Rights Norms in the Nordic and Baltic Countries*, The Hague 1996, p. 11 ff., for a comparative study of this influence in the Nordic and Baltic countries.

¹⁸ PETER HÄBERLE, *Textstufen als Entwicklungswege des Verfassungsstaates: Arbeitsthesen zur Verfassungslehre als juristischer Text- und Kulturwissenschaft*, in: *Festschrift für Karl Josef Parth*, 1989, S. 555 ff.

¹⁹ HÄBERLE, PETER: *Rechtsvergleichung im Kraftfeld des Verfassungsstaates: Methoden und Inhalte, Kleinstaaten und Entwicklungsländer*, 1992; for the text of preambles: THOMAS FLEINER-GERSTER/LIDIJA BASTA-POSAVEC: *Federalism, Federal States and Decentralization*, in: *Institut de Fédéralisme* (ed.), *The Territorial Distribution of Power in Europe III*, 1993, S. 1 ff. (8 ff.).

tings,²⁰ thereby informing framers of new constitutions about different options rather than forcing them into copying the constitution of some reference state. The eclectic nature of substantive analysis, however, has the drawback of not allowing comprehensive structural statements: single problems and their solution in different countries are at the forefront of this methodology.

2. Traditional Method

To avoid the disadvantage of eclectic comparisons, a more extensive method has evolved for constitutional comparison on a larger scale. If, for example, an international research project about the judiciary tries to analyze the current differences and similarities of the constitutional framework for that power, a long list of questions is drawn up and experts from the respective countries answer these questions on the basis of their constitutional law. This leads to a combined presentation of constitutional texts and administrative or judicial decisions. The resulting views are called country reports (Länderberichte). Only after each of those reports has been drafted on the basis of the national viewpoint, the comparison begins, mostly by bringing the researchers together in a conference to present their views and, hopefully, arrive at some ad-hoc-comparison. The methodological reasoning behind this complicated two-step-procedure is the belief, that only an "objective" presentation of each country's constitution by the experts from that country and in the terms of that country's legal language can be honest to the sources. Directly looking at a constitution with the preconceptions of the constitutional law in another country is considered incorrect – politically as well as academically.

3. Dialectical Method

A disadvantage of the traditional method results from the fact that drafting country reports burns most of the research energy. In many cases, after everything is presented, hardly any time or motivation remains for detailed analyses of the similarities and differences. Therefore, an alternative method has been suggested for constitutional comparison. Rather than presenting independent country reports on a neutral platform, it directly looks at a specific issue from the partial viewpoint of a single constitution. This will, admittedly and intentionally, lead to

²⁰ VICKI C. JACKSON/MARK TUSHNET: *Comparative Constitutional Law*, 2nd ed., New York 2006, p. 188.

some misunderstanding of the other constitution's solution to the problem. However, repeatedly asking critical questions, identifying preconceptions and then rearranging one's view about the other constitution will more effectively lead to substantive comparisons. Since this method relies on repeated readjustment of views on ever higher levels of understanding, it can, following HEGEL, be called the dialectical method.²¹

4. Reflexive Method

A quite similar, more psychological approach to creative comparison of constitutions is the reflexive method.²² It also starts with the conscious assumption of a non-neutral perspective, but compensates for the resulting lack of mutual understanding by openly fostering intercultural and intersubjective competence. During the comparative process, a change of perspective has to take place in order to distance oneself from the original viewpoint. To concede that a phenomenon of another legal culture cannot be grasped due to an inherent strangeness of "the other" is the starting point. Consciously experiencing strangeness opens the door to a dialogical and self-critical learning process.

IV. Constitutional Typology

1. Systemic Dichotomies

While comparative private law has a long tradition of arranging legal systems into "families", this approach is of no use in constitutional law. We do not lack useful dichotomies – monarchy vs. republic, bicameral vs. unicameral parliament, proportional vs. majoritarian elections, presidential vs. parliamentary government, federal vs. unitary systems. But legal systems do not easily line up along these criteria. While federalism usually comes with a bicameral parliament, exceptions are possible. In the United Republic of Tanzania, for example, the entities of the mainland and Zanzibar island are legally separated as witnessed by Zanzibar's own parliament, but the nation has a unicameral parliament for union affairs. Also, federalism is associated with all kinds of governmental organization: presi-

²¹ AXEL TSCHENTSCHER, *Dialektische Rechtsvergleichung. Zur Methode der Komparistik im öffentlichen Recht*, in: *JuristenZeitung* 2007, p. 807-816.

²² SUSANNE BAER, *Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz*, in: *ZaöRV* 64 (2004), p. 735-758 (745 ff.).

dential systems (Brazil, United States of America), parliamentary systems with prime minister (Australia, Canada, Germany), or even parliamentary systems with consociationalism (Belgium, Switzerland). The extent of autonomy within a federation can be strong (United States of America, Switzerland) or weak (Germany). A bicameral parliament can be symmetric by requiring mutual agreement for every legal act (United States of America, Switzerland), or it can be asymmetric by assigning some state functions to only one chamber (France, Germany).

2. Typology Instead of Classification

Altogether, the overlap between legal systems does not line up, but remains quite diverse. Having a distinct class of states with identical properties (Westminster System) is the rare exception. Therefore, we can only rely on some features being similar while others will remain different. At most, this leads to typologies, not classifications. We cannot, for example, assign a legal system to the "class" of presidential democracies and then conclude that there must be a constitutional court with the power of judicial review.

3. Common Tasks

Apart from the systemic dichotomies mentioned above, there are some tasks every legal system has to cope with. The separation and balance of powers, particularly the issue of judicial independence, is among those tasks. Crucial questions of value judgments in fundamental rights (death penalty, abortion) are to be addressed. The need for constitutional change must be answered by procedural provisions as well as substantive judgments about the utmost extent of possible revisions (constitutional entrenchment). Term limits for governmental and judicial positions are at issue. The installation of a constitutional court with the power of judicial review is a feature currently quite en vogue, but not at all necessary in the process of constitutional development. And finally, political rights can be channelled into democratic participation with strong features of direct control (Switzerland), or they can, at least on the national or federal level, remain focused on a system of representation (Germany, United States of America).

4. Objectives of Comparison

Since each of these common tasks can be freely combined with the systemic dichotomies mentioned above, the resulting legal system is often quite unique.

This reflects on the objective of comparative constitutional law. Rather than looking for similarities and grouping legal systems together, the comparison should first capture the constitution within the loose net of typologies and then concentrate on the distinctive features of this particular legal system.

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