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Comparative Methodology and Constitutional Change

Jaakko Husa

Abstract

Comparative research expands over the traditional boundaries of constitutional law scholarship and deepens our understanding of constitutional change. This chapter addresses comparative methodology in studying constitutional change. Discussion in this chapter is based on a theoretically and methodologically broad and flexible view shunning a narrow legal perspective. Chapter addresses the methodology of comparative law, the purposes of comparative constitutional law, and the purposes of studying constitutional change comparatively. Also universalism and culturalism, the potential relevance of legal families, and legal transplants are highlighted. It is argued that both qualitative and quantitative research methods can be used and that comparative study of constitutional change allows different intellectual styles.

Introduction

Researching constitutional change by using the comparative approach lies at the heart of comparative constitutional law and interdisciplinary comparative constitutional studies. It is about concentrating on constitutional change as a substantive matter by abandoning a country-bound approach and drawing comparisons between different systems.¹ Whether it is a question of formal or informal change is of no consequence, i.e. comparing differences and similarities and trying to find explanations for them is a core technique when we are studying constitutional change. There is more to it because the novel research field of comparative constitutional change makes the comparative approach its methodological centrepiece. As a result, researching constitutional change comparatively cannot be parochial; it expands over the traditional epistemic boundaries of constitutional law scholarship and deepens our understanding of constitutional change.

¹ See, e.g., Oliver and Fusaro.

The emergence of the new field has taken shape under two major developments. First, comparative constitutional law has freed itself from the paradigmatic grip of a private law-oriented comparative study of law.² This has brought new approaches and an openness towards various methods not familiar from doctrinal comparisons.³ In short, the suffocating epistemic embrace of private law-focused legal doctrine has all but died out.⁴ Second, many constitutional scholars have conceived that research of such things as amendments, replacements, revisions, adaptations, interpretation, disuse, and even revolution is not only a single area of study but, rather, a distinct field that combines comparative constitutional law and constitutional studies under a united thematic banner.⁵ Studying constitutional change comparatively is essentially a multidisciplinary endeavour. Constitutional change is both a legal and political phenomenon that fuses the normative and factual together so that narrow views like ‘law’ or ‘politics’ become virtually untenable because of the subject matter itself.⁶ The legal dimensions of constitutions are intertwined with the political when constitutions or their smaller components transform.⁷

This chapter addresses comparative methodology in studying constitutional change. The chapter, while written from the point of view of comparative constitutional law, is based on a theoretically and methodologically broad and flexible view shunning a narrow legal perspective. In articulating key issues of comparative methodology, this chapter discusses the methodology of comparative law (Section 2), the purposes of comparative constitutional law (Section 3) and the purposes of studying constitutional change comparatively (Section 4). Next, Section 5 addresses specific issues by discussing universalism and culturalism, the potential relevance of legal families, and legal transplants. The concluding Section 6 draws out the key points and rounds off the discussion. In addition, questions that concern case-selection and choice of method are discussed throughout this chapter because they are interlinked to nearly everything this chapter deals with.

² See, e.g., Ginsburg and Dixon (eds) and Rosenfeld and Sajó (eds).

³ Empirical study of constitutional narratives is a good example of an approach not familiar from private law comparisons, see Law. Typically, new approaches rely on empirical and quantitative approaches such as Ginsburg and Versteeg.

⁴ It is argued that comparative constitutional law ‘has now moved front and center’, Rosenfeld and Sajó, 1.

⁵ See, e.g., Contiades (ed) and Albert, Contiades, Fotiadou (eds).

⁶ Accordingly, to study constitutional engineering as a phenomenon of constitutional change cannot rely on a narrow approach but has to take multi-faceted parameters into account (e.g. party systems, the role of civil society and constitutional experts, and informal constitutional change). See Contiades et al. (eds) 2012.

⁷ One example of this fusion is that constitutional changes have become more citizen-led as we have seen the growth of popular participation. See Contiades and Fotiadou (eds) 2017.

Method and methodology

In a comparative study of law, method refers to a particular way in which a series of research steps are taken in a predetermined manner. This includes processes, tools, and techniques by means of which a research topic is addressed. Methodology, on the other hand – the theme in this chapter – deals in a general way with the principles that guide research practices and operations.⁸ Comparing constitutions opens possibilities for many kinds of research techniques. In principle we can apply any method as long as it helps to find answers to research questions. In essence, answering becomes possible through understanding the constitutional material under scrutiny. An element of qualitative approach is involved, stressing the role of understanding, underlying the comparative approach. This is not to say that quantitative approaches would not enter the question. On the contrary, numerical data is useful but underused in a comparative study of law. Numerical approaches fit well with comparative constitutional law. Moreover, there are no reasons to limit the scope of comparative constitutional law as it leads to overtly jurisprudential or, at worst, legalistically narrow comparisons that needlessly shy away from quantitative or interdisciplinary methods.⁹

Without a shadow of doubt, quantitative methods have their place in the study of constitutional change. As Meuwese and Versteeg say, ‘Well-executed research designs, relying on the quantitative analysis of legal or semi-legal texts or using survey- or indicator -based data, either as the lead method in large cooperative projects or in a clearly defined support role, are good candidates to offer...help to comparative law’.¹⁰ Accordingly, comparative study of constitutional law is not about disciplinary boundaries or differences between qualitative and quantitative approaches but about suitable research designs. In practice, this means that comparative study of constitutional change can combine doctrinal-legal and empirical approaches. Moreover, research may rely on an interpretative-legal approach but it may also utilise avant-garde computational techniques. Importantly, the approach should be chosen according to the research design, not according to disciplinary boundaries.¹¹ The key factor is that there is no such thing as a one-size-fits-all method in comparative research of constitutional change.

⁸ Adams, Husa, and Oderkerk (eds) xi.

⁹ ‘The proliferation of constitutional courts, judicial review, and constitutional rights jurisprudence worldwide, indeed the rise of the human rights discourse more generally, turned the comparative study of constitutionalism into a predominantly legalistic enterprise that is heavily influenced by the prevalent case-law method of instruction’, Hirschl 2013, 6.

¹⁰ Meuwese and Versteeg.

¹¹ See Tushnet 2017.

The methodological choices of comparative research can be roughly divided into two categories. On the one hand, choices of a technical nature (e.g. what kind of constitutional change is being studied), and on the other hand, theoretical choices having to do with different schools of thought, such as choosing between culturalism and universalism. Choices are not exclusive but take turns during the research process: how many cases and what kind of constitutional changes are included may depend on time, resources and linguistic reach. Undoubtedly, a great number of methods are available to be applied in the comparative study of constitutional change. As such, this is a strength, not a weakness, because comparisons are not similar and do not have identical purposes.¹² For example, analysing one case of constitutional transplantation is sure to differ from a text-oriented computational analysis looking for a longer time-series in numerous constitutional systems. Yet the object of study is the same: constitutional change in its various forms and manifestations.

Importantly, the attempt to compare constitutional change concerns rejection of constitutional ethnocentrism, pushing away the implicit thought pattern according to which national solutions are considered usual and what lawyers inherently expect. In the world of constitutional law we can learn from others; we can see ourselves in the foreign mirror. None of this is to say, however, that comparative constitutional change would necessarily require a commitment to universalistic assumptions.¹³ Comparisons are of significant importance because studying constitutional change is a specialised thematic field that does not focus on any specific country or group of countries but on a certain issue or problem related to the change of constitutions in general. Importantly – and this is a key factor – only comparison can reveal the details and complexities of constitutional change worldwide, thus rendering them understandable in a larger context.

In fact, the larger context is the bread and butter of comparative constitutional law, pushing beyond judicial comparativism and a narrow legal framework. For the study of constitutional change this is an important feature because a narrow legal point of view seldom yields satisfactory answers to the research question ‘how’, which can be found on the basis of ‘Large N’ (looking for patterns in a large number of cases) studies enabled by new information technology. What is more, unlike judges – who are bound to their normative framework – scholars enjoy a greater degree of epistemic freedom in their attempt to describe, analyse, and ultimately understand constitutional change.¹⁴

¹² Cf. Rosenfeld and Sajó, 8.

¹³ See, e.g. Teitel.

¹⁴ For a more detailed discussion on ‘Large N’ and ‘Small N’ studies, see Ginsburg 2016.

Importantly, national constitutions were not born – or have not grown – in isolation.¹⁵ Scholarly work in constitutional change renounces the idea according to which constitutions are inherently national products and instead demonstrates the importance of border-crossing constitutional diffusion, as we shall see later in this chapter.¹⁶ In essence, only a comparative approach can properly highlight this phenomenon and produce general knowledge on the subject exceeding the national framework.

Domestic constitutions have adopted far more from others than doctrinalists comprehend: constitutional ideas and doctrines are migrating; for example, the separation of powers, constitutional judicial review, and constitutional rights. Nevertheless, constitution drafters and other constitutionally relevant actors are not distinctly aware of the layers of loans, borrowings and all sorts of constitutional plagiarism that their own constitution accommodates. In contrast, comparative constitutional scholars are well aware that national systems consist of patchworks of migration alongside domestic ideas. However, this is certainly not to say that constitutional transfers would be problem-free.¹⁷ Ideas and doctrines move beyond borders whether we admit it or not, and whether they work in the ways intended or not.¹⁸ Comparative constitutional change is an illustration of how everything that is not bolted down can be copied to elsewhere.¹⁹ Moreover, it should go without saying that nothing is bolted down in the world of constitutional ideas; indeed, the world of constitutional law is a world of migration.

Purposes and approaches

In a broad view, the purposes of studying constitutional change are rather similar to the purposes of comparative study of constitutional law in general. A comparative approach to the study of constitutional change may benefit from many possible uses and involve multiple goals. Generally speaking, we can distinguish two basic purposes. These are description and analysis. Be that as it may, these aims cannot be separated from the aims of comparative law in general. The underlying

¹⁵ See Versteeg and Goderis. They argue that even though constitutions are normally regarded as purely domestic products, shaped by national ideas and politics, they are in fact much more transnational.

¹⁶ See Ginsburg, Foti & Rockmore.

¹⁷ Frankenberg ('Read ten constitutions and you know them all, at least you know the most common varieties of constitutional construction. Such will be the implicit message of the hasty traveller' 563).

¹⁸ See for more detailed discussion, Spector (speaking mostly about the Argentinian experience).

¹⁹ However, transplants are difficult to control: 'Once grafted onto a different constitutional system, transplants can grow, evolve, or atrophy', Rosenfeld and Sajó, 15.

idea, namely that comparative study of law needs a specific aim, is a crucial one; comparison is undertaken for a purpose and not merely to decorate a nationally oriented study of law as some kind of supplementary nicety. Before addressing description and analysis, however, we need to briefly discuss the purposes of comparative law more generally.

General aims

One key aim of comparing laws (in a broad sense) has been to use comparison as an instrument of learning. By and large, this has meant expanding knowledge as a means of understanding law better. For example, French constitutional law textbooks have typically also contained comparative parts.²⁰ Albeit these lightweight comparisons have not been rigorously comparative, nevertheless they have provided a larger comparative context for reaching a better understanding of the French system. We may characterise this kind of lightweight comparison as contextual because it provides a comparative context for the study of a single system. However, it is not genuinely comparative in the sense that it does not look at differences and similarities in a balanced way but, rather, focuses on a certain system which it hopes to better explain by using foreign examples and illustrations. At best, light-weight comparison may provide concepts and tools for understanding constitutional change within a single system.

Another key aim has been to use comparative law as an instrument of evolutionary and taxonomic science. Taxonomic comparatists have tried to mimic sciences in which classification has enjoyed a long and successful history, even though no truly scientific global classification of legal systems has ever emerged, as we shall see later in this chapter. Yet another category of key aims has included various utilitarian and pragmatic aims, such as improving national legislation or using foreign legal ideas in judicial problem-solving.²¹ Whereas legislatures are motivated by political or economic considerations, courts may look elsewhere to draw inspiration when no domestic rule is available or the domestic rule is unclear and needs interpretation.²² No doubt, these aims are familiar from the comparative study of constitutional law, too. However, comparative constitutional scholarship has stepped out of the methodological and epistemological boundaries of general comparative law. This transformation has opened new areas for interdisciplinarily-flavoured comparative constitutional law research such as comparative constitutional change.

²⁰ See, e.g., Duhamel and Tusseau. A classic example is Duverger.

²¹ Glenn, 66-70.

²² See Smits 2006.

Stepping out of the old boundaries has been facilitated and enhanced by growing interest in the international diffusion of constitutional ideas. One of the key consequences has been a shift away from a mere description of differences and similarities and outdated taxonomy-building to genuinely seeking to explain comparative findings. Notwithstanding that this is not necessarily a shared view or the paradigmatic position of all comparatists, yet the effort to move the focus towards a more explanation-oriented study and use of non-doctrinal approaches has gained in popularity. In any case, in the comparative study of constitutional change it is useful to distinguish the two basic purposes mentioned above, i.e. description and analysis.

Describing and Analysing

Describing constitutional change plays an important role in the comparative endeavour. Without reliable description it is not possible to move on to analysis. Disciplined descriptions of national systems, and the ways they change, provide crucial data for comparative study. One of the key outcomes of these kinds of non-doctrinal descriptions is that they highlight the role of change taking place outside the official amendment procedures. For example, Strauss has demonstrated and described how many changes in the US constitution have come about without changing formal constitutional law. His study demonstrates how American constitutional law is not simply a matter of legal concern but, rather, the result of a complex evolutionary process and not merely a result of political acts by a sovereign people.²³ We can also analyse the gradual change within a shorter period within a single system by analysing key judgments without textual change taking place.²⁴ A further example is Albert's study of quasi-constitutional amendments (especially highlighting the Canadian case), which analytically describes sub-constitutional changes that achieve constitutional status over time because of their constitutional substance.²⁵ These kinds of case-oriented studies provide a thick description of a certain constitutional system (or a group of systems) without aiming at establishing generalised relationships between a great number of variables. Case-oriented studies provide comprehension of complex units (constitutional systems) following a different logic of research, that is, other than variable-oriented approaches.²⁶

²³ Strauss ('forms of popular rule that are less romantic than the idea of the People speaking with one voice to amend the Constitution...these forms of popular rule may be less congenial to lawyers because they do not provide a canonical text to be scrutinized and interpreted' 1505).

²⁴ For example, Hong Kong's system has been changed – without textual amendments to the Basic Law – by the authoritative interpretations of the Standing Committee of the National People's Congress. See, e.g., Husa 2017.

²⁵ Albert.

²⁶ See, e.g., Pap (analyses the Hungarian system and describes its slide toward illiberalism).

Besides descriptions, the comparative study of constitutional change needs to analyse its results and draw conclusions. Whereas describing the actual working of a certain system seeks to characterise the constitutional reality in its complexity, analysis seeks to understand the nature of what is being described in order to determine its essential features against a larger comparative framework. In the field of comparative constitutional change, analysis can produce new knowledge and challenge our previous understanding of the phenomenon. For instance, Ginsburg, Elkins, and Melton relied on cross-national historical data and produced interesting results on constitutional mortality. They demonstrate that – against commonplace expectations – constitutions actually last only nineteen years.²⁷ To take a further example, Law's research on constitutional archetypes is an illustration of a study that uses an empirical text-based approach to analyse constitutional narratives. On the basis of his research, Law finds a combination of three basic archetypes, which he labels as a liberal archetype, a statist archetype and a universalistic archetype. The study finds evidence of these archetypes in constitutional preambles. Law's applied computational linguistic analysis also points out a growing interdependence between constitutional law and international law because the language used in universalistic preambles mirrors the language of leading international human rights instruments.²⁸

On the basis of description and analysis it is possible to move to interpretation and evaluation. For example, theory building or judging whether or not a constitutional transplant has been a success or not becomes possible only after the research object's relevant features have been described and analysed. For comparative methodology in the study of constitutional change, the key conclusion seems clear: even though we may distinguish between approaches using a large number of cases and those concentrating on a few cases in depth, this distinction is not decisive. In short, the choice of comparative approach arises from the interests of the researcher, the research problem, and the availability of data. A particularly relevant topic in this context is the question concerning the distinction between the quantitative and qualitative approaches.

Quantifying data or the empirical approach

In the above, description and analysis were discussed. However, another methodologically important basic distinction exists between constitutional data: qualitative and quantitative.

²⁷ Ginsburg, Elkins, Melton.

²⁸ Law 2017.

Traditional jurisprudentially-oriented approaches are typically qualitative as to their nature. Essentially, a qualitative approach is a specific form of empirical research where data are not in numerical form. Commonplace, qualitative approaches assume an interpretive – or even an almost naturalistic – approach to their subject matter, relying typically on legal doctrine or a judicial framework.²⁹ Because this approach is so typical and widespread, it is not meaningful to discuss it here.³⁰ The traditional law-focused approaches differ from quantitative approaches because the latter follow the more general model of empirical social sciences.

In essence, the quantitative approach is based on an idea according to which it quantifies the research problem by way of generating data that can be transformed into utilisable statistics. Quantitative research is particularly interested in collecting numerical data and generalising it across groups of variables or to explain a specific phenomenon like, in this case, constitutional change. Importantly, statistics make it possible to turn quantitative constitutional data into useful information. Then, statistics can be used to summarise data and to describe patterns, relationships, and connections between constitutionally relevant factors. When quantitative data is used descriptively, it enables the researcher to summarise data and, in doing so, compress information on a particular subject. Then again, if we use quantified data inferentially we can identify relevant differences between variables and between groups of data. A crucial benefit of quantitative research is that it uses measurable data to formulate facts and uncover patterns not visible in the qualitative framework. In other words, relying on quantitative data means that research is more structured than if relying on qualitative data and accompanying interpretative or naturalistic approaches.³¹

An example of the use of the quantitative approach is the study by Law and Versteeg on sham constitutions.³² They first match their quantified data on the rights-related content of the world's constitutions concerning human rights performance, and then they calculate numerical scores. These scores represent the extent to which countries violate the rights pledged in their constitutions or how they uphold more rights than their constitution seems to contain. Scores are also used to rank countries according to their constitutional performance (underperformance or over-performance). Statistical analysis is finally deployed to identify a number of variables that seem to

²⁹ See, e.g., de Visser.

³⁰ 'Quantitative research is empirical research where the data are in the form of numbers. Qualitative research is empirical research where the data are not in the form of numbers', Punch, 4.

³¹ See Brannen (underlines contextualisation, particularly in cross-national research).

³² Law and Versteeg 2013 ('our goal is to measure the extent to which constitutional rights are actually realized' 879).

be able to predict the degree to which countries perform in relation to their codified constitutional guarantees.

In the discussion on methodology of comparative constitutional law, quantitative methods have met resistance because they are so different from jurisprudential approaches. However, several reasons have been proposed as to why empirical methods – or, in a slightly broader sense social science-based approaches – are needed. One reason is that extra-judicial factors play an important role in constitutional court decision-making patterns. This means that even though constitutional courts and judges use the language of legal doctrine, their real decision-making patterns are correlated with such things as policy preferences and ideological factors. A second reason is that constitutional law as such, i.e. as a normative phenomenon, has rather limited capability to cause real, on-the-ground change, independently. In other words, legal rules alone do not suffice but other things are needed in order to turn such values as constitutional rights into reality. A third reason comes from the methodology of comparative constitutional law, a methodology that can be described in a critical tone as ‘fuzzy and amorphous at best’. This argument basically claims that comparative study of constitutional law simply lags behind the social sciences and does not perform controlled comparisons or seek to trace causal links.³³

However, we do not need to go this far in order to see a justified place for empirical approaches in the study of constitutional change. Other scholars have pointed out that accepting empirical approaches as a part of our methodology does not alter the fact that various conceptual, philosophical, analytical, and even classical jurisprudential questions remain relevant in the comparative study of constitutional law.³⁴ Finally, if more traditional approaches to constitutional law involve a risk of becoming overtly jurisprudential, then that risk is matched by another: of overemphasising empirical and other formal approaches, too. As noted by Hirsch, large-N studies may open up new kinds of possibilities for scholarship and ‘constitutional drafting, notably the possibility of a ‘scientific,’ ‘planned,’ or perhaps even computerized process of constitutional design’.³⁵ This kind of focus on a formal computational approach may be a step too far in terms of comparative study of constitutional change. As Jackson points out, ‘Law cannot be a science in the way some other disciplines can—especially in our field, of comparative constitutional law’.³⁶

³³ Hirschl 2013, 7-9.

³⁴ Möllers and Birkenkötter, 621.

³⁵ Hirschl 2014, 272.

³⁶ Jackson, 1374.

Moreover, we know from the general methodology of social sciences that quantitative approaches have been typically more directed at theory verification whereas qualitative approaches are typically more concerned with theory generation.³⁷ Quantitative approaches are arguably more objective than qualitative approaches, but then again, because constitutional change is a multidimensional and cultural phenomenon it would be a mistake to rely only on quantitative approaches.

Comparing Constitutional Change

It would be wrong to claim that interest in constitutional change is a novelty. As the classic distinction between rigid and flexible constitutions demonstrates, constitutional change has been in the focus of constitutional theory for quite some time.³⁸ However, what does tell the old and the present interests apart is the fact that our recent interest in constitutional change is guided by methodological self-consciousness based on the comparative nature of the attempt to understand constitutional change beyond the national level. As a result, the field of comparative constitutional change today holds a keen interest in research design and methodology.

How does one start planning a comparative research design when focusing on constitutional change? The methodological toolbox of comparative constitutional law (broadly understood) does not provide an exact methodology but, instead, contains a number of useful rules of thumb. Due to the variety of legal cultures and the differing interests of comparatists, the methodology of comparative constitutional law is generally speaking heuristic. This, however, does not mean that justifiable methods for comparative constitutional law could not be found. And, to be sure, research design does not need to be qualitative/case-oriented merely because it has been the tradition in comparative law. As pointed out in the introduction to this chapter, studying constitutional change requires both legal and non-legal factors to be taken into account. Indeed, as also noted in the above section, both case-oriented and variable-oriented approaches can be used. To address these issues in more detail, we need to discuss illustrative examples in what follows.

Evidence is available that quantitative approaches form a natural part of the comparative study of constitutional law, i.e. systematic empirical approaches have been shown to be able to provide constitutionally interesting findings. For example, Law and Versteeg provide empirical and

³⁷ Punch and Oancea, 23.

³⁸ See, e.g., Bryce, 3-94.

systematic information about the extent to which the US Constitution has influenced the revision and adoption of formal constitutions in other countries. Their key conclusion is that the USA is not leading the way in terms of global constitutionalism because the US Constitution appears to be losing its appeal as a global model for constitutional drafters.³⁹ In other words, the US model does not inspire constitution-drafters in terms of changing constitutions worldwide. What is more, the choice of approach is of course connected to selection of research data: one needs quantitative techniques seeking to explain when there are many cases, whereas hard cases can also be studied by a more traditional jurisprudential (i.e. case-oriented) approach that can highlight detailed legal questions and provide thick descriptions in the shape of offering legal-cultural context and meaning so that a scholar outside a given system is able the better to comprehend.⁴⁰

With many cases it makes sense to apply statistical or computational methods and produce generalised results whereas with a few difficult cases it makes sense to underline a thick description and an understanding of the cases qualitatively.⁴¹ Illustrative cases, on the other hand, can be used in order to show the range of scenarios that may occur concerning a particular research subject, such as distinguishing different models of judicial review (for example, centralised vs. decentralised, constitutional court vs. no constitutional court, abstract norm-control vs. concrete case-bound control)⁴² Crucially, as already noted, the research question has a decisive role for the choice of method, not the disciplinary banner under which research takes place. For such a thematic field as comparative constitutional change this is methodologically a crucial factor.

An important point needs to be made here. Instead of methodological relativism we need look to the direction of heuristics as suggested above. Heuristics concerns an approximation method by the use of which it is usually possible to get sufficiently close to what is deemed a satisfactory result.⁴³ Typical heuristic methods include rules of thumb that are based on a limited but sufficient amount of information. In the context of the research process, this means that the constitutional comparatist need not consider available approaches in a methodological vacuum. Example approaches as to how comparative research can be carried out are available. Previous studies are a store of methods from which the constitutional comparatist can learn without minutely following a particular approach.

³⁹ See, e.g., Law and Versteeg 2012.

⁴⁰ See also, presenting different classification of approaches, Hirschl 2005.

⁴¹ See, e.g., Goderis and Versteeg.

⁴² See, e.g., Husa 2000.

⁴³ See Kiss ('Heuristic contains "sign-posts", while methodology tells us, even if provisionally, whether we are going in the right direction' 317).

Accordingly, the methodology of comparative constitutional change can be defined as a heuristic compilation of rules of thumb on exposure and discovery. Much, if not all, depends on the purpose of the research: aiming at generalisation requires a variable-oriented approach, whereas aiming to explain complexity (and to generalise only in a very limited manner) requires a case-oriented approach.

For the comparative study of constitutional change this relative methodological freedom is a welcome facet because it helps to focus on suitable comparative approaches instead of fixating on one type of method only. The downside of this is, of course, that the comparative study of constitutional change offers no exact methodology (in the sense of a cookbook: offering straight directions). Importantly, practical methodological literature is available that highlights case selection, as Hirschl's useful proposition shows. He distinguishes five basic principles of case selection: 1) the most similar cases logic, 2) the most different cases logic, 3) the prototypical cases principle; 4) the most difficult cases principle; and 5) the outlier cases principle.⁴⁴ None of these is a method in a technical sense (research technique), yet they provide guidance and conceptual tools in relation to the interests of the researcher. In practice, we can see that these kinds of methodological choices are intertwined.⁴⁵ Of course, other methodological frameworks are also provided by recent methodological scholarship in comparative constitutional law.⁴⁶ In any case, we will next discuss specific issues of methodological significance.

Specific methodological issues

As already stated above, comparative constitutional change is a broad field of study; hence, it is not possible to deal with all relevant issues on its methodology in a single chapter of a handbook. Moreover, the heuristic nature of methodology and broad variety of methods prevent addressing all the possible questions in a thorough manner. Consequently, instead of trying to cover all relevant methodological questions this section addresses three select themes of methodological importance. These analyses are heuristic instances that help make important methodological questions clear,

⁴⁴ See Hirschl 2005.

⁴⁵ See, e.g., Bilchitz and Landau (studies the change of separation of powers from a comparative perspective and shows how it has developed in the countries of the global south.)

⁴⁶ See, e.g., Tourkochorit. Distinguishes three approaches: 1) focusing on the social and political context in an attempt to explain differences or similarities, 2) a philosophical analysis informed by the study of differences or similarities in the regulation of rights, and 3) a combination of these two approaches aiming at challenging existing philosophical and socio-political frames.

even though they are not designed to offer methods in a technical sense. The specific issues chosen deal with universalism and culturalism, the role of legal families, and legal transplants. All these issues are familiar from comparative law scholarship but, crucially, they play a different role and lead to different implications for the comparative study of constitutional change.

Universalism and culturalism

The debate between universalists and culturalists (or particularists) is a well-known issue in comparative law scholarship.⁴⁷ However, to address or rehearse that abundant debate here would not make much sense. Instead, we discuss the juxtaposition of universalism and culturalism in the area of constitutional law, where it is a key underlying factor in so-called global constitutionalism.

Global constitutionalism is related to the broader notion of global law. Global constitutionalism consists of various strands.⁴⁸ The state of current debate on global constitutionalism has been described as ‘a constitutional cacophony’.⁴⁹ One strand argues that constitutionalism is moving beyond the nation state into the transnational sphere and the private sector. It is argued that even transnational corporations are obliged to respect human rights.⁵⁰ Another strand underlines that globalisation has placed states and domestic constitutions under strain. This strand holds that states have transferred certain previously government-held functions to non-state actors. What is more, it is argued that governance is exercised beyond the traditional confines of nation states.⁵¹ The third strand assumes that a new international order is being developed following the principles and values of Western constitutionalism. In effect, this strand maintains that various scattered international legal texts form a body of international constitutional law that is a specific subset of the international legal order.⁵² These strands are all universalist; however, there is also a cultural counter-argument. Because global ideas are so sweeping, they face difficulties when they meet the realities of what constitutional law globally actually is.

⁴⁷ See Husa 2006.

⁴⁸ Peters.

⁴⁹ Mac Amhlaigh, 176.

⁵⁰ Peters 2015.

⁵¹ Id.

⁵² Id.

The project of global constitutionalism is especially appealing to universalist public international lawyers.⁵³ Notwithstanding, international law is a minimalist and fragmented body of law which is mostly subject to the will of states still holding on to their sovereignty.⁵⁴ Regardless of globalisation, the Westphalian order refuses to become merely a shadow of the past and international law holds no supremacy over other law, such as written national constitutions.⁵⁵ Essentially, global constitutionalism is built on national ideas and national constitutions in turn are based on certain preconditions of which one of the most important is the common political community creating a base for a constitutional order.⁵⁶ According to the Western view, the constitutional chain of legitimacy starts from the people and is channelled into a constitution.⁵⁷ But, in the case of substantive-wise constitutionalised and seemingly universal international law, there is no such community, no such polity or democratic way to channel the political will to the international law sphere.⁵⁸ Instead, we have a rich plurality of cultures, languages, and accompanying ideas about the constitution. Global constitutionalism undoubtedly changes constitutions but the overall picture is less than clear.

There is a gap between universal and cultural notions of constitutionalism. Saunders points out that constitutional differences still matter and we need to ‘bridge the gap between the universalist assumptions of international law and the realities of constitutional difference’.⁵⁹ The keyword here is ‘difference’ – constitutional globalists are essentially universalists and they seek to homogenise, setting aside the concerns of comparative study of constitutional law, showing great differences between systems. For the study of constitutional change, this is a relevant observation because it addresses the choice between universalism and particularism.

In essence, global constitutionalism contains an inherent component of universalism. At the same time, constitutionalism is the theory and practice of government and law, which is a product of modern Western civilisation.⁶⁰ Like most globalising legalities, global constitutionalism is quintessentially a Western construct seeking universal acceptance. Yet, as Koskenniemi points out,

⁵³ See Schwöbel.

⁵⁴ See Koskenniemi and Leino.

⁵⁵ Peters.

⁵⁶ Basically, this is the same critique which is known in as the ‘no demos thesis’ in connection with the question of the so-called European constitution. See Weiler.

⁵⁷ Mac Amhlaigh interprets constitutionalism as a specific form of constitutional legitimacy.

⁵⁸ However, see Habermas.

⁵⁹ Saunders, 38.

⁶⁰ Chen, 650.

‘constitutionalism is not necessarily tied to any definite institutional project, European or otherwise’, by which he means to say that constitutionalism may also be grasped as a political and moral mind-set.⁶¹ Then again, the growth of the global legal universe does not mean that this would lead to a unified constitutional space.⁶² The comparative approach has specific value here because it enables one to ‘appreciate the diverse capacities of human societies in the domain of constitutionalism’.⁶³ Comparative appreciation may require us to unlearn what we have learned from our domestic constitutions and domestic forms of constitutionalism.⁶⁴

The quintessential problem is that theoretically- or normatively-focused constitutional universalism disregards the fact that constitutional assumptions are not epistemologically universal but are based on one or a set of constitutional systems.⁶⁵ To govern constitutional change globally is practically not possible. Consequently, strong universalism may not be the best epistemological assumption guiding the choice of method in the study of constitutional change. Be that as it may, assuming an over-strong cultural and relativist view underlining the singularity of each constitutional system is a step too far; it would deny variable-oriented approaches, which does not make sense in the comparative study of constitutional change. In the end, both nomothetic and idiographic dimensions exist in constitutional change and they both need to be taken into account: sometimes an interpretative jurisprudential approach may work, and at other times empirical or computational approaches may work better. In principle, the impulses for constitutional change may be domestic, foreign, or sometimes transnational. Some changes may be national, some regional, and some even global. In any case, the research problem should play a decisive role for the choice of comparative method. Consequently, researching constitutional change comparatively requires taking into account both universalist and cultural factors depending on the purpose of the study at hand. Whether one chooses to underline universalism or particularism is not essentially a methodological but a philosophical or political choice.

⁶¹ Koskenniemi, 18.

⁶² For more in-depth discussion, see Kuo.

⁶³ Harding and Son Bui, 170.

⁶⁴ Cf. Schwöbel, 21.

⁶⁵ See Dixon and Stone.

Relevance of legal families

Comparative law scholars have traditionally constructed such macro-concepts as legal families, legal cultures, and legal traditions. Even though differences between them do exist, they are in fact very similar as to their contents.⁶⁶ Of these notions, the notion of ‘legal family’ is the most widespread and discussed; but what does it mean for the methodology of comparative study of constitutional change?

As an academic field, comparative law may be divided into two main areas of research, albeit this division is flexible as to its nature. Customarily, micro-comparison deals with specific legal rules, cases and institutions, whereas macro-comparison normally focuses on larger-scale themes and questions. Systematisation, grouping and classification of the legal systems of the world lie at the heart of macro-comparative law: it deals with comparison between entire legal systems, not specific small-scale problems of a legal nature.⁶⁷ The assumption has been that a limited number of different typical key questions relate to the classification of legal systems: can legal systems or legal cultures of the world be classified into entities belonging to only a few large groups? Which are the large legal families of the world? According to what criteria can inclusion of an individual legal system in a specific legal family be decided? What is the relevance of these issues for the methodology of comparative constitutional change? To begin with, one should realise that comparative law’s macro-constructs are to a great extent overlapping although the comparatists who created these constructs might emphasise the differences between macro-constructs. On closer inspection each of these classifications resembles the other.

In their classic work on Roman, Germanic and Nordic laws, Zweigert and Kötz listed the common law and the Far Eastern systems, Islamic systems and Hindu law. Their work has conveyed to the twenty-first century this epistemological tradition that is based on the theoretical and conceptual foundation of European legal history. Moreover, in the French tradition the phrase ‘familles de droit’ has been and still is used when referring to the so-called grand modern legal systems (*grands systèmes de droit contemporains*). In short, family has been a metaphor favoured by many a macro-comparatist. In the classic work by David, Romano-Germanic law, common law and socialist law

⁶⁶ Husa 2016.

⁶⁷ See Zweigert and Kötz, 4-5.

were presented. Like other non-Western legal systems David mentioned Islamic, Hindu and Jewish law and the laws of the Far East, Africa and Madagascar.⁶⁸

A significant change in macro-classifications has been the fact that socialist law has been dropped since the early 1990s. It seems to have been replaced by Islamic law as the Other law (the main form of non-Western law; representing legal otherness) and not only in a limited sense. Islamic law also appears in the form of different mixed law combinations with secular law in various systems in which the aim is to observe Islamic teachings. A more recent example of classification that concentrates on legal families features in the work on 'grand' legal systems by Cuniberti. He distinguishes between Western law, Eastern/Oriental law, and African law. Cuniberti's macro-comparison is based on David's work in terms of everything that is essential although his classification differs in its contents from the (outdated) classifications by David.⁶⁹ It makes sense to point out that all of these classifications are compiled by private law-oriented scholars for private law-oriented scholars.

Now, we need to ask: what is the value of legal families for the comparative study of constitutional change? To begin with, seemingly no equivalent classifications exist in comparative constitutional law. Nevertheless, this is perhaps a misleading view because constitutional law has for a long time had other types of ways to classify constitutions. The purpose of these classifications has been to offer knowledge of the structure and scope of constitutions. As a result of comparison, among other reasons, the following classifications of constitution have been recognised: written/ unwritten; coherent/dispersed; rigid/flexible; monarchic/republican; and federal/unitary.⁷⁰ In fact, it is a question of basic alternatives that concern the constitutional model of governance. The basic models mentioned offer a conceptual framework by means of which it is easier for the comparatist to approach constitutions and constitutional laws that form part of foreign legal and political structures. To take another example, it is possible to compare the controlling organs of constitutionality in many respects: nature of norm control, controlling organ, organisational control, effect of control, and so on. It is also possible to distinguish different legal-cultural features in the supervision of the constitutionality of laws.⁷¹

⁶⁸ *Les grands systèmes de droit contemporains* was first published in 1964. The 12th edition was published in 2016.

⁶⁹ Cuniberti.

⁷⁰ See, e.g., the classic work by Wheare.

⁷¹ See, e.g., Husa 2000.

Altogether, the classification of legal families does not offer too much for the comparative study of constitutional change. However, it may provide useful information on context and explain general legal-cultural factors of a constitutional system. For instance, the fact that the UK does not have a codified constitution but Germany does can be broadly explained by the differences between common law and civil law legal families. Accordingly, the specific ways in which constitutional change take place are influenced by the plain fact of which legal family the system belongs to. But in terms of more detailed research questions, either in the form of variables or idiographic detail, the explanatory force of the legal family diminishes quickly. So far no equivalent has been found to legal families in the comparative study of constitutional law, although the idea of specific ‘public law families’ is not unheard of.⁷² Notwithstanding, constitutional scholars and political scientists tend to inadvertently distinguish between democratic and non-democratic or constitutionalism-abiding and unconstitutional systems. However, these can hardly be characterised as constitutional families in the sense of a legal family.

Legal transplantation

One key theme in comparative study of constitutional change is the use of legal transplants. This is a contested notion that Watson introduced in 1974.⁷³ Originally it was important for a legal transplant to have a historical connection between the formal laws of the systems concerned. What was essential was the ‘relationship of one legal system and its rules with another’.⁷⁴ What takes place is a movement of law (broadly understood) between states.⁷⁵ Study on borrowings and legal transplants breaks the idea of the nationality of law and its bond to a particular system by pointing out the reciprocal relations that cross national restrictions. This is precisely why transplantation is so relevant a theme for comparative study of constitutional change. Yet it is a contested concept.

Criticism of the transplant theory was severe from the very beginning. Kahn-Freund presented an influential early criticism.⁷⁶ He underlined the significance of the social context of law. According to critique, the whole concept of transplant was out of place in the world of law, although it was possible to metaphorically refer with it to a surgical operation in which a kidney from one

⁷² See Venter, 41.

⁷³ Watson.

⁷⁴ Id, 6.

⁷⁵ See Van Hoecke.

⁷⁶ See Kahn-Freund (‘requires a knowledge not only of the foreign law, but also of its social, and above all its political, context’, 27).

individual was transplanted to another person. Notwithstanding, ‘we cannot take for granted that rules or institutions are transplantable’.⁷⁷ Accordingly, it would be essential to observe the societal context of law, or the result could be transplant rejection in the new system.⁷⁸

Discussion has continued over the years, and various replacements have been proposed for the concept of legal transplant, with one of the best known being the proposal by Teubner. He emphasised that the result of transplantation can be anything. Therefore, we should not speak of a transplant but of an irritant.⁷⁹ Teubner stressed that when some element is transferred from one foreign legal culture to another, something happens – but not what is expected: it is not transplanted into another organism; rather, it works as a fundamental irritant that triggers a whole series of new and unexpected events. In other words, what follows transplantation is an evolutionary legal dynamic, the consequences of which are very difficult, if not impossible, to fully predict. Other critiques include Legrand who presented a culturalist and relativistic view of the sheer absurdity of (private law) legal transplants.⁸⁰ At present, concepts such as legal translation, legal transformation, and legal transposition are also used.⁸¹ However, the majority of comparatists continue to use the notion of legal transplantation either solely or in parallel with other conceptualisations. Constitutional comparatists are no exception to this: it seems to be a part of our comparative constitutional law vocabulary, whether we like it or not.

To be sure, legal diffusion, copying or transplanting does take place in the world of constitutional law – but how well it actually works and whether it leads to the desired results or not, are different questions altogether.⁸² Notwithstanding, it remains a fact that migration of constitutional law is taking place everywhere or, as one scholar puts it: ‘Legal rules are extracted from one context, transferred and implanted in another context, or migrate across sometimes fluid borders and so on’.⁸³ One needs only to read constitutional documents around the world for the migration of constitutional ideas and doctrines to become crystal clear, as pointed out above when discussing Law’s study on constitutional archetypes.⁸⁴ Altogether, it seems that a belief in legal transplants still

⁷⁷ Kahn-Freund, 9.

⁷⁸ See, e.g., Nichols; Alshorbagy.

⁷⁹ See Teubner.

⁸⁰ See Legrand.

⁸¹ See, e.g., Örüci; Langer; Xu; Chen-Wishart.

⁸² ‘Constitutional borrowing and transplantation of constitutional norms, structures, doctrines, and institutions is a fact of life regardless of ideological or theoretical objections to these practices’, Rosenfeld and Sajó, 13.

⁸³ Tohipur, 33.

⁸⁴ Law 2017.

forms part of comparative law scholarship and, more importantly, part of national legal practices, and there are scholars trying to outline a methodology for successful legal transplants.⁸⁵

Typically, comparative study of constitutional transplants concentrates on and starts with a constitutional text. Numerous examples show that constitutional transplantation has taken place. But, as noted above in this chapter, the study of constitutional change cannot focus only on constitutional provisions. This is because constitutional rules are interrelated with other rules, principles, doctrines, and larger institutional structures. Many kinds of constitutional ideas can migrate and this includes ideas that are not based on written constitutional norms, such as constitutional doctrines and methods. One area of globally significant migration is the expansion of judicial review. This in turn is flanked by the growing significance of constitutional rights.⁸⁶ This has changed systems that did not previously have constitutional judicial review as a part of their constitutions.⁸⁷ Perhaps, nonetheless, the most noteworthy example of constitutional transplant in the area of methods is proportionality. Originally it migrated from Prussian administrative law to many present-day national and supranational judicial organs around the world.⁸⁸

The proportionality principle is basically a set of rules that determines the conditions for a limitation of constitutionally protected rights. Today it is widespread not only in Western democracies but also worldwide.⁸⁹ It has been argued that by ‘the end of the 1990s, virtually every system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of proportionality analysis . . . [It has become] a foundational element of global constitutionalism’.⁹⁰ The speed and width of the migration of proportionality has been such that it may be labelled as the ‘most successful legal transplant of the twentieth century’.⁹¹ However, it would be a mistake to regard constitutional transplants only as a relatively recent phenomenon, as indeed the example of the Nordic institution of Ombudsman clearly shows.⁹² On the whole, constitutional borrowing is a historical fact: constitution-drafters and developers copy, adapt, and

⁸⁵ See Peerenbom.

⁸⁶ See Horwitz.

⁸⁷ For a broader discussion, see Gyorfi (argues against strong constitutional review).

⁸⁸ See Perju, 1314-16.

⁸⁹ See Bendor, Sela.

⁹⁰ Stone Sweet and Mathews, 74.

⁹¹ Kumm, 595.

⁹² See, e.g., Gregory and Giddings.

recycle constitutional ideas.⁹³ In other words, constitutional transplanting (broadly understood) takes place and is an important way to change a constitution.⁹⁴

At the same time, we need to tread carefully when we speak of comparative methodology and transplants. For the comparative study of constitutional change, legal transplantation is not a method as such. However, it is a way to conceptualise the migration of constitutional ideas as a means of constitutional change. Crucially, legal transplantation cannot dictate the choice of method or case-selection: case-oriented or variable-oriented and jurisprudential or non-legal approaches are all possible in terms of studying constitutional change through legal transplants. To repeat a point, research interest plays a key role in choice of method(s) even when studying constitutional transplants.

Conclusion

From the above, it should be reasonably clear that comparative constitutional change is a distinct field of scholarship with an interwoven link to comparative methodology. Constitutional change is conceived not at a national level but in a broader comparative framework. Quintessentially, it is a comparative endeavour seeking to provide a broad framework through which changing constitutions and constitutionalism can be conceived, freed from the epistemic boundaries created by national borders. Constitutional change goes beyond studying formal constitutional amendments and reaches out to fields outside the scope of legal disciplines.

As a distinct field, comparative constitutional change is methodologically open and flexible because it encompasses all sorts of comparisons ranging from the study of formal amendment procedures to analysing more subtle mechanisms of change. Accordingly, comparative approaches in this field can be idiographic when seeking to describe and analyse contingent and unique cases such as use of transplants as a means of constitutional change. Crucially, in terms of constitutional change it is necessary to bear in mind that non-measurable aspects that impact how constitutions change may indeed be involved. However, comparative approaches can also be nomothetic in the sense that they may seek to explain and derive general rules of constitutional change worldwide and in longer time

⁹³ For example, the Canadian Charter of Rights and Freedoms (1982) influenced constitution making in South Africa, New Zealand, Hong Kong, Israel and many members of the Council of Europe. See Oliver, Macklen, and Rosiers, 5-6.

⁹⁴ See Tebbe and Tsai.

series. In other words, both case-oriented and variable-oriented approaches are possible. The key factor in the choice of approach is the research interest of the researcher. Accordingly, comparative methodology of comparative constitutional change is necessarily of a heuristic nature flanked by a rejection of one-size-fits-all methodology. Consequently, qualitative and quantitative research methods that are often juxtaposed as representing different epistemic views can both be used in the study of constitutional change i.e. comparative study of constitutional change allows different intellectual styles in terms of research methods.

However, the heuristic nature of methodology does not mean that there would not be some sort of general methodological guidelines. Crucially, the comparative study of constitutional change needs to follow shared guidelines even though it needs also to allow use of diverse tools. In practice, when planning research design one needs to look carefully at what kind of previous research and data is available. In principle, certain types of existing good practices (some of them mentioned in this chapter) should be followed, albeit allowing the use of diverse techniques and constitutional data. Identifying a research topic and problem holds imperative significance for the choice of a particular approach. Finally, it is beyond any shadow of doubt that studying constitutional change comparatively places methodological questions at the forefront and obliges researchers to pay close attention to methods in relation to their particular research interests and research designs.

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