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HOW DO AND SHOULD WE COMPARE CONSTITUTIONAL LAW?

BY

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How Do and Should We Compare Constitutional Law?

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1. Introduction

The Comparing Comparative Law conference for which this essay was written had as its aim to "explore usual topics in comparative law theory such as the nature, methods, aims, justifications and authority of comparative law, but...in a more practical and contextualized fashion" than is typically undertaken.¹ Accordingly, in what follows I address the specific question posed for my panel -- "*How* does and should one compare law?" -- contextually, from the perspective of one particular subfield of comparative law; a context that, I will argue, has a special and distinctive connection to the world of practice both inside and beyond the courtroom.

How we compare constitutional law tends to depend in significant part on which side of several different divides we happen to be situated, on who the "we" is. Are we engaged in constitutional comparison (1) as legal academics or as social, especially political, scientists; (2) as legal academics whose national constitutions operate within a robust transnational legal order or more autonomously; (3) as legal academics from common law or civil law jurisdictions and law faculties; (4) as primarily scholars of constitutional/public law or of comparative/private law; or (5) not as scholars at all but as constitutional judges, lawyers, drafters, consultants or experts?

In other words, as soon as we begin to address the question in this particular contextualized fashion, we encounter a second important level, or meta-level, of context. The

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¹ Comparing Comparative Law Programme: Description.

methods, as well as the aims and objects, of constitutional comparison vary quite widely among its practitioners, academic and otherwise. What we compare and how we do so depend importantly on the purposes of comparison, which in turn differ according to who is doing it -- the identity of the actor -- and which side of which divide they occupy.

But should it? Should there be a more uniform or trans-contextual approach to constitutional comparison that transcends these divides? And how does this differentiated practice relate to what are sometimes perceived as the disciplinary or methodological weaknesses of comparative constitutional law despite its undoubted revival and growth in recent decades? Is this practice the root cause of any such problems so that, again, eliminating these divisions is the solution? If not, what if anything should be done to change how we compare constitutional law?

This essay argues that rather than adopting either a single, more uniform approach or a series of specialized and mostly compartmentalized sub-fields, as for example in political science, comparative constitutional law should acknowledge, and indeed celebrate, the pluralism and interdependence of its methods as mutually important pieces of the overall enterprise. This is emphatically not to say that the discipline could not usefully become more methodologically aware and self-conscious of the fit between aims, objects and methods, nor to deny the value of more empirical and interdisciplinary work, but rather that trans-contextual uniformity or compartmentalization would be a mistake in a field as broad, developing, and as rooted in the world of practice both inside and outside the courtroom as comparative constitutional law.

After presenting my specialized case study in the main body of the essay, I turn briefly in the conclusion to drawing out some of its implications for a comparison of methodologies between comparative constitutional law and comparative law more generally, and the questions of whether and how the former is different.

2. Contextual divisions in how comparative constitutional law is done

One key scholarly divide within the field of constitutional comparison is between constitutional law (as primarily engaged in by legal academics) and constitutional politics (as primarily engaged in by political scientists). This division appears to be distinctive to comparative constitutional law in that there is no close analogue of a social science sub-field operating within, indeed sharing, the central terrain of comparative law generally or its other main sub-fields. At the considerable risk of oversimplifying, legal academics paradigmatically focus on constitutional texts and/or judicial decisions as the major objects of comparison; employ functionalist, interpretive and/or "case" methods of analysis; and have as their scholarly aim or aims the description, classification, interpretation, systematization, normative evaluation and/or reform of constitutional doctrine and principles. By contrast, political scientists paradigmatically focus on constitutional politics as the object of analysis; that is, roughly, on the powers and practices of political elites and institutions with respect to constitutional design, drafting, interpretation, amendment, replacement, transitions and conflicts. They do not ignore courts but rather treat them as one among several political actors and institutions. Political scientists mostly employ realist/interest analysis and empirical (including quantitative and qualitative) methods, and have as their primary aim the explanation of constitutional outcomes through the development of falsifiable causal hypotheses.

Excellent recent book-length examples of the constitutional law side of the divide include Victor Ferrera Comella's *Constitutional Courts and Democratic Values* (2009), Vicki Jackson's *Constitutional Engagement in a Transnational Era* (2009), Po Jen Yap's *Constitutional Dialogue in Common Law Asia* (2015), and Sam Issacharoff's *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (2015), each of which focuses on constitutional court decisions

or practices. On the constitutional politics side, leading examples include Tom Ginsburg's *Judicial Review in New Democracies* (2003) and Ran Hirschl's *Towards Juristocracy* (2004), which seek to explain the rise of judicial review in interest analysis terms by means of the "insurance" and "hegemonic preservation" theses respectively, as well as Elkins, Ginsburg and Melton's *The Endurance of National Constitutions* (2009), which employs a cross-national historical dataset to examine the causes of constitutional endurance from an institutional perspective.

In terms of personnel, this division is far from mutually exclusive as a growing number of scholars -- mostly teaching in law schools -- are crossing it by training in both disciplines. Interestingly, the growing number of quantitative studies undertaken by law professors trained in political science have mostly focused, for entirely understandable reasons of database availability and coding convenience, on constitutional texts and so might perhaps be open to drawing from some of their non-quantitative colleagues the sort of critique of relying on "form" alone at the expense of practice more usually directed at lawyers by social scientists.² In terms of influence, trade in ideas and approaches seems to be moving largely in one direction only: from political science into law. Ran Hirschl has recently issued a call for the end or lowering of this disciplinary divide between constitutional law and constitutional politics by including both within the broader field of comparative constitutional studies, for the mutual benefit of each.³

The enmeshing of national constitutional systems within robust transnational and supranational legal orders in certain parts of the world has set the intellectual agenda for many comparative constitutionalists in (or of) those regions. This has resulted in the development of the competing descriptive and normative concepts of "legal pluralism" and

² For example, LAW & VERSTEEG, *The Evolution and Ideology of Global Constitutionalism*. For more on this point, see n. 24.

³ HIRSCHL, *Comparative Matters*, p. 13-15 & chap. 4.

"cosmopolitanism/global constitutionalism" as alternative ways to the more traditional and formalist monist-dualist dichotomy of understanding these interactions and the continuing relevance or otherwise of the notion of national sovereignty. Simply put, pluralists posit the existence of a complex, interactive, but largely non-hierarchical relationship between the two legal orders, while cosmopolitans/global constitutionalists tend to view the international one as normatively superior in that consistency with it is essential to the legitimacy of domestic laws, thereby problematizing claims of national constitutional autonomy and sovereignty.⁴ This issue has been a central occupation of comparative public law scholars in Europe in particular, given the complex legal relationship between national constitutions and both the European Union and European Convention on Human Rights, and has played out through development and contestation over the notion of "European constitutionalism"⁵; and to only a slightly lesser extent in Latin America given the Inter-American Human Rights system and the distinctive regional pattern of incorporating international human rights treaties into domestic constitutions. Although they can perhaps be viewed as local offshoots of the broader comparative law sameness/difference, universal/particular dichotomies, for all their theoretical sophistication legal pluralism and cosmopolitanism are driven less by the standard academic urge to dichotomize than by the distinguishing practical reality of dual but interdependent constitutional orders. By contrast, outside these regions, scholars looking at transnational engagement among constitutional systems or with supranational legal orders tend to view it as more of a free choice on the part of an otherwise "sovereign" state or individual judge or scholar, rather than as a

⁴ Leading works by legal pluralists include KRISCH, *Beyond Constitutionalism*; WALKER, *The Idea of Constitutional Pluralism*; STONE SWEET, *The Structure of Constitutional Pluralism*. On cosmopolitanism/global constitutionalism, see, e.g., KUMM, *The Cosmopolitan Turn in Constitutionalism*.

⁵ See, e.g., the essays collection in DEBURCA & WEILER (eds.), *The Worlds of European Constitutionalism*.

practical legal necessity,⁶ so that its urgency or centrality within comparative constitutional law tends to be far less.

How comparative constitutional law is done also sometimes varies with the common law or civil law background of the scholar in question. Because comparative constitutional law is, as a whole, (1) less preoccupied with the standard paradigms of comparative law more generally,⁷ and (2) for the most part focused on newer, post-1945 developments that borrow deeply from the basic US model of constitutional supremacy,⁸ it might well be thought of as relatively immune from the more traditional, deeply-ingrained habits that underlie whatever is left of the civil/common law distinction. In fact, however, the stickiness of legal education and characteristic styles of legal scholarship have to some extent carried over into comparative constitutional law. I once heard a prominent comparative constitutional theorist declare that he can always tell whether a particular piece of scholarship was written by someone from a common law or civil law jurisdiction, and my sense is that there is indeed less of a "universal," more of a contextualized, approach in law generally, and also in comparative constitutional law, than in most other academic disciplines (philosophy perhaps apart, with its "Anglo-American" or "analytic" and "continental" division) -- whether physics or sociology. Common law comparative constitutionalists tend to produce more bottom-up, case by case, judicial opinion-centric scholarship, whereas civil law scholars tend to write more top-down, systematized work, whether of constitutional doctrine or principles. One example of this difference, I think, is scholarship on proportionality, even among its proponents and within the same broadly normative genre. Compare the more abstract, systematizing work of the German-trained Matthias

⁶ Vicki Jackson, for example, identifies three different postures of constitutional courts towards transnational law: resistance, convergence, or engagement. JACKSON, *Constitutional Engagement in a Transnational Era*.

⁷ See text accompanying n. 10-13 and the conclusion.

⁸ See GARDBAUM, *The New Commonwealth Model of Constitutionalism*, p. 711-18.

Kumm and Kai Möller on the one hand with the more concrete, case-specific style of the Canadian David Beatty on the other.⁹

Constitutional comparison undertaken by scholars whose work is primarily within the general discourse and discipline of comparative law also sometimes differs from that of primarily constitutional lawyers. Notwithstanding its above-mentioned, perhaps unconscious, impact on scholarly style and method, the overarching division of legal systems into families and traditions that partly defines comparative law generally plays little role in the substantive analyses of contemporary constitutionalists, for whom, if any, the mostly separate and independent, or non-correlated, divisions between written and unwritten constitutions, judicial and legislative supremacy, federal and unitary, parliamentary, presidential and semi-presidential systems, centralized and decentralized, weak and strong-form, judicial review are more central.¹⁰ Although constitutional lawyers do make some use of versions of both the sameness/difference and legal transplant debates -- specific versus "generic constitutionalism" and "constitutional migration"¹¹ -- they generally do so in a distinct manner with little reference to, or influence of, the current paradigms of the general comparative law literature. Accordingly, scholarship by general comparative lawyers on constitutional law -- for example Ugo Mattei's interesting article on the new Ethiopian constitution of 1994, which focuses on US cultural imperialism and the absence of provisions reflecting the "African mentalité"¹² -- can read as pursuing somewhat orthogonal concerns from the vantage point of the comparative constitutionalist. To the latter, similarities of new national rights guarantees to comparative/international norms and instruments

⁹ KUMM, *Democracy is Not Enough*; MÖLLER, *The Global Model of Constitutional Rights*; BEATTY, *The Ultimate Rule of Law*.

¹⁰ Interestingly, the work of the previous generation of comparative constitutional scholars tended to rely more on the civil-common law distinction than the current one. See, for example, CAPPELLETTI, *The Judicial Process in Comparative Perspective*; BREWER-CARIAS, *Judicial Review in Comparative Law*; FAVOREU, *Constitutional Review in Europe*.

¹¹ LAW, *Generic Constitutionalism*; CHOUDHRY (ed.), *The Migration of Constitutional Ideas*.

¹² MATTEI, *The New Ethiopian Constitution*.

is familiar fare, and the attempt to give expression to the country's multiple ethnic identities and diffuse tensions among them through devices of federalism is perhaps the constitution's most visible feature -- and, again, one shared with several other contemporary constitutions around the world.¹³

This leads into perhaps the most obvious divide. Constitutional comparison is not only undertaken by scholars, of any of the above stripes, or as an academic exercise but also by constitutional judges, lawyers, drafters, consultants, and reformers, and as an intensely practical one. These different roles and their corresponding aims -- rendering a judicial decision, presenting a case for a client, deciding on and writing constitutional provisions, amendments, replacements, etc. -- all structure the point, methods and objects of constitutional comparison. What they are using it for, what materials are (most) relevant, and what counts as good comparison all vary depending on role and context.

Finally, apart from the growing amount and influence of empirical scholarship in comparative constitutional law, non-empirical scholarship among legal academics in the field -- even in the same institution -- varies considerably in its types and aims. So, without attempting to draw up an exhaustive list, one type aims to identify, develop and clarify relevant concepts through analytical methods that contribute to understanding the range and clusters of constitutional phenomena, such as "authoritarian constitutionalism," "constitutional revolutions," and "weak-form judicial review."¹⁴ Another aims at pushing beyond understanding such phenomena to subjecting them to normative evaluation and, if failing, to change. A third,

¹³ See, e.g., CHOUDHRY & HUME, *Federalism, Devolution and Secession*.

¹⁴ On authoritarian constitutionalism, see n.22; on constitutional revolutions, see JACOBSON, *Theorizing the Constitutional Revolution* and GARDBAUM, *Revolutionary Constitutionalism*; on weak-form judicial review, see, e.g., TUSHNET, *Weak Courts, Strong Rights*.

doctrinal scholarship, focuses on the work product of the courts and/or the content of the law and seeks to clarify, compare, synthesize, systematize or reform them.

3. How does this pluralism relate to the "problems" of comparative constitutional law?

Perhaps the surest sign of the arrival or "establishment" of any new or revitalized academic discipline is that scholars begin to question its methodological and/or theoretical foundations. No self-respecting field exists without undergoing such a critique of its meta-respectability. By this standard, comparative constitutional law is now well on its way to being admitted (or readmitted¹⁵) into the pantheon. In recently setting out what, from his vantage point as a political scientist with a joint appointment in a law school, continues to be problematic about the discipline of comparative constitutional law despite its tremendous growth over the past two decades, Ran Hirschl incisively and insightfully captures, names, and gives expression to a widely perceived diagnosis, albeit previously a mostly inchoate one.¹⁶ It is also one, incidentally, that will be partly familiar to comparative lawyers more generally.¹⁷ Hirschl argues that there are four main, albeit somewhat interrelated, problems with the discipline. First, it remains under-theorized regarding its methods, aims and objects -- of how constitutional comparison should be done -- and rests on "fuzzy" foundations. Second, there is a marked lack of empirical and interdisciplinary work, especially that focusing on the explanation of constitutional phenomena. Third, comparative constitutional law has become increasingly "juridified" in recent years, overly focusing on the rapid growth of constitutional courts and their bodies of rights jurisprudence at the expense of a more "holistic" approach to the study of

¹⁵ In his recent book, Ran Hirschl unearths the long, but mostly forgotten, history of comparative constitutional law. See HIRSCHL, *Comparative Matters*, chaps. 2 & 3.

¹⁶ *Ibid.*, chaps. 4 & 6.

¹⁷ See REIMANN, *The Progress and Failure of Comparative Law*.

constitutional phenomena. As a result, the need to cross disciplinary boundaries to incorporate the benefits of social science and create a broader, combined field of comparative constitutional studies is greater than ever. Finally, as practiced by the various types of legal actors, comparative constitutional law suffers from a case selection or "cherry-picking" problem, in that it disproportionately (and therefore misleadingly or inaccurately) relies on a small handful of favored jurisdictions -- "the usual suspects" of the US, Canada, Germany, the UK, Israel, India, South Africa -- at the expense of whole regions of the world (Latin America, the rest of Africa, the Middle East, most of Asia).

This list of perceived problems appears to be closely related to the multi-furcated nature of how constitutional comparison is done, discussed in the previous section. Thus, the wide variety and contextual nature of approaches is perhaps responsible for the methodological/theoretical "fuzziness" and the absence of more standardized foundations. The constitutional law-politics disciplinary division helps to explain both the "juridification" of the former and its underrepresentation of empirical/explanatory work, with its traditional focus on legal rather than social science. And the relative dearth of the latter in turn helps to account for the case selection problem, as less methodologically rigorous factors -- ad hoc or Eurocentric choices, common law biases and familiarity -- drive the choice of comparators.

One solution to these problems, though to be sure *not* the one Hirschl advocates, might be to merge comparative constitutional law into a new, social science-dominated field of comparative constitutional studies.¹⁸ Arguably, this would, in one fell swoop, solve all four problems simultaneously. Thus, by borrowing or adopting the framework of social science, the newly merged discipline would no longer suffer from the under-theorized methodological

¹⁸ Rather, Hirschl proposes "crossing" and no longer "maintaining" the disciplinary divide between comparative constitutional law and closely related disciplines that study the same set of phenomena. HIRSCHL, *Comparative Matters*, p. 190-191.

foundations of its legal ancestry but would inherit the "good" genes from its politics side. As a result, it would also prioritize empirical and especially explanatory goals and scholarship; marginalize the over-"juridified"; and overcome "cherry picking" and the "usual suspect" syndrome through the more rigorous case selection principles of quantitative and qualitative analyses of comparative constitutional phenomena.

4. Why resist such a merger?

Such a full-scale merger would, of course, aim to end not only the academic division between constitutional law and politics, but also to subsume within the new discipline all of the *intra*-legal divisions discussed in the second section above that combine to contextualize how constitutional comparison is done -- in favor of a more uniform approach based largely on social science methods and criteria. Abolishing some of these intra-legal divisions, however, appears to present either serious practical difficulties, for example ironing out the effects of the civil law-common law division on scholarly style and content, or to be undesirable and/or inappropriate. Consider here the different ends (and therefore objects and methods) of comparative constitutional scholars on the one hand and those of constitutional judges, lawyers, drafters, consultants on the other. The growth of comparative constitutional law as an academic discipline in recent decades cannot be separated from the growth of constitutional law in (and around) the world, so that a large part of its importance and value is its practical application and use -- as is of course true more generally about law versus more exclusively academic fields. The relationships between academic comparative constitutional law, constitutional court doctrine, and comparative constitutional practice outside the courts are more complex, interactive, and reciprocal, and less one-directional, than is standardly the case between

academic constitutional politics and the practices in the world it seeks to explain. If lowering the interdisciplinary scholarly divide means raising that between comparative constitutional academics and practitioners (both inside and beyond the courtroom), then this would not obviously be a helpful or beneficial exchange.

But even with respect to the constitutional law-politics division itself and the prospect of dissolving it by merging comparative constitutional law into a new social science-dominated discipline of comparative constitutional studies, I think there are good reasons for resistance. To be clear, these are *not* arguments against lowering the disciplinary divides or increasing the amount of empirical, explanatory, and interdisciplinary scholarship in comparative constitutional law, but against a wholesale abandonment or dissolution of the first part of the division in favor of the second. Even though no one is calling for this at present, it might be a helpful exercise in terms of countering any implicit bias or drift in this direction to think about the potential costs involved.

First, although comparative constitutional law undoubtedly has a lot to gain by absorbing more from the social sciences, it also has something big to lose by going down the same path as the most relevant of them, political science. This is the raising of artificial and hard-to-cross *internal* boundaries between methodological sub-fields -- quantitative, qualitative, normative -- that has compartmentalized the discipline and mostly destroyed its overall unity. One of the beneficial features of contemporary comparative constitutional law is that, perhaps because of its relative newness -- or, more accurately, revitalization -- as an academic discipline, it is very much a single field despite the divisions and variety of actors, methods and approaches discussed above. Those engaged in the different types of scholarship still read each others' work and view it as part of a common, overarching enterprise. This is valuable not only for sociological reasons

of academic community but, more importantly, for epistemological ones. In a "healthy" field, different approaches are inter-related and inter-dependent, their scholarly practitioners learn from and build off each other. This is still the case in comparative constitutional law, in which scholars *also* attempt to keep up with what various constitutional practitioners are doing around the world,¹⁹ so that although greater methodological self-awareness and "best practices" within each approach are certainly to be encouraged, overly formalized and specialized adherence to method, importing the "guild mentality," is to be avoided as counterproductive to its dynamic fluidity.

A second reason for resistance is that social science in general, and political science in particular, still has a tendency to view constitutional law and doctrine as essentially epiphenomenal, as reducible to constitutional politics in a way that belies the "thickness" of how constitutional systems operate. To be clear, this reason is *not* (or not primarily) to be understood as resistance to the notion that constitutional judges are political actors. Few comparative constitutional legal academics would deny this proposition, but they tend to view it as more the beginning of wisdom than its end. Constitutional judges are political actors of a particular and distinct sort, whose institutional role and modes of operation do, and are significantly designed to, complement those of the other branches of government, whether elected or not. Legal academics tend to be experts in the constitutional politics of constitutional law and courts, as distinct from that of other political actors and institutions. So the issue is not so much whether constitutional politics, but what type and whose. While realist-interest analysis has shed illuminating light on, for example, the question of why judicial review -- which is, by definition, a decision/issue that engages the political-constitutional system as a whole and not simply the

¹⁹ See, e.g., the popularity of the I.CON blog's weekly "What's New in Comparative Public Law" feature, containing information about recent constitutional developments, politics and court decisions, as well as new scholarship.

courts -- it less clearly or uniquely does so on many other consequential issues of judicial conduct, including how judicial review operates, courts' interactions with and attitudes towards the other branches of government, modes of internal deliberation, style of opinions/judgments, and methods of constitutional interpretation.

Despite stating that lowering the disciplinary divide between constitutional law and politics would be to the *mutual* benefit of both, as Hirschl presents it the learning curve seems mostly one-way, from social science to law.²⁰ But taking law more seriously -- again, not as a non-political forum but as a distinct political one -- would benefit social science by rendering its approach to constitutional phenomena richer, less reductionist, and more realistic. This suggests the need more for partnership and collaboration than a full-scale merger.

Third, non-empirical and non-explanatory modes of comparative constitutional scholarship continue to add significant value to the field. So while the field should certainly absorb more of the methods and benefits of social science,²¹ it should not be limited to it; this is not a zero-sum proposition. The importance and relevance of conceptual, normative and doctrinal work (and non-empirical descriptive, if there is such) obviously varies across subjects and topics in comparative constitutional law. Perhaps they are generally less so in work on, for example, constitutional transitions in deeply divided societies or executive-legislative relations, but more so in such areas as the forms and varieties of constitutionalism, the content, scope and enforcement of constitutional rights, and constitutional design questions dealing with judicial-legislative powers and relations. Moreover, there are clearly areas in which, for example,

²⁰ I say "mostly," because although Hirschl expressly acknowledges that for scholars of comparative politics, "the ability to grasp modes of legal reasoning...is essential to comparative constitutional inquiry," the greater part of his analysis focuses on the need for comparative constitutional lawyers to "open up to the social sciences." HIRSCHL, *Comparative Matters*, p. 191.

²¹ For my own recent attempt to import some of the political science literature to enrich and change how comparative constitutional lawyers think about separation of powers issues, see GARDBAUM, *Political Parties, Voting Systems, and the Separation of Powers*.

conceptual and empirical scholarship supplement each other in a form of division of labor to make a greater combined contribution than would either alone. Think here of recent work on authoritarian constitutionalism. Conceptually-minded scholars identified and outlined a pattern of constitutional conduct in certain countries that seemed to fall somewhere in between full-blooded authoritarianism and liberal-democratic constitutionalism, and then asked whether "authoritarian constitutionalism" is a coherent concept or an oxymoron.²² Empirical scholars looked in more detail at possible candidates and asked the explanatory question: why might mostly one-party states elect to rule through the occasionally constraining, albeit thin form of constitutionalism, what interests of theirs does it serve?²³ Then, the normative question was asked as to whether such a form of constitutionalism is always a bad thing or whether in certain contexts it might be preferable to the likely alternatives.²⁴

5. What, then, should be done?

To begin, it is interesting to note how the identified problems of comparative constitutional law appear to be self-correcting to some significant extent as the discipline grows and develops. As I have suggested, the greater self-consciousness and self-reflection that has resulted in the naming and identification of the problems are themselves testaments of a sort to the arrival and success of a discipline. Only after a period of time and an accretion of first-order work would one expect the second-order process of reflection and deliberation to take place. In

²² THIO, *Constitutionalism in Illiberal Polities*; TUSHNET, *Authoritarian Constitutionalism: Some Conceptual Issues*.

²³ LAW & VERSTEEG, *Constitutional Variation Among Strains of Authoritarianism*.

²⁴ TUSHNET, *Authoritarian Constitutionalism*. A common critique of work by legal academics is that too much of it focuses on "form" or formal legal powers at the expense of how those powers actually operate in the world. For example, is "weak-form judicial review" distinct from "strong-form" in practice as well as theory? This critique, however, is very far from being made only by social scientists of legal scholarship, but has been made by legal scholars of their peers ever since the first stirrings of what would come to be called "legal realism." Whether the appropriate response of studying how courts exercise their powers in practice is properly thought of as "empirical" scholarship, I leave to others.

any event, the large contribution that Hirschl and others have made in beginning this meta-conversation is itself an important stage in its resolution. As for the second problem, empirical and explanatory work in comparative constitutional law is now a growing sub-field of the discipline, arguably the most visible and dynamic one in the last few years. Perhaps to be thought of as a form of academic arbitrage, there are now several well-regarded and highly-trained scholars in law schools in the U.S. and elsewhere engaging in methodologically rigorous qualitative and quantitative work, which in turn is helping to lower the boundaries between constitutional law and politics.²⁵ Finally, as the field continues to grow worldwide and beyond the core group of jurisdictions comprising the "usual suspects," the selection bias problem is reduced. Today there are thriving groups of comparative constitutional scholars around the world who are increasingly joining the "global" conversation, and thereby rendering their own countries and regions better known by everyone else. Moreover, as the discipline grows, it has more to offer practical people dealing with constitutional conflicts and emergencies in various parts of the world, which in turn brings these regions into the consciousness of the scholarly community. Think of the transformation of the Middle East from a backwater area of interest only to a small group of regional or religious specialists to a focal point in comparative constitutional studies since the so-called Arab Spring. Constitutional transitions in Latin America and Asia have had similar reciprocal effects.

Because of these and other ongoing changes, I believe that the lowering and crossing of disciplinary walls on the constitutional law side of the divide is already taking place, so that in fact the continuing resistance by social and political scientists to constitutional law and legal

²⁵ See, e.g., the work cited in n. 2 & 23.

scholarship is, if anything, the greater remaining artificial boundary to the mutual benefits of exchange.²⁶

Beyond the continuing impact of these self-correcting mechanisms, I believe two general interventions are called for: one that slightly revises how constitutional comparison is done in the face of existing diversity and division, while the other acknowledges and celebrates this diversity as a major source of strength and dynamism. The first intervention, which echoes another of Ran Hirschl's actual prescriptions, is still greater general methodological awareness and self-consciousness. In concrete terms, this means, for example, that a piece of scholarship should provide a clear sense of the fit between its aims, objects and methods, and it should specify how limited or general its claims are, based on the range or type of comparators. If it makes an explanatory claim, this should be based on a defensible methodology, although this can certainly include the causal role of ideas and historical-institutionalism, and need not be limited to quantitative or realist-interest analysis.

The second is to openly acknowledge and cultivate the inter-relationship between the various methods and approaches, as well as to celebrate the pluralism within comparative constitutional law. As the example of authoritarian constitutionalism demonstrates, different types of scholarship -- descriptive, conceptual, normative, qualitative, quantitative, doctrinal -- with their attendant methodologies are, at their best, supplementary and mutually supporting rather than separate enterprises. They provide and contribute different pieces of the overall puzzle. Quantitative work can help to identify appropriate case studies for smaller-n qualitative analysis;²⁷ and these latter in turn can provide data not only for the development of causal hypotheses but also to test normative claims and to develop more nuanced conceptual work.

²⁶ There are, of course, notable exceptions here too, including Ran Hirschl, Gary Jacobsohn, and Cindy Skatch.

²⁷ See CHOUDHRY, *Method in Comparative Constitutional Law*.

Comparative constitutional law is the richer for the presence of methodological pluralism: there is no either-or choice between, for example, the empirical versus the normative study of judicial review. So it is, too, for the variety of aims introduced by the pluralism of actors -- scholars, judges, constitutional drafters and advisors. Just as there should be no artificial compartmentalization of different scholarly approaches, there should be none between comparative constitutional scholars and other actors in the field. The growth of the field is mostly due to practical developments in the world, and its continued dynamism depends on maintaining that connection and contributing to them.

6. Conclusion: comparing methodologies in comparative public and private law

Finally, let me bring this contextualized analysis to bear on the broader topic of how one compares law by pulling together and highlighting some of the points in the essay that deal indirectly or in passing with a methodological comparison between comparative constitutional law and comparative law more generally. In particular, is the former different?

On the one hand, comparative constitutional law is of course a sub-field of comparative law, akin to comparative contracts, torts or criminal procedure. All have similar disciplinary goals and employ similar methods of comparison. But on the other, as actually undertaken by scholars in the sub-field, it appears to be quite autonomous. Few of the current leading paradigms of comparative law as an academic discipline (for example, the notion and role of different legal traditions, the sameness-difference dichotomy, legal transplants, postmodernism) have very much traction in comparative constitutional law scholarship, at least in terms of the specific debates and opposing camps they engender. Comparative constitutional law tends to

have its own paradigms, debates, distinctions and camps, which are not really applications or offshoots of the broader field.

In other words, there is now, perhaps for the first time, a significant public-private law division *within* the academic discipline of comparative law itself, with the public side operating more or less autonomously -- although ironically this might be viewed as a testament to the longevity and continuing importance of one of comparative law's key points and distinctions, at least on the civil law side. The recent rapid development of public law and the growing split between it and private law in almost all common law legal systems -- as reflected first in the courts, then in the domestic academy, and finally in comparative scholarship -- is further evidence of this point.²⁸

Two other concrete features arguably differentiate constitutional from general legal comparison methodologically. First, this autonomy of public law is itself partly the result of the fact that, unlike comparative law more generally, in many ways comparative constitutional law shares its *primary* terrain with -- and perhaps (as discussed above) is being partly *colonized by* -- a separate social science sub-field, and this influences both how it is done and the literature its practitioners tend to engage with.

Similarly, just as comparative constitutional law cannot, I think, be a "purely" academic discipline, because of its intrinsic and reciprocal connections to practical developments in the world, both inside and beyond the courtroom, it also cannot be a "purely" legal one in its approach and methodology, however broadly "the law" is understood -- in the way I believe comparative law *could* choose to be. In other words, comparative constitutional law tends to be an inherently "broader" field (or sub-field) than comparative law *per se* because of the inevitability or necessity of going beyond the law and courts to achieve/perform certain of its

²⁸ On the UK, see, e.g., HICKMAN, Public Law after the Human Rights Act.

roles, uses, goals and objects. The legally enforceable components of constitutions and constitutional systems are only part of the whole and essentially connected to those that are not. Those who draft, design or advise on constitutions in contexts of deeply divided societies or democratic transitions must usually take multi-methodological, interdisciplinary approaches to their tasks. Moreover, the *non*-academic boundaries between constitutional law on the one hand, and constitutional principles, constitutional norms, constitutional discourse, and constitutional politics on the other are very fine, if any. Indeed, the very adjective "constitutional" in these terms appears to have no obvious equivalent in other fields of law.

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