WORKSHOP "OBJECTIVES, METHODS AND PERSPECTIVES OF A CONTEXTUAL ANALYSIS IN COMPARATIVE LAW"

Institute for Legal Studies, Centre for Social Sciences,
Hungarian Academy of Sciences
(MTA TK JTI)

JTI Meeting Room

Budapest, 19 May 2016

Morning session

10.00-10.10 Opening remarks by the organizers

10.10-10.40 Russell Miller (Washington & Lee University): *Differencing Comparative Constitutional Law – The Case of American and German Privacy Rights*

10.40-11.10 Mila Versteeg (University of Virginia): *Do Constitutional Rights Make A Difference?*

11.10-11.40 Konrad Lachmayer (MTA TK JTI – Durham Law School): *A Pluralistic Approach to Contextualism in Comparative Law*

11.40-12.15 Discussion

12.15-13.00 Lunch (MTA TK JTI)

Afternoon session

13.00-13.30 Katalin Kelemen (University of Örebro): *Reflections on the Path Dependency of Legal Systems and Contextuality*

13.30-14.00 Renata Uitz (Central European University): *Comparative Constitutional Scholarship 2.0: Why? What? How?*

14.00-14.30 Mathias Siems: Mathias Siems (Durham Law School): *Comparative Law in the 22nd Century – and what to do in the meantime*

14.30-15.00 Balázs Fekete (MTA TK JTI): *Uses and misuses of legal culture in comparative law*

15.00- Discussion

Abstracts

Balázs Fekete (MTA TK JTI)
Uses and Misuses of Legal Culture in Comparative Law

Legal culture has definitely become a fashionable term of recent comparative law literature. In many cases, its use seems to be similar to those magical potions of fairy tales that can even solve the greatest drama, for example: defending against the fiery dragon breath or giving back the forgotten memories of the princess. When studying chapters and articles that rely on the concept of legal culture the reader may have exactly the same impression: by invoking legal culture scholarly problems are immediately solved, for instance, a reference to the cultural embeddedness of a legal rule may explain the hardest research question (or may not).

This presentation is about providing an in-depth and critical discussion of the term of legal culture and its various uses in comparative law scholarship. My main thesis is that many scholars apply this term without any serious methodological reflections, therefore they misuse it frequently. The first part is about methodological considerations. As a first step, it identifies three different meanings of legal culture (1. a holistic one addressing the mostly extra-legal – that is historical, political or sociological – specificities of a given legal order, it is usually used when a broader, not simply rule-focused explanation or outlook is needed; 2. a dynamic one being focused on the (power) relationships of the various, official or non-official, legal actors, again it is invoked if the inter-institutional dynamics are to be explained; and 3. an attitudinal one trying to understand the mass attitudes toward law as such). Needless to say, due to definitional uncertainties these three concepts may overlap each other in many cases. As a second step, the presentation offers a detailed discussion of three main deficiencies identified in the uses of legal culture in comparative law; these are to be called as "misuses" of legal culture. These are as follows. 1. A confusion of the various meanings of the term in the same paper. 2. Over-theoretization of the term thereby making the scholarly argumentation almost incomprehensible because of the conceptual complexity. 3. Under-theoretization of the term leading to weak conceptual foundations.

In sum, this presentation argues that the application of the concept of legal culture is both unavoidable and necessary in contemporary comparative law studies. However, it should be done in a much more conscious way taking into account the multi-layered nature of the concept and the various conceptual uncertainties. Moreover, the inclusion of legal culture into comparative law is really encouraged as it can help in opening up the boundaries of traditional comparative law by inviting important insights from other fields of social and human sciences.

Katalin Kelemen (Örebro universitet)
Reflections on the path dependency of legal systems and contextuality

Ugo Mattei, when reflecting on transfer of legal knowledge from one system to another in his well-known article proposing a new, dynamic classification of legal systems, argues that law is remarkably path dependent and comparative research helps identifying the differences in the path of legal systems that make dependency occur. The very use of the concept 'path dependency' by Mattei reveals an interdisciplinary approach to law. Most lawyers do not know and employ this term which belongs to other social sciences, mainly economics. On the other hand, one of the fundamental maxims of comparative law is that comparison involves

history. In order to understand a legal rule or institutions we have to go back to its roots. But it is a retrospective exercise. The theory of path dependency aims at predicting the future. But how does the historical perspective, including the theory of path dependency, fit within a contextual analysis? My presentation aims at reflecting on the concept of path dependency and the appeal it has or may have for comparatists.

Konrad Lachmayer (MTA TK JTI – Durham Law School)
A Pluralistic Approach to Contextualism in Comparative Law

Although comparative law is based on the analysis of the "legal" dimension of societies, different methodological approach will agree that it is necessary to take the political, economic, historical and cultural contexts into consideration. The challenge of the multiple contexts of a legal system is, however, the enormous complexity, which quickly arise. Legal comparison cannot implement a full comparison of political institutions, economic systems, intercultural dependences and historical influences.

The strong influence of empirical studies in comparative law in the last years, show a new approach to comparative law in general and a contextualistic approach in particular. The use of empirical legal data and databases of political sciences enables new ways of comparing. The social science approach to legal comparison focuses primarily on certain factors, which are measurable, and tries to create a quantifiable dimension of legal comparison. This dimensions, however, neglects various perspectives, which are the result of the multiple contexts of comparative law.

It seems much more feasible to address the complexity of the multiple context of a legal system by using a pluralistic approach, which is not limited to a social sciences perspective, but which is able to take also other methods, like a philosophical debate, a historical source analysis or linguistic-hermeneutical analysis, into consideration. Moreover, it seems legitimate to extend this kind of approach towards other scientific methods of cognitive psychology on the one hand and artistic comparison of cultures on the other hand. The most promising way to implement such a pluralistic approach to legal comparison is to establish interdisciplinary research teams and collaborative research methodologies. The interdisciplinary dialogue enables intercultural results, which might address the complexity of multiple contexts of legal comparison.

Russell Miller (Washington & Lee University)
Differencing Comparative Constitutional Law – The Case of American and German Privacy Rights

Amidst the rubble of the damage caused by the so-called "NSA-Affair" one finds the dashed expectation that Western constitutional regimes have a shared commitment to privacy as a common – if not universal – value. It is clear from the radically different reactions to Edward Snowden's revelations in the U.S. and Germany that there is hardly any other issue on which views differ so dramatically on opposite sides of the Atlantic. But the assumption of similarity with respect to constitutional notions of privacy was never sound, even if the blind search for similarity in comparative constitutional law remains the dominant approach, informing both the functionalist and utilitarian/ideological approaches. Reflecting on the work of Pierre Legrand – and especially his summons that we should become "difference engineers" – this paper seeks to document the many profound differences between U.S. and

German constitutional law on the questions of privacy and intelligence-gathering, differences that reflect the unique socio-cultural foundation of the respective constitutional regimes.

Mathias Siems (Durham University)
Comparative Law in the 22nd Century – and what to do in the meantime

The first part of the presentation will look into the distant future of the 22nd century. Based on findings from the growing field of futures studies, it will outline how the world will have evolved and how this may shape the future of the law – as well as comparative law as a discipline. This long-term perspective will raise doubts about the scope of contemporary comparative law, and it may well be suggested that it will be replaced by other fields such as transnational or global law. However, in the meantime, it remains important to revisit the methods of comparative law. Here, the second part will start with the general question of whether a particular method is preferable or 'anything goes': it will suggest that, while it may be appropriate to use different methods for different questions, it is also appropriate to use different methods for the same questions. Subsequently, it will be suggested that many interesting questions still wait to be explored with methods of numerical comparative law; my recent quantitative taxonomy of the world's legal systems will be used to illustrate this point.

Renata Uitz (Central European University)
Comparative Constitutional Scholarship 2.0: Why? What? How?

Comparative constitutional scholarship, and especially, comparative constitutional law scholarship has excelled at providing an anatomical insight into how constitutions look like. Traditionally, comparative constitutional law scholars have been interested in mapping models on larger scale, often in abstract terms. Their interest often has been in bridging the civil law-common law divide, and in locating the core of the universal constitution. This search for a common minimal core has been hastened by the discourse on universal human rights. Consequently the rights-related segments of constitutional designs have been explored more closely than architectural details on institutions.

In recent years, in large part due to the Comparative Constitutions Projects, quantitative (large-n) studies revealed many hidden traits of written constitutions. Some of these discoveries (e.g. life span, differences between authoritarian / sham and democratic constitutions) are at odds with fundamental assumptions which tend to inform contemporary comparative constitutional analysis. Due to methodological limitations, however, large-n studies focus on written constitutions (in English translation) and do not reflect on how those constitutional texts function in real life, on the ground.

Indeed, when constitutional scholars are asked about how a constitution works in practice, they point to constitutional case law as their starting point. More often than not, however, constitutional law scholarship also halts at this point, without looking into those political practices which are framed by the constitution. At best, constitutional lawyers would say that the constitutionality of a particular practice has not been challenged before courts or has not been assessed by courts for some reason (lack of standing, lack of jurisdiction, lack of justiciability are being prime considerations here).

Answers to questions on how constitutions work are often formulated in the sister disciplines of comparative constitutional scholarship, by constitutional theorists, historians and even intellectual historians (usually as a side issue), political scientists, legal sociologists and legal anthropologists. Their work presents fascinating findings for comparative

constitutional scholarship, as they study phenomena which are usually beyond the scope of legal analysis (eg. impact of political party affiliations on separation of powers, of popular mobilization, economic crises or scandals on presidential impeachment etc).

In the paper I argue that in order to remain relevant as an intellectual and academic exercise, comparative constitutional scholarship has to engage not only with how constitutions look like, but also with *how constitutions work*. This is a clear departure from the mission of comparative constitutional law scholarship, as it is often practiced today.

As to the "what" and the "how" questions, comparative constitutional scholarship's answer has long been to study constitutions, as they are written and interpreted by courts in constitutional cases. Studying how constitutions work requires a different answer to "what" and "how." I propose to readjust comparative constitutional scholarship's perspectives in light of findings of its sister disciplines. In addition to drawing on their findings as a resource, comparative constitutional scholarship has a lot to learn from the manner in which they pose questions and the manner in which they seek answers.

I argue that taking an interest in how constitutions work will necessarily shift the focus of attention from constitutional designs and models to how those models are adapted and adjusted on the ground. Constitution-drafters hardly ever seek to transplant perfect constitutional models. Instead, they adjust existing solutions and even create new ones in light of political and practical compromises the text of the constitution needs to enable, or at least reflect. In comparative constitutional scholarship important work needs to be done to analyze solutions which make certain models work better (or worse) in certain political or economic settings. Telling compromises apart from good luck could add new insight for constitutional design purposes for those interested in practical implications. See for instance important political science research exploring the mechanics of presidential powers in presidential systems with fragmented vs majority-driven legislatures.

Taking an interest in how constitutions work will also shift attention from the workings of constitutional institutions to the behavior of constitutional actors.

The latter term refers to those players of the public and political sphere who use (and therefore shape) constitutional processes and institutions regularly to achieve their aims. Constitutional actors come in many shapes and forms, and they differ across contexts. The set includes political parties, unions, churches, civil society organizations, human rights commissions (where they are not constitutionalized), to name a few. In addition to domestic constitutional actors there are several regional and international organizations which operate as constitutional actors on the regional and also on the domestic level. In Europe the European Court of Human Rights, the Venice Commission and several EU institutions are obvious examples, in the Americas the Inter-American Court and Commission come to mind.

While these players may not be mentioned in constitutions expressly, or if they are mentioned, usually they are covered by passing references, their engagement with constitutional institutions and processes shapes not only the fate of particular bills, policy proposals or governments, but also affects the constitutional architecture as a whole. If comparative constitutional scholarship does not account for the impact of their presence in the constitutional space, it misses out on key forces and developments which shape its object of study on the ground.

As to the "how" question posed in the title: it is obvious that shifting the aim ("why") and the focus ("what") of analysis will require a fundamental rethinking of methods. Interdisciplinarity is a promising starting point. It should mean more than using the results of the sister disciplines, though. Instead, it will require a more active engagement, resulting in reciprocal interaction. In addition, comparative constitutional projects will need to embrace the global constitutional experience, beyond the standard examples of Europe and North America and will need to engage with a time horizon across several regimes, to get a better

picture. Research like this will by definition require collaboration due to its scope and scale. Importantly, research projects will need to focus not on textual similarities (or the lack thereof) in the standard fashion of checklist, but on making sense of constitutional experiences beyond constitutional provisions. As such, comparative projects will need to move towards conceptual comparisons, taking their base line not only from constitutional provisions, but also from jurisprudence and from scholarship.