

Keynote Speech

Towards a Global Constitutional Gene Pool

Cheryl Saunders*

ABSTRACT

This essay aims to develop the methodology of comparative constitutional law in a way that draws more comprehensively on world constitutional experience. It proceeds in two stages. The first part identifies key methodological challenges for comparative constitutional law, drawing on the literature of comparative law, while taking account of the distinctive character of constitutional law. The challenges examined here are the dichotomy between similarity and difference; the approach to the task of comparison; taxonomy; the impact of culture; and pluralism. The second part of the argument considers the impact on comparative constitutional method of the conditions in which Constitutions operate in the early 21st century, including internationalisation, globalisation and advances in information technology. This part of the essay aims to show that, while there are considerable contemporary pressures for convergence, with implications for comparative method, other forces foster difference and pluralism, creating new methodological challenges. The essay concludes with a series of propositions for the methodology of comparative constitutional law, as a platform for further research and dialogue.

Keywords: *Global Constitutionalism, Constitutional Law, Comparative Constitutional Law, Comparative Method, Pluralism, Globalisation, Internationalisation*

* Laureate Professor, University of Melbourne. Email: c.saunders@unimelb.edu.au. This paper was originally presented as a key-note address to the Third Asian Forum for Constitutional Law at the National Taiwan University Law School in September 2009. Versions of it have since been presented to an International Round Table on Constitutional Law in Seoul, Korea in November 2009 and at the 21st Anniversary Conference of the Centre for Comparative Constitutional Studies at Melbourne Law School in late November 2009. I am grateful for the comments that I received from participants on all three occasions. I also express my thanks for research assistance from the Law Research Service of the Law Library of Melbourne Law School.

CONTENTS

I. INTRODUCTION	3
II. IS COMPARATIVE CONSTITUTIONAL LAW DIFFERENT?	5
A. <i>Methodological Problems of Comparative Law</i>	5
B. <i>Differences Between Constitutional and Private Law</i>	8
C. <i>Comparative Constitutional Method</i>	12
III. CONDITIONS OF CONSTITUTIONAL MODERNITY	16
IV. IMPACT OF THE PRESENT ON CONSTITUTIONAL COMPARISON	21
V. MAXIMISING THE GENE POOL	27
REFERENCES	31

I. INTRODUCTION

The purpose of this essay is to explore how the discipline of comparative constitutional law might be developed so as to take full account of the breadth of world constitutional experience, thus maximising the possibilities of what might be considered to be a global constitutional gene pool.

In doing so, I make two assumptions. One, which seems obvious enough to need little justification, is that the discipline does not presently do so. Much of the discourse of comparative constitutional law focuses on the established constitutional systems of North America and Europe and a few outlier states with similar arrangements, based on similar assumptions. These are the progenitors of many of the current conceptions of world constitutionalism. They are deeply interesting subjects of comparative study in their own right: dynamic, despite their relative stability and sufficiently distinctive from each other to make comparison thought-provoking. Much of the most influential constitutional scholarship emanates from these parts of the world.

One consequence of the concentration on North America and Europe is that constitutional law and practice in other regions, where the majority of states is located, is not factored into mainstream comparative constitutional law and is, in effect, marginalised. Marginalisation may take a variety of forms: overlooking the constitutional experience of particular states and regions; assuming their effective similarity with western constitutional systems; reserving them for specialist study by those with anthropological or sociological interests and skills. To a greater or lesser degree, all other regions are affected in one or more of these ways: Africa, South America, Scandinavia, the Middle East, and the Pacific.

The marginalisation of regional constitutional experience takes a distinctive form in relation to Asia, however. Asia is one of the most diverse regions of the world in a multiplicity of senses, including approaches to law and government. It is also a region in which there have been significant developments in democratisation and constitutionalism in recent years, generating a substantial literature and encouraging the development of regional constitutional networks.¹ Typically, however, Asia has been underrepresented in comparative legal and constitutional studies.² Even

1. The Asian Forum for Constitutional Law is an example.

2. For observations to this effect in relation to general comparative law, see Andrew Harding, *Comparative Public Law: Some Lessons from South East Asia*, in *COMPARATIVE LAW IN THE 21ST CENTURY* 249, 251 (Andrew Harding & Esin Örtücü eds, 2002).; WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* 185 (2000). See also WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT* 17 (2006), arguing that Asian and African legal systems should be studied both in their own right and as “integral elements of the global legal order.”

more remarkably in the face of the evidence, there has been a tendency in comparative law, with implications for comparative constitutional law, to treat Asian legal systems as homogenous.³ This tendency appears to be a reaction to the perceived difficulty of dealing with the depth and distinctiveness of Asian culture, which in this context also tends to be perceived as homogenous.⁴ In Asia as elsewhere, however, while a degree of regional cultural homogeneity can be expected, driven by shared historical and geographical experience, there is considerable cultural difference both within and between states. While this essay is not confined to consideration of Asia, it is written with the challenge of developing a comparative approach that is apt to include Asia in mind.

The second assumption that I make for present purposes is that at least some of the impediments to a truly global approach to comparative constitutional law are methodological. This is the principal subject of this essay. For reasons that might themselves be instructive if we were to reflect on them, there is no developed debate on method in comparative constitutional law although there are useful individual contributions to the field.⁵ By contrast, there is a rich literature on method in general comparative law, which is the subject of wide-ranging debate and, sometimes, vigorous disagreement among legal comparative scholars.⁶ In this essay, I use the debate on method in general comparative law as a foil, although I note that insights into method in comparative constitutional law may be also be derived from other branches of the social sciences, including comparative politics.⁷

My argument is developed in two primary stages. In the first, I examine

3. See, e.g., K. ZWEIGERT & H. KOETZ, AN INTRODUCTION TO COMPARATIVE LAW (3d ed. 1997), who identify “Far Eastern Systems” as one of their eight legal families of the world. Cf. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45 AM. J. COMP. L. 5, 8, 36 (1997). His very different taxonomy was designed to incorporate different conceptions of law “within the mainstream of comparative law to avoid their marginalization into area studies,” but who nevertheless assigned all Asian legal systems to his third category of “traditional” law, which he equated with the “Eastern legal tradition.”

4. Mark van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT’L. & COMP. L.Q. 495, 502 (1998) (identifying “Asian culture” as one of four cultural families for comparative purposes).

5. E.g., Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Gunter Frankenberg, *Comparing Constitutions: Ideas, Ideals and Ideology—Toward a Layered Narrative*, 4 INT’L.J. CONST. L. 439 (2006); Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005); VICKI C. JACKSON & MARK TUSHNET, *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* (2002); SUJIT CHOUDHRY, *THE MIGRATION OF CONSTITUTIONAL IDEAS* (2006); Mark Tushnet, *Comparative Constitutional Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 1226 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

6. For the recent Oxford handbook gives insight into the range, see *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 5.

7. In relation to which, see *THE OXFORD HANDBOOK OF COMPARATIVE POLITICS* (Carles Boix & Susan C Stokes eds., 2007).

the relevance for comparative constitutional law of methodological problems developed in the context of general comparative law, so as to better understand the nature of the challenges of constitutional comparison. This part of the paper therefore begins with a necessarily brief discussion of a range of standard methodological issues in comparative law, before identifying the particular characteristics of constitutional law that might affect comparison and assessing their implications. At this stage, I treat constitutional law in traditional terms, as the framework of government for an ever-increasing number of Westphalian states.

The second stage of the argument deals with the impact of contemporary conditions on the nature and extent of the challenge of comparing constitutional arrangements. Famously these conditions include, although they are not limited to, the phenomena of internationalisation and globalisation. In a variety of ways, these are a force for a degree of constitutional convergence, in substance as well as in form. In this part of the paper I suggest, however, that at least some contemporary trends are a catalyst for diversity as well. If this it is correct, the difficulties of comparative constitutional law in our times may be neither greater nor less than they were before, but simply different.

In the conclusion to the paper I draw these threads together, in order to make some propositions on which a more global discipline of comparative constitutional law might be based. Some of these are tentative at this stage. I welcome observations on them all.

II. IS COMPARATIVE CONSTITUTIONAL LAW DIFFERENT?

A. *Methodological Problems of Comparative Law*

The literature on comparative law canvasses a range of standard methodological and theoretical questions that have potential application to comparative constitutional law. Five are identified below. Although they are examined separately, it should be obvious that they are interrelated in a variety of ways.

The first concerns the extent to which assumptions can properly be made about the similarity of legal systems or the differences between them for the purposes of comparative law.⁸ This question is inherent in any comparative project although it is raised in a critical form by proposals for the harmonisation of law, which contributed to the emergence of the

8. On the proprieties of making any assumptions at all, see Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 5, at 339, 369-72.

discipline in the first place.⁹ As consideration of the implications of harmonisation suggests, the challenge presented by the dichotomy between similarity and difference potentially extends to the values that underpin any legal system, the principles to which it gives effect and the goals that it seeks to achieve.¹⁰ There are sharply divergent views on this issue, between those who are prepared to accept, albeit to varying degrees, that there is substantial and increasing similarity between legal systems and those who maintain that the differences are deep, significant and potentially unbridgeable, and that any convergence is more apparent than real.¹¹

A second methodological issue raises the question of how comparativists can ensure that the phenomena about which they seek to draw conclusions across two or more jurisdictions are relevantly comparable. The technique of functionalism is one standard response, offering the function to be performed as the *tertium comparationis* around which comparison should focus, thus avoiding the predictable danger that similar functions might be performed in different ways in different societies. Insofar as functionalism assumes too readily that certain functions are shared, or that they are always performed by legal rather than other social institutions, it falls foul of the dichotomy between similarity and difference.¹² Functionalism can avoid these obvious pitfalls but can never, probably, take sufficient account of contextual circumstances to satisfy difference theorists.¹³

A third issue concerns taxonomy or classification. In this context, it refers to a means by which the legal systems of the world might be grouped to assist macro-comparison, at least in the initial stages of a project. The task of finding a reliable and consistent classificatory system is complicated by the diversity of the world's legal systems, including the phenomenon of "mixed" legal systems; the effects of ongoing processes of evolution and cross-fertilisation; and the implications of cultural context for the validity of particular classification schemes. The three principal contenders would categorise legal systems by reference to legal families, legal traditions or legal culture.¹⁴ All accept that the boundaries of each category must be

9. For an account of the contribution to comparative law of the Congress of the Société française de législation compare, held in Paris in 1900, see Roderick Munday, *Accounting for an Encounter*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 3-8 (Pierre Legrand & Roderick Munday eds., 2003).

10. See, e.g., James Gordley, *The Universalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS*, *supra* note 9, at 31 (2003); Laurence Rosen, *Beyond Compare*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS*, *supra* note 9, at 493 (2003).

11. For a survey by a scholar committed to the latter view, see Pierre Legrand, *The Same and the Different*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS*, *supra* note 9, at 240 (2003).

12. Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 5, at 383, 388-91.

13. Michaels, *supra* note 8, at 365.

14. See respectively, ZWEIGERT & KOETZ, *supra* note 3, at 69-75; H. PATRICK GLENN, *LEGAL*

permeable to a degree. None gives an entirely satisfactory account of the legal systems of the world that also is useful for classificatory purposes.¹⁵

A different approach, by Ugo Mattei, categorises legal systems by reference to dominant “patterns” of influence on law as professional, political or traditional. For the purposes of this approach, a professional pattern of law is one in which law and politics are distinguishable and “largely secularised”;¹⁶ under a political pattern law and politics are more closely intertwined, in the sense that the political process tends to determine the outcome of the legal process, rather than vice-versa;¹⁷ in the context of a traditional pattern of law there is no separation between law and religious or philosophical traditions.¹⁸ I will return to this approach later, for the purposes of determining the extent to which this schema, although not the detailed application of it, might be adapted to the needs of comparative constitutional law.¹⁹

A fourth issue for the methodology of comparative law concerns cultural difference. How significant is it? Can it adequately be grasped by an outsider? To what extent does it matter if the richness of an “insider’s” point of view, evocatively characterised by Legrand as “mentalité,” is beyond the reach of a comparativist?²⁰ And what is “culture” for this purpose, anyway? In this last regard, two points should be noted. One is a view in the literature that what really counts is legal culture, or the “mentalité” of the principal actors in a legal system.²¹ The other is the recent disaggregation of the idea of culture by Roger Cotterrell into four component parts: beliefs and values; tradition, including historical experience; material culture including levels of technological and economic development; and “emotional attachments and rejections.”²² Cotterrell notes that the linkages between these elements makes it useful to continue to have regard to more general conceptions of culture, rather than examining its component parts in isolation from each other. The disaggregation is helpful, nevertheless, to deal with a challenge

TRADITIONS OF THE WORLD (3d ed. 2007); ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001).

15. There is a helpful overview and critique in WILLIAM TWINING, *GENERAL JURISPRUDENCE* 67-87 (2009).

16. Mattei, *supra* note 3, at 23.

17. *Id.* at 28.

18. *Id.* at 35.

19. Mattei assigns Asian legal systems generally to the category of “traditional” patterns of law, although with some hesitation. *Id.* at 36.

20. Pierre Legrand, *Comparative Legal Studies and the Matter of Authenticity*, 1(2) *J. COMP. L.* 365 (2008), available at <http://ssrn.com/abstract=1259920>.

21. This view is examined by Roger Cotterrell, *Comparative Law and Legal Culture*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 5, at 709.

22. Roger Cotterrell, *Law and Culture—Inside and Beyond the Nation State*, 31(4) *RETFÆRD: NORDISK JURIDISK TIDSSKRIFT* 23 (2008).

that Cotterrell himself has described as “trying to nail a jelly to a wall.”²³

The final issue for consideration here is the phenomenon of pluralism. For present purposes, this draws attention to the fact that a variety of legal orders, or normative orders with an essentially legal effect, may be operative within a single state and thus relevant for comparative purposes.²⁴ In some cases, state law will indicate which norm is to prevail in cases of conflict, although the outcome may be different in practice. In other cases, legal orders sanctioned by the state will co-exist with other unofficial normative systems, which may be even harder to detect.²⁵ In either case, the competing legal orders may be underpinned by different values and rationales, which also may conflict with each other.²⁶ The phenomenon of pluralism potentially affects all states, but is likely to be particularly significant in societies in which both western law and the western conception of law have been superimposed on other forms of legal and social organisation.

B. *Differences Between Constitutional and Private Law*

Much of the literature on comparative law excludes or at least gives short shrift to public law. In part, this reflects the manner in which comparative law evolved historically, as a discipline concerned with private law, driven by the potential for harmonisation. As a practical consequence, the expertise of most comparative legal scholars lies in private law. As Alan Watson warned his readers as recently as 2004, “[C]onstitutional law is beyond my expertise.”²⁷

But the exclusion of public law from much comparative law discourse also reflects a view that comparative public law—of which constitutional law is, for this purpose, the most challenging subset—is more difficult, to the point of making comparison “misleading and futile.”²⁸ This is not a view that comparative constitutional lawyers are likely readily to accept. It nevertheless highlights the reality that constitutional law is a distinctive

23. *Id.*

24. See MENSKI, *supra* note 2, at ch.2. The discussion in Menski is helpful.

25. The distinction between these two is sometimes conceived in terms of “weak” and “strong” pluralism respectively. See MENSKI, *supra* note 2, 115-16, discussing the work of John Griffiths. See also the distinction between “official” law (including both State and non-State law) and “unofficial” law developed by Masaji Chiba and examined in MENSKI, *supra* note 2, 119-28.

26. Characterised by Chiba as “postulates.” *Id.* at 125.

27. Alan Watson, *Legal Culture v. Legal Tradition*, in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW I* (Mark van Hoecke ed., 2004). For one notable exception, see the work of John Bell on comparative administrative law in, for example, *Comparing Public Law*, in *COMPARATIVE LAW IN THE 21ST CENTURY*, *supra* note 2, at 235.

28. ESIN ÖRÜCÜ, *THE ENIGMA OF COMPARATIVE LAW: VARIATIONS ON A THEME FOR THE TWENTY-FIRST CENTURY* 179 (2004); see also the influential views of Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1, 7 (1974) (summarising the observations of Montesquieu on the question).

branch of law, for which a distinctive methodology may be required. In what follows I identify a range of differences between constitutional and private law which may affect comparative method. They are grouped under five headings: the relationship between Constitutions and states; the roles of Constitutions; the impact of politics; the relevance of history; and the correlation, or lack of correlation, between legal and constitutional systems.

The first and most obvious distinction between Constitutions and other law is the close identification of Constitutions with the states or other polities to which they relate. Each state has a Constitution of its own, whether embodied in a single formal document or not. A Constitution may be regarded as constituting or reconstituting the state.²⁹ In any event, it typically is the source of legitimacy for the authority of the organs of the state. The Constitution derives its own legitimacy from theories about the locus of sovereignty within the state.³⁰ On any view, therefore, there are at least as many Constitutions as there are states; and no two state Constitutions are the same. Even more significantly, the nature of the bond between a state and its Constitution provides a basis on which claims of exceptionalism can be, and sometimes are, built.³¹

A second point of distinction concerns the roles of a Constitution. Constitutions typically organise the power of the state; create its institutions;³² structure fundamental aspects of the relationship between the state and its people and sometimes between the people *inter se*; provide the basis on which to identify the validity of other state law. In these respects, Constitutions represent a form of positive law, which is quintessentially state law, although differing in important respects from ordinary state law.

But Constitutions perform other roles in the polity as well. Almost every Constitution has some kind of symbolic value, for which it may deliberately have been designed, although symbolic status may also inadvertently be acquired. In this connection, a Constitution may be used to reinforce certain goals of the state of which national unity, inter-communal respect, peaceful co-existence and national self-determination are possible examples.³³ A Constitution may play, or be perceived to play, an expressivist role within a state, reflecting its history and culture.³⁴ All or parts of a Constitution may

29. HANNAH ARENDT, ON REVOLUTION 125 (1973).

30. These accounts may, of course, be different. See generally THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2007).

31. In relation to the United States, see Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391 (2008) (including the sources there cited).

32. On the significance of the link between public law and institutions for the purposes of comparison, see Bell, *supra* note 27, at 240.

33. The values listed in the founding provisions of the Constitution of the Republic of South Africa, section 1, provide a good illustration, including, *inter alia*, the “achievement of equality.”

34. On the general notion of the expressive function of law, for which Constitutions are

be aspirational, particularly during periods of transition or transformation. In some cases, all or part of a Constitution may be cosmetic, with a view to influencing perception rather than action. As Gunter Frankenberg has argued, not all dimensions of the role that a Constitution plays are likely to be clearly articulated, although they may be signalled by ‘odd details and loose ends’ in the written document.³⁵

Third, Constitutions typically lie somewhere between politics and positive law. In the early 21st century, almost all Constitutions are legal instruments, representing positive law in whole or in large part. Most Constitutions also are accepted as a type of higher law, which is given effect through a form of judicial review. But in the final analysis, the original authority for the Constitution of a state depends on factors that lie beyond law and the ongoing effectiveness of the Constitution as superior law depends on the acquiescence of powerful political actors.³⁶ Moreover the nature of a Constitution is such that it is likely to be supplemented significantly, not only by a variety of “legal formants”³⁷ but by political practices and understandings of various kinds. The extent of dependence on the latter varies, with the United Kingdom as an extreme case.

A fourth distinctive feature of constitutional law is the formative influence of history. In some instances, of which the United Kingdom again is a conspicuous example, a Constitution is an organic product of the history of the state. Most contemporary Constitutions are somewhat more contrived, in the sense that they are deliberately made at a particular moment in time, drawing on other constitutional models. Even so, however, history has a formative effect. A Constitution is likely to be the product of an historical moment, or a succession of such moments.³⁸ Constitutions tend to be written with past, as well as present problems in mind.³⁹ All else being equal, constitutional choices are likely to show evidence of path-dependency.⁴⁰ Constitutions are written to last, whether or not they actually do so.⁴¹ A

particularly well-equipped, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA L. REV. 2021 (1996). On its particular application to constitutional law, see, for example, Tushnet, *supra* note 5, at 1269-81.

35. Frankenberg, *supra* note 5, at 458.

36. For both these points, see NEIL MACCORMICK, *INSTITUTIONS OF LAW* 39-49 (2007) (drawing on the work of Hans Kelsen and HLA Hart respectively).

37. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (I)*, 39 AM. J. COMP. L. 1, 22 (1991) (using the term to cover “statutory rules, the formulations of scholars, and the decisions of judges”).

38. The idea of such moments was developed most famously by BRUCE ACKERMAN, *WE THE PEOPLE*, VOLUME I, FOUNDATIONS (1991).

39. Bell, *supra* note 27, 241-42.

40. Mariana Mota Prado & Michael J. Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 U. TORONTO L.J. 341, 356 (2009).

41. For an estimate that the average life-span of a written Constitution is 17 years, see Thomas Ginsburg, Zachary Elkins & James Melton, *The Lifespan of Written Constitutions*, THE RECORD

Constitution that is long-lived is likely to be encrusted with historical experience that may be critical to an understanding of it.⁴² Such a Constitution may well have developed organic characteristics of its own, of which the interdependence of its component parts is a common sign.

One final, potentially relevant point of distinction between constitutional and private law concerns the relationship between constitutional and legal systems. There is a degree of correlation between the two. Most states with a common law legal system have constitutional arrangements that are influenced by one or other of the common law constitutional traditions of the United Kingdom and the United States or, often, by some composite of the two. Many states with a civilian legal system have constitutional arrangements that draw on the traditions of the civil law, often derived from the French or German originals. States that recognise Islamic law as a source of state law may have Islamic features in the Constitution as well.⁴³ The correlation has some functional significance, moreover, to the extent that legal and constitutional systems complement each other. By way of example, the use of a diffuse form of constitutional review by most common law constitutional systems suits the typically indistinct boundary between public and private law in common law states and enables courts to resolve issues before them by reference to any source of applicable law.⁴⁴

But the correlation is not complete. The point was made earlier that so-called mixed legal systems complicate analysis even in comparative private law. Typically, systems are characterised as mixed because they draw on different legal families for private and public law. Relevantly for present purposes, in many such cases, public law follows the contours of the common law tradition.⁴⁵ Already, in such cases, there is a disjunction between the legal system and constitutional arrangements, which may affect the operation of both. And the alignment of Constitutions with legal systems is further disturbed by the fact that many states with legal systems that normally would be assigned to one of the standard families of law have

ONLINE, 2009, <http://www.law.uchicago.edu/alumni/magazine/lifespan> (last visited Dec. 13, 2009).

42. The Australian Constitution, enacted in 1901, before independence, is a case in point. For discussion of the significance of the changes that have occurred, see, e.g., *Sue v. Hill* (1999) 199 C.L.R. 462.

43. Anver M. Emon, *The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES 258 (Sujit Choudhry ed., 2008). More generally, see Khilafah al-'Alam al-Islami, *Assessing the Constitution of Islamic States*, http://www.islamic-world.net/islamic-state/assessing_consti.htm (last visited Sept. 20, 2009).

44. This proposition is subject to any other constraints that might be imposed on the sources of law to which a court might turn as, for example, in federations with dual court systems, of which the United States and Australia are examples.

45. Jacques du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 5, at 477.

constitutional arrangements generally found in association with another. The mingling of an essentially civil law legal system with diffuse constitutional review in some countries in Latin America, under the influence of the Constitution of the United States, is a case in point.⁴⁶ Japan is another example.⁴⁷

C. *Comparative Constitutional Method*

To draw conclusions about the implications for comparative method of these characteristics of constitutional law I return to the methodological issues I identified earlier, drawn from experience in comparative private law.

The first of these concerned the extent to which assumptions can be made about the similarity of legal systems for the purposes of designing comparative projects. I noted in passing that, in relation to private law, this question sometimes is raised in the context of proposals for harmonisation of law, with the aim of achieving effective uniformity. At the very least, in relation to constitutional law, it is clear that harmonisation of constitutional text and structure between states is not a goal, at least for comparative constitutional scholars. In other respects, however, the questions presented for comparison by the dichotomy between similarity and difference are as significant and difficult in constitutional as in private law; and perhaps more so.

Constitutions are not written in a vacuum. Ever since the concept of a Constitution began to emerge, new Constitutions have been modelled on old ones, impelled by a variety of influences ranging from admiration to colonisation and other hegemonic processes and including, more recently, internationalisation. A degree of convergence of constitutional concepts, institutions and norms is the inevitable result. But convergence in form does not necessarily mean convergence in understanding, in values and priorities, or in the operation of constitutional arrangements in practice in the face of a plethora of local contextual factors. There may be convergence in these respects as well in consequence of, for example, interjurisdictional borrowing by judges at the interpretive stage. Nevertheless, drawing on their innate understanding of the nuances and interconnectedness of the constitutional arrangements of their own states, comparative constitutional scholars should be cautious about drawing conclusions too readily from apparently similar constitutional phenomena.

The second question about method identified earlier was the need to

46. Jan Kleinheisterkamp, *Development of Comparative Law in Latin America*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 5, at 261, 268.

47. YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW, ch. VII (Anthony H. Angelo trans., 1989) (1976).

ensure that the subject-matter of comparison is soundly based. I have hesitated over the suitability of the functionalist method for comparative constitutional law, given the importance of historical and cultural understanding. For the moment at least I am persuaded, however, that functional assumptions are latent in many comparative constitutional projects and that functionalism is positively required for the effective design of others, although it is by no means an all-purpose tool. A classic illustration of its use in the constitutional context is the manner in which human rights are protected. A comparison of rights protection in, say, India where a wide range of rights are constitutionalised,⁴⁸ Hong Kong, where rights protection depends on the constitutional status given to international human rights treaties by section 39 of the Basic Law⁴⁹ and Australia, where rights are protected largely through institutional design,⁵⁰ clearly calls for a functional approach rather than one confined to positive law alone.

I use functionalism here to refer to the sophisticated form of equivalence functionalism recently elaborated by Michaels, which, inter alia, assumes that rules are “culturally embedded,” albeit from an outsider’s point of view.⁵¹ Its application for the purposes of constitutional comparison is complicated by the problem of accurately identifying functional equivalence. While some functions are common to most constitutional systems, many others are much less widely shared. An example of a function that is confined to South Asia is the eradication of the practice of untouchability, which the framers of the Constitution of India set out to achieve.⁵²

The third issue, concerning taxonomy, involves the ordering of constitutional arrangements in order to frame a comparative project and in particular a project that is undertaken on a large scale. The nature of Constitutions and, by extension, of constitutional law suggests two hypotheses here, each of which involves some departure from the methodology of private law. The first is that the breadth of a constitutional system calls for a multiple or layered taxonomy, which enables relevant teleological, structural and cultural characteristics of a constitutional system to be taken into account. The second is the possibility that constitutional tradition is a more useful organising principle than legal family or even legal tradition, accepting that the latter may be subsumed in the former. Drawing

48. INDIA CONST. Part III; cf. the Directive Principles of State Policy in Part IV.

49. Andrew Byrnes, *And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong’s Bill of Rights*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 318 (Philip Alston ed., 2000).

50. National Human Rights Consultation, *Report*, ch. 5, http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads (last visited Oct. 28, 2009).

51. Michaels, *supra* note 8, at 365 (2006).

52. ANUPAMA RAO, *THE CASTE QUESTION: DALITS AND THE POLITICS OF MODERN INDIA* 167-78 (2009).

on Glenn, the notion of constitutional tradition might be conceived for this purpose as “transmitted information,” which reflects identity and offers cohesion, but which nevertheless is a “an ongoing bran-tub churned by new generations,” open to influence from outside.⁵³

Classification of constitutional arrangements by reference to either family or tradition has some useful analytical and predictive value. On the other hand, it has downsides as well. One is that, inconveniently for the development of a global discipline, the most influential constitutional traditions for much of the 20th century were those of the United States, the United Kingdom, Germany and France; the extent to which other competitors are now in the field is taken up in the next part. The second is that categories of this kind are also potentially misleading. A constitutional tradition is never inherited in toto and assignment of a particular constitutional system to a “tradition” may deflect consideration of other dimensions of it, some of which will be distinctive to a degree that is likely to deepen over time. At best, therefore, consideration of constitutional tradition can be only a *prima facie* indicator of the types of constitutional arrangements likely to be found in any particular system and of the rationale for them.

The fourth methodological problem concerned the need to identify and take account of cultural context in any comparative legal project. As noted earlier, four dimensions of the concept of culture, identified by Cotterrell for this purpose, are beliefs and values; tradition, including history; material considerations; and emotional reactions and responses.⁵⁴ Each of these components, individually and collectively, may be critical to understanding of a constitutional regime. If anything, they are likely to be more significant for understanding constitutional than private law. On the other hand, the distinctive nature of a Constitution affects—or may affect—the enterprise of understanding it in cultural context. As Gunter Frankenberg has observed, Constitutions often seek to shape aspects of culture, as well as being shaped by it⁵⁵ and their character gives them a chance of doing so.

In any event, there is a question about whose culture is relevant for the purposes of understanding constitutional arrangements. The answer must be that it depends on the subject-matter of the comparison. One option is the culture of the community at large, to the extent that it can be conceived as homogenous.⁵⁶ This possibility rests not so much on the theoretical attribution of the authority for a Constitution to popular sovereignty, but on

53. GLENN, *supra* note 14, ch.1.

54. Cotterrell, *supra* note 22.

55. Frankenberg, *supra* note 5, at 446.

56. In fact, homogeneity is unlikely across all the components of culture that are relevant to constitutional comparison. *See generally* Cotterrell, *supra* note 22.

the practical efforts that increasingly are made to safeguard the efficacy of a Constitution by ensuring popular ownership of arrangements that in other respects may seem abstract, unfamiliar and remote.⁵⁷ In some instances, moreover, the operation of a Constitution will be affected directly by community culture. To take an obvious example: a Constitution that is regarded as significant and expected to shape the actions of organs of state is likely to last longer and to operate more effectively than one that is not.⁵⁸

A second, and not necessarily mutually exclusive option, would focus on the values, beliefs and emotional responses of constitutional elites, drawing by analogy on the view that legal culture is critical for an understanding of private law.⁵⁹ Such elites might comprise, for example, political leaders, elected representatives, senior state employees, judges, constitutional scholars; perhaps the media. It goes almost without saying that the attitudes of people in these positions are likely to be critical in a variety of constitutional contexts. But these groups are also likely to be divided on key questions of culture, including, in some contexts, the constitutional relevance of culture.⁶⁰ They may also be tempted to use arguments about culture strategically, to secure their own vision of the state. In the face of these possibilities, claims of culture cannot be taken at face value and require more thorough evaluation, however fraught such an exercise may be.

Finally, there is a question about whether and if so how pluralism might affect a comparative constitutional project. Constitutional law is state law *par excellence*. Of course, Constitutions are supplemented by other types of laws and other norms, in the form of non-legal practices. It is often not possible, or even sensible, to try to draw a bright line between Constitutions and the rest of the legal order. Typically, however, all such laws and practices are part of the same system of state law and practice, the hierarchical ordering of which is generally relatively clear.

Even in the comparative constitutional context, however, pluralism may be a relevant factor. There may be other, non-state domestic norm systems that compete with the constitutional order and render it ineffective or, at least, less effective than it might otherwise be. The custom and practice of the caste system in India again is an example; conflict between traditional

57. The point is illustrated by the process followed for making the Constitution of South Africa. HEINZ KLUG, *CONSTITUTING DEMOCRACY*, ch. 5 (2000). See generally, Vivien Hart, *Democratic Constitution Making*, 107 SPECIAL REPORT, July 2003, <http://www.usip.org/files/resources/sr107.pdf>

58. Nidhi Eoseewong, *The Thai Cultural Constitution*, 3 KYOTO REV. S.E. ASIA (Chris Baker trans.) (March 2003), <http://kyotoreview.cseas.kyoto-u.ac.jp/issue/issue2/index.html> (noting the disjunction between cultural constitution and successive written Constitutions in Thailand that assists to explain why “the constitution is torn up often”).

59. JOHN BELL, *FRENCH LEGAL CULTURES*, ch. 1 (2001).

60. AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY*, ch. 5 (2006).

attitudes to gender and individual human rights standards is another.⁶¹ There may also be other domestic normative systems that complement constitutional arrangements. The determination of the Constitutional Court of Korea that the location of the capital in Seoul is part of “customary constitutional law” is a recent, although contested, case in point.⁶² Finally and most obviously, constitutional law may co-exist with supra-national or international regimes in competitive conditions, where the formal legal hierarchy is unclear or its application is unpredictable. The interpenetration of domestic constitutional and international law is now a significant phenomenon and is taken up again in the next part.

III. CONDITIONS OF CONSTITUTIONAL MODERNITY

The discussion so far has deliberately relied on a somewhat traditional, acontextual understanding of constitutional law, in order to focus on the points of similarity and difference between comparative private and comparative constitutional law. It is not possible to reach conclusions about the methodology of comparative constitutional law in the first part of the 21st century, however, without factoring in the forces for change in the discipline that have emerged in recent decades, many of which can be traced to the end of the cold war. These include the growing significance of international law and the impact of globalisation in a variety of guises.⁶³ The results, as far as the Constitutions of the world are concerned, can conveniently be summarised as proliferation, innovation, internationalisation and cross-fertilisation, the influence of all of which is extended by the extraordinary advances in communication that have been made possible by information technology. Famously, this period has also been characterised by some erosion of the sovereignty of states. This development has by no means been all one way, however. The state remains the most significant, although no longer the sole, subject of international law. And in the first decade of the 21st century a collection of factors has tended to reinforce the perceived potential of the state as the champion of its people in global affairs. These have included security concerns in the face of international terrorism, successive regional and global fiscal crises and the struggle to find an acceptable and effective solution to climate change.

61. Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUM. RIT. Q.Y. 838, 848 (2000).

62. Relocation of the Capital City Case, Judgment of Oct. 21, 2004, 2004 Hun-Ma 554, 566 (Const. Ct.).

63. For one of many analyses of the impact of internationalisation and globalisation on state constitutions see Anne Peters, *The Globalization of State Constitutions*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 251, 251-52 (Janne Nijman & André Nollkaemper eds., 2007).

The remainder of this part examines the nature of these various forces for change in the discipline of constitutional law more closely. The next part identifies their principal implications for constitutional comparison.

Over the last two decades, there has been a marked proliferation of new Constitutions. As a rough estimate, 91 new Constitutions or constitutional-type instruments for states and other distinct polities have come into force since 1990; and 26 of these were promulgated from 2000.⁶⁴ The explanation for some of this activity lies in the emergence of new states. Some indication of the extent to which this has occurred is offered by the increase in membership of the United Nations from 159 member states in 1990 to 192 members in 2006, although admittedly it is not a perfect guide.⁶⁵ On any view, however, there are now more constitutionalised polities than there were before and thus more players on the constitutional field. In any event, the increase in new Constitutions for old states is significant as well for present purposes, for the insight that it offers into changes in the conception, substance or process for making Constitutions that may be taking place. In this connection it should be noted that the statistics understate the potential for constitutional innovation because they do not take into account major changes to existing Constitutions that undoubtedly have occurred over the past 20 years.⁶⁶

The extent of constitutional innovation that has occurred during this period requires more targeted research. Anecdotally, however, it is significant. A growing literature documents experimentation with the process of Constitution making, in the wide range of contemporary conditions in which it takes place.⁶⁷ There have been shifts in ways of thinking about Constitutions, of which the elaboration of the concept of transitional constitutionalism, in the face of experience in East Asia and elsewhere, is an

64. The data is derived from the Central Intelligence Agency, *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/index.html> (last visited Dec. 17, 2009). Non-state polities included in these figures include Hong Kong and Macao.

65. United Nations, *Growth in United Nations Membership, 1945-present*, <http://www.un.org/en/members/growth.shtml> (last visited Dec. 17, 2009). These figures are imperfect for present purposes because they do not include non-state polities or polities that, for any reason, have not been admitted to the UN, of which Taiwan is an example. The Constitutions or constitutional instruments of these polities nevertheless contribute to world constitutional experience. These figures also include pre-existing states that have only recently been admitted to the UN including, for example, Switzerland.

66. Thus they do not include, for example, Hungary, where the Constitution of 1949 was extensively amended following the fall of communism: CATHERINE DUPRÉ, *IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS* 31 (2003).

67. *E.g.*, YASH GHAI & GUIDO GALLI, *CONSTITUTION BUILDING PROCESSES AND DEMOCRATIZATION* (2006); VIVIEN HART, *DEMOCRATIC CONSTITUTION MAKING* (2003); DEVRA C. MOEHLER, *DISTRUSTING DEMOCRATS: OUTCOMES OF PARTICIPATORY CONSTITUTION MAKING* (2008); ANDREW ARATO, *CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ* (2009); Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, in 5 *ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE* 201 (John Hagan ed., 2009).

example.⁶⁸ And there have been many new initiatives in the substance of Constitutions: the matters for which Constitutions make provision and the way in which they do so. These have been driven by a variety of factors: popular demand; the need to resolve new problems, including deep cleavages within societies; the impact of internationalisation and globalisation, both generally and on traditional concepts of citizenship and territoriality; the interest in new ideas that is naturally fostered by such a ferment of activity.⁶⁹ Some of the many responses range from experimentation with the constitutional entrenchment of social and economic rights in justiciable form;⁷⁰ constitutional recognition of environmental rights and duties;⁷¹ a host of mechanisms to accommodate divided societies, including the devolution of public power along ethnic lines;⁷² the development of techniques to balance rights protection with parliamentary sovereignty in the particular form associated with the British constitutional tradition;⁷³ the extension of voting rights to the diaspora;⁷⁴ and various formulations designed to reconcile recognition of the *sharia* with constitutional protection of rights.⁷⁵

Internationalisation refers to the development of international and in some regions supra-national law through which states become committed to shared norms of a broadly constitutional kind. Typically, such norms have effect in domestic law and practice in one way or another, although there is an extraordinary mosaic of ways in which this occurs.⁷⁶ In some states both customary international law and treaties to which the state is a party automatically have the force of law and in a few international law overrides

68. Jiunn-Rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: East Asian Perspective*, 4 NTU L. REV. 145 (2009).

69. For a wide-ranging survey, see Yash Ghai, *A Journey Around Constitutions: Reflections on Contemporary Constitutions*, 122 S. AFRICAN L.J. 804 (2005).

70. S. AFR. CONST. 1996, ch.2.

71. 2004 CHARTER FOR THE ENVIRONMENT (Fr).

72. CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? (Sujit Choudhry ed., 2008), *supra* note 43; on “ethnic federalism,” see CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA.

73. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. OF COMP. L. 707 (2002).

74. In 2007, it was estimated that 120 countries allowed diaspora voting to some degree; a further 9 had it under consideration; and 90 made no provision for diaspora voting. Nine of the first group also provided representatives of the diaspora in the national Parliament. See Andy Sundberg, *Diaspora Voting Rights in 214 Countries of the World* (Apr. 3-4, 2008), <https://www.overseasvotefoundation.org/initiatives-summit2008-proceedings>; Andy Sundberg, *Diasporas Represented in their Home Country Parliaments* (Apr. 3-4, 2008), <https://www.overseasvotefoundation.org/initiatives-summit2008-proceedings> (drawing on INTERNATIONAL IDEA, VOTING FROM ABROAD: THE INTERNATIONAL IDEA HANDBOOK (2007)).

75. *E.g.*, CONSTITUTION OF IRAQ, arts. 2, 3, 92.

76. See generally NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW, *supra* note 63.

the Constitution, generally or in specified circumstances.⁷⁷ Increasingly, international norms are transposed directly into new Constitutions, in preference to reliance on the formulation of rights in the Constitutions of other states.⁷⁸ Even in the absence of any formal act of incorporation, international legal norms are likely to have indirect effect in state public law, through adjudicative processes.⁷⁹ Importantly, for present purposes, national judges sometimes take international law into account in the interpretation and application of the Constitution and in some states they are constitutionally required to do so.⁸⁰

Cross-fertilisation, on the other hand, is the product of globalisation, understood here to refer to all forms of interaction between people, institutions and economic and social actors across jurisdictional boundaries. It has an impact on the global flow of constitutional ideas at many levels and in a variety of ways. Constitution-makers and their advisers invariably look to the experience of other states for insight into both process and substance, at the point at which a Constitution is being developed. The emergence of international and regional constitutional support organisations further encourages the spread of global constitutional experience.⁸¹ The interconnectedness of world fiscal and economic arrangements often drives the direction of constitutional design, either as the price of international assistance or in order to develop and maintain competitive advantage.⁸² In other respects, also, political leaders are likely to consider practice elsewhere in determining policies of a broadly constitutional kind: in relation to electoral law and administration, for example, or in developing anti-corruption measures. Scholarly networks of various kinds provide a medium through which emerging perspectives on constitutional law spread

77. *E.g.*, Grondwet voor het Koninkrijk der Nederlanden [Constitution of the Kingdom of the Netherlands], arts. 91, 93.

78. See the examples of Colombia, the Czech Republic, the Philippines and Romania cited in HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1090 (3d ed. 2008). See generally Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201 (2008).

79. This is so even in dualist states: Fiona de Londraw, *Dualism, Domestic Courts, and the Rule of International Law*, in *IUS GENTIUM* (Mortimer Sellers ed., forthcoming 2009). For an argument that draws on the principles of conflict of laws see Karen Knop, Ralf Michaels & Annelise Riles, *International Law in Domestic Courts: A Conflict of Laws Approach*, 103 AM. SOC'Y INT'L L. PROC. (forthcoming 2009).

80. *E.g.*, S. AFR. CONST. 1996, art. 39(1).

81. The European Commission for Democracy through Law (the Venice Commission) is a telling example. All 47 members of the Council of Europe are members of the Venice Commission; other non-European members in 2009 were Kyrgyzstan, Chile, the Republic of Korea, Morocco, Algeria, Israel, Tunisia, Peru and Brazil. Eight other states are observers. See also International IDEA, which has 25 members drawn from Africa, the Americas, Asia, Europe and Oceania.

82. Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN ST. INT'L L. REV. 89, 110 (2008); see also Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985 (2008-2009).

through the global constitutional community.⁸³

Cross-fertilisation takes place in the course of constitutional adjudication as well. Despite the angst recently generated by this practice in the United States, constitutional judges increasingly consider the perspectives, doctrines and conclusions of courts of other states in dealing with the questions that come before them and in framing their own reasons.⁸⁴ In the case of some courts, their ability to do so is enhanced by a practice of employing clerks from other jurisdictions.⁸⁵ Courts in some other polities draw some or all of their judges from other states, with similar effect.⁸⁶ In both this and other contexts, cross-fertilisation is considerably facilitated by the ease and speed with which increasingly sophisticated technology enables information to be obtained about constitutional developments elsewhere. At least for English speakers, the flow of information is assisted by a growing tendency for the jurisprudence of constitutional courts in some jurisdictions where English is not an official language to be made available in English nevertheless.⁸⁷

The consequences of internationalisation and globalisation for the institution of the state are ambiguous; a situation that is likely to persist for some time to come. The tendency of these forces to erode the influence of the state is in tension with the continuing significance of states for the vast majority of their peoples. But on any view some changes have occurred that are relevant from the standpoint of constitutional law. States are no longer fully sovereign, if sovereignty is understood in absolute terms, encompassing both theory and practice. The degree of involvement of the international community in the governance of states raises questions for the very conception of a Constitution and the sources from which it derives its legitimacy. And the hitherto close affinity between a state, its territory and its

83. Examples range from the International Association of Constitutional Law, <http://www.iacl-aidc.org/en/index.htm> (last visited Dec. 17, 2009) to the US based website [Constitutionmaking.org](http://www.constitutionmaking.org) with its Comparative Constitutions blog: <http://www.constitutionmaking.org/default.html> (last visited Dec. 17, 2009).

84. For evolving outcomes of research on the extent of this practice across a wide range of countries and regions, see the activities of the Foreign Law Interest Group of the International Association of Constitutional Law. Interest Group: Use of Foreign Precedents by Constitutional Judges, <http://www.unisi.it/dipec/en/interestgroup.php> (last visited Dec. 17, 2009).

85. See, e.g., Supreme Court of Israel, Foreign Clerkships with the Supreme Court of Israel, http://elyon1.court.gov.il/eng/Clerking_opportunities/main.html (last visited Dec. 17, 2009) (advertising for clerks from the United States, Europe and Commonwealth countries for the purposes of comparative law analysis).

86. The Hong Kong Court of Final Appeal Ordinance 1997 authorises the Court to invite judges from other common law jurisdictions to sit on the Court as a member of the Court. In relation to the Pacific see, for example, Peter MacFarlane, *Some Challenges Facing Legal Strengthening Projects in Small Pacific Island States*, 4 J. COMMONWEALTH L. & LEGAL EDUC. 103 (2006).

87. For example, Constitutional Court of Korea, <http://english.court.go.kr/> (last visited Dec. 17, 2009); Justices of the Constitutional Court, Judicial Yuan, Taiwan, http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p01_03.asp (last visited Dec. 17, 2009).

people is now somewhat more complex. Threats to the internal territorial hegemony of states that are presented by internationalisation are complemented by a tendency to constitutionalise some forms of extraterritorial action by states.⁸⁸ Increasingly heterogeneous populations with multiple affinities and allegiances, which are in part the product of population movements,⁸⁹ are a catalyst for a decline in the significance of formal citizenship.⁹⁰ One of the many implications of these developments is the erosion of the cultural identity of states, in the sense that culture is less likely to be bounded by state borders and, conversely, that a state is more likely to be host to a multiplicity of cultures.⁹¹

IV. IMPACT OF THE PRESENT ON CONSTITUTIONAL COMPARISON

What are the consequences of the context in which Constitutions operate in the 21st century for the methodology of comparative constitutional law?

On the face of it, most of the changes that have occurred are a catalyst for convergence of national constitutional systems. To the extent that convergence is taking place, moreover, it has implications for most of the methodological issues already explored: the approach to comparison and the utility of the functional method; the significance of the barrier presented by cultural difference; the difficulty of understanding another's system in adequate depth.

The arguments in favour of convergence are relatively clear. There has been a slow but steady spread of forms of democracy and of at least a minimalist understanding of the rule of law. Increasingly, there is a shared conception of a constitution as an instrument that represents fundamental law, derives its authority from a sovereign people and needs to be taken seriously by the organs of state, at least as far as public and international perception are concerned. In one form or another, the institution of judicial review of the constitutionality of state action, including legislation, is gaining acceptance. There is some growing similarity in the substance of Constitutions, involving both text and institutional structure. Equally, similarities in the interpretation of Constitutions are facilitated by trans-border judicial dialogue. Arguably, there may even be some

88. For a review of developments in three countries, the United States, Canada and United Kingdom, see Chimène I. Keitner, *Rights Beyond Borders* (Oct. 2, 2009) (unpublished manuscript, available at <http://ssrn.com/abstract=1480886>).

89. In 2008 the United Nations estimated that international migrants would constitute 3.1% of the total global population in 2010, but the proportion varies between regions, from 9.5% in Europe to 1.5% in Asia: United Nations, Department of Social and Economic Affairs, *International Migrant Stock: The 2008 Revision*, <http://esa.un.org/migration/> (last visited Dec. 17, 2009).

90. For a detailed examination of this phenomenon see Symposium, *The Evolving Concept of Citizenship in Constitutional Law*, 8 INT'L J. CONST. L. (forthcoming 2010).

91. Cotterrell, *supra* note 22.

convergence of values, if significance can be attached to the commitments of states to norms of a constitutional character laid down by international law.⁹² Reflecting on these trends, Mark Tushnet has described the globalisation of constitutional law as “inevitable,” with reference both to the structures of constitutional systems and their protection of rights.⁹³ Jiunn-Rong Yeh and Wen-Chen Chang have argued that “most nations . . . now have similar constitutions.”⁹⁴ Anne Peters has claimed that Constitutions are globalising both in form and substance, identifying the rule of law, democracy, social security and the organisation of territory as four of the core principles in relation to which convergence has occurred.⁹⁵ She has argued further that, in consequence, national constitutions are now only part of a “compound constitutional system” supplemented by international law.⁹⁶

Prudence suggests caution, however. Inevitably, convergence is patchy: most pronounced, although far from complete, in relation to rights; less reliable in relation to institutional features of a Constitution.⁹⁷ As in earlier times, it remains true now that apparent similarity may mask underlying difference. Be they ever so similar in design, constitutional arrangements are likely to have different effects in different cultural contexts and in states in different stages of constitutional development. It follows that it cannot be assumed that principles and institutions adopted by one state from another will operate in precisely the same way, even in the equally unlikely event that they are adopted in precisely the same form.⁹⁸ In the interconnected setting of a Constitution, moreover, adopted institutions will be affected by the rest of the Constitution, to which they are likely gradually to adapt.⁹⁹ The challenge of comparison is further exacerbated by the generality with which many key constitutional concepts are expressed, leaving considerable scope for varied understandings. The rule of law is a case in point, capable of embracing both arrangements that require no more than mere compliance

92. See Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223, 225 (2006) (explaining the views of Christian Tomuschat on the role of international law in “legitimizing, limiting and guiding politics”); Yeh & Chang, *supra* note 82, at 101, 106, also noting that some of the norms of customary international law derive from common state practice and do not require explicit state consent.

93. Tushnet, *supra* note 82, at 987.

94. Yeh & Chang, *supra* note 82, at 109.

95. Peters, *supra* note 63, at 271, 305.

96. *Id.* at 257.

97. Vicki C. Jackson, *Narratives of Federalism: of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 272 (2001).

98. For this reason, in the context of private law, Teubner described such transplants as “irritant.” Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

99. The adoption of the Swiss style referendum for constitutional change by Australia, with its culture of parliamentary sovereignty, is an example.

with law and those that expect the law to meet stipulated standards.¹⁰⁰

More significantly still, there are features of the contemporary global constitutional scene that foster diversity and difference. Some of these have been identified already: a larger number of constitutionalised states; the recent degree of constitutional innovation. Diversity is further promoted by a new self-confidence on the part of many states in relation to questions of governance and constitutional design, leading them to explore the implications of their own culture and historical experiences as bases for local constitutional solutions.¹⁰¹ In a parallel development, the pattern of constitutional borrowing has become increasingly eclectic, particularly amongst newly democratising states.¹⁰² Relevantly for present purposes, those who make, use, interpret, apply and analyse Constitutions are more likely now to draw insight from an increasingly wide range of available sources, rather than confining themselves to a particular legal or constitutional tradition.¹⁰³ Less usual combinations of institutions and concepts produce correspondingly less predictable results.¹⁰⁴

Increasing diversity in the flows of constitutional information and influence, heralding a breakdown of constitutional traditions, has other implications for comparative constitutional law, two of which are considered further here. The first concerns the state of constitutional theory. We know that the older, established, western constitutional systems from which most of the world's constitutions derived in the 19th and 20th centuries were closely intertwined with and justified by theories informed by the historical experience of their respective states.¹⁰⁵ These theories continued to be honed over time, also by reference to historical experience. What happens to these

100. THE RULE OF LAW: HISTORY, THEORY AND CRITICISM (Pietro Costa & Danilo Zolo eds., 2007); Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677 (2003).

101. These solutions in turn become available for adoption elsewhere. For an example, see Werner Menski, *Indian Secular Pluralism and Its Relevance for Europe*, in LEGAL PRACTICE AND CULTURAL DIVERSITY 31 (Ralph Grillo et al. eds., 2009).

102. Yeh & Chang, *supra* note 82, at 122.

103. The use of foreign law by the Constitutional Court of Indonesia is described by Justice Harjono in "The Indonesian Constitutional Court." The judge emphasises, however, that the external sources are not used as the main source and are confined to "carefully studied . . . practices of the Constitutional Courts of friendly countries." Harjono, *The Indonesian Constitutional Court*, <http://www.ccourt.go.kr/home/english/introduction/pdf/05.pdf> (last visited Dec. 17, 2009).

104. The adaptation of the German Bundesrat to create the South African National Council of Provinces is one example. Christina Murray, *Republic of South Africa*, in LEGISLATIVE, EXECUTIVE AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES 259 (Katy Le Roy, Cheryl Saunders & John Kincaid eds., 2006).

105. Consider, for example, the link between the logic of *Marbury v. Madison*, 5 U.S. 137 (1803) and the acceptance of written Constitutions as fundamental law and the link between the theories of Hans Kelsen and the structure and functions of a specialist Constitutional Court. Theo Öhlinger, *The Genesis of the Austrian Model of Constitutional Review of Legislation*, 16 RATIO JURIS 206 (2003). A similar point might be made about the link between the events of the French Revolution and acceptance of the right of a Nation to give itself a Constitution: EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? 119 (M. Blondel trans. & S. E. Finer ed., 1964).

theories, in the rush of constitutional transplants? There are several possibilities: that the theories are transferred as well, but without historical roots; that local theories emerge in the recipient states, with implications for the depth of convergence; that transplanted arrangements are only lightly theorised, if they are theorised at all, with implications for the discipline; and that all these more localised theories are being supplanted by others that purport to be global, but that nevertheless need to be tested against the lived experience of states. These questions are not new, but were more easily overlooked as long as transplantation occurred within more or less clearly defined traditions as part, for example, of the colonisation process. They now require more sustained attention, drawing on the knowledge base and skills of comparative constitutional law.

A second issue raised by the erosion of traditions is the familiar problem of taxonomy. I suggested earlier that, before the intervention of the current phase of globalisation, constitutional arrangements might be classified by reference to constitutional traditions, which in turn are influenced by, although not necessarily co-extensive with legal traditions. For this purpose, I used the concept of tradition in the way developed by Patrick Glenn, as determined by degrees of influence, with boundaries that necessarily are “fuzzy.”¹⁰⁶ It follows that my conception of taxonomy or classification also is somewhat loose, providing only an indication of some of the characteristics that may be found, which may call for independent verification.

Loose as it is, once overlaid by conditions of globalisation with their encouragement to less discriminate borrowing, the concept of classification by reference to constitutional tradition becomes less satisfactory still. It may be asked, therefore, why classification by reference to traditions should not be abandoned altogether. The answer is that it still has some utility in relation to many—perhaps most—states. The dynamics of path dependency are still operative. There are some incentives to remaining broadly within the same constitutional tradition, in terms of continuity, familiarity and complementarity with the rest of the legal system. Consideration of constitutional tradition still has some predictive value: within the Asian region, for example, my understanding continues to be assisted by knowledge of the fact that the constitutional arrangements of India have been substantially influenced by common law constitutional institutions, principles and practices while those of, for example, Indonesia have not.

Nevertheless, the extent of cross-fertilisation is such that this classification needs to be handled with increasing caution. On any view,

106. H. Patrick Glenn, *Legal Families and Legal Traditions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 5, at 421, 425.

provision needs to be made for a “non-aligned” category of states that cannot helpfully be assigned to any tradition, even with the usual caveats attached. And the time may have come either to begin investigating the insights that can be derived from the somewhat different conception of constitutional family trees¹⁰⁷ or to consider abandoning genealogy altogether in favour of a predominantly historical approach.

A classification based on traditions, or even influences, is historical and conceptual in character. Given the character of Constitutions, it would be useful to have another that takes account of contextual difference as well, including the significance of a Constitution in the system of law and government. There have been various attempts to categorise constitutions for this purpose over time. Writing in 1957, for example, in response to the then-prevailing geopolitical climate, Karl Loewenstein distinguished between “nominal,” “semantic” and “normative” Constitutions.¹⁰⁸ Prompted by reflection on the Constitution of South Africa, Cass Sunstein has developed a distinction between “preservative” and “transformative” constitutions.¹⁰⁹ In his opening remarks to the Third Asian Forum for Constitutional Law, Juinn-Rong Yeh identified three “changing paradigms” of modern constitutionalism: traditional constitutionalism; transitional constitutionalism; and transnational constitutionalism.

Each of these categorisations offers insights into what may be significant differences between constitutions for comparative purposes. The more recent reflections of Sunstein and Yeh suggest two additional points. One is that it is no longer possible, if ever it was, to draw a bright line between normative and other Constitutions and that the line between “constitutional” and other approaches to governance also may be indistinct.¹¹⁰ The second is that, on this basis, even within the category of Constitutions that might loosely be described as “normative,” there are important distinctions to be drawn.

I suggested earlier that Mattei’s classification of legal systems as professional, political or traditional might lend itself to adaptation to

107. In relation to private law, see Esin Örüçü, *Family Trees for Legal Systems: Towards a Contemporary Approach*, in EPISTEMOLOGY AND METHODOLOGY IN COMPARATIVE LAW, *supra* note 27, at 359.

108. Albert H.Y. Chen, *A Tale of Two Islands: Comparative Reflections on Constitutionalism in Hong Kong and Taiwan*, 37 H.K.L.J. 647, 651 (2007) (citing KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENT PROCESS 147-53 (1957), describing the conception of a “normative” constitution as an essential ingredient of the practice of authentic constitutionalism).

109. CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 68 (2002).

110. See also, on this point, the notion of a constitutional “tipping point” developed by Victor Ramraj to describe the point where “the politics of constitutionalism irreversibly gives way to an entrenched constitutional culture . . .,” in Victor Ramraj, Constitutional Tipping Points: Sustainable Constitutionalism in Theory and Practice, Paper Presented at the Third Asian Forum for Constitutional Law (Sept. 25, 2009) (transcript available in the National Taiwan University Library).

comparative constitutional law. Mattei's approach is driven by conceptions or "patterns" of law, grouped by reference to the primary source of influence on social behaviour. His categories offer potentially useful surrogates for different constitutional paradigms, which may also help to give some insight into the distinction between constitutional arrangements that are relatively established and those that are in the process of significant transition. Thus a "professional" conception of a Constitution might refer to one in which the Constitution has significant normative effect although not necessarily as law;¹¹¹ under a "political" conception outcomes might tend to be governed almost entirely by the political process;¹¹² and a "traditional" conception might be understood as one in which decisions of a constitutional kind are governed primarily by religious or other cultural traditions.¹¹³

Mattei has acknowledged that each of the patterns is in play to a degree in each legal system and that in particular cases outcomes may be determined by one of the less dominant patterns.¹¹⁴ He insists, nevertheless, on the classification of legal systems according to the pattern that is perceived to have hegemony, while accepting that hegemony may change over time. His concessions about variable influences must necessarily apply in the constitutional context as well. In addition, for a more nuanced taxonomy of constitutions, it may be useful to develop an approach whereby the proportionate contribution of each of the patterns of influence, however approximately determined, can be taken into account.

One final observation about the contemporary constitutional scene concerns the emergence of constitutional pluralism, understood to reflect the perception that, at least in some states, the Constitution is in competition with other legal orders.¹¹⁵

It will be recalled that comparative law has had a longstanding fascination with various forms of pluralism within the confines of the state. Critics have argued that the domination of comparative law by western legal scholars has caused the role of state law to be exaggerated and the need for the coherence of the legal system to be overstated, at the expense of an appreciation of other, sometimes competing, legal and non-legal norms that may significantly affect social behaviour.¹¹⁶ This perception was more significant for private than for public law, although it may have had some implications for the latter as well. But the interpenetration of domestic

111. Mattei, *supra* note 3, at 23.

112. *Id.* at 28.

113. *Id.* at 35.

114. *Id.* at 14.

115. A range of perspectives is canvassed in the papers on "Constitutionalism and Legal Pluralism" in Symposium, *Constitutionalism in an Era of Globalisation and Privatisation*, 6 INT'L J. CONST. L. (2008).

116. TWINING, *supra* note 2, at 232.

constitutional and public international law has provided additional sources of law that challenge the monopoly and ultimate predictability of state law in ways that undoubtedly affect the constitutional order.

Much of the initial thinking about constitutional pluralism was stimulated by the unusual character of the relationship between the European Union and the constitutional arrangements of its member states, creating two levels of governance each of which had “internally plausible claims to ultimate authority.”¹¹⁷ The most famous illustration comes from Germany, where the Constitutional Court asserted its competence in successive *Solange* cases to determine the validity of European law vis-à-vis the German Constitution, in uneasy co-existence with the competence of the European Court of Justice.¹¹⁸ Arrangements comparable to the European Union, with similar constitutional effects could be, although they have not yet been, reproduced in other regions. Meanwhile, however, prompted by reflection on the relationship between legal orders in Europe, it is possible to understand the increasingly porous boundary between constitutional and international law, accompanied by some erosion of the hierarchy between the two, as a form of pluralism that, at least for the moment, affects states in different degrees.¹¹⁹ Krisch has claimed that constitutional pluralism has advantages in terms of adaptability, space for contestation and checks and balances in managing the framework of governance for diverse communities.¹²⁰ If so, it may have potential that could usefully be developed to manage diversity and conflict within particular states as well.

V. MAXIMISING THE GENE POOL

For a truly global discipline of comparative constitutional law, the methodology for comparison must apply effectively, and be recognised as having effective application, to constitutional arrangements in all parts of the world. In what follows, I draw together some general propositions about method that take into account of the lessons of comparative law, the nature of constitutional law and the global context in which Constitutions operate in the early part of the 21st century.

First, the conception of a constitution as a body of norms that empowers

117. Nico Krisch, *The Case for Pluralism in Postnational Law* (London Sch. of Econ. & Political Sci. Law, Soc’y & Econ. Working Papers, No. 12/2009), available at <http://ssrn.com/abstract=1418707>.

118. *Solange I*, BVerfGE 37; *Solange II*, BVerfGE 73, Brunner, BVerfGE 89; *Solange III*, 2BvE 2/08. See generally Jacques Ziller, *Solange III*, or the *Bundesverfassungsgericht*’s ‘Europefriendliness’. On the Decision of the German Federal Constitutional Court over the Ratification of the Treaty of Lisbon (Ana Julia Aliverti trans., 2009), <http://ssrn.com/abstract=1474698>.

119. Peters, *supra* note 63, at 267.

120. *Id.*

and constrains public institutions and that, typically, has the status of fundamental law is increasingly widely shared. Exactly how widely and at what level of generality requires further research. To the extent to which this development has occurred, however, it provides a platform for a broader and more inclusive discipline of comparative constitutional law.

Secondly, there has been and is likely to continue to be a significant degree of convergence of constitutional arrangements themselves, affecting text, institutional design, interpretation, and, somewhat more speculatively, values. This is not a phenomenon that is peculiar to the 21st century, but there are features of our times that have accelerated the process. Convergence contributes further to the ease of constitutional comparison and thus is useful for present purposes.¹²¹ It is not an unqualified good, however. The world of the 21st century has not attained a peak of perfection in the design and operation of constitutional arrangements, in terms of either acceptance or performance. There are advantages in a diversity of approaches to constitutional government and in a degree of competition between them; this, indeed, is one of the reasons for seeking a more global approach to comparative constitutional law. And as the circumstances change with which Constitutions must deal, constitutional innovation is required.

Thirdly, the extent of convergence should not be overestimated. No Constitution is exactly the same in form or operation. Constitutional concepts have different meanings in different system. In any event, Constitutions are complex organisms. To some degree at least, every Constitution is affected by its history, including the circumstances of its making; the context in which it operates; the often unarticulated assumptions on which it is based; the priority accorded to particular values; and a tendency to develop organic characteristics over time. The significance of these features may be mitigated, but it is unlikely to be eliminated, by the forces for constitutional convergence.

Further, it is plausible that contemporary conditions are a catalyst for diversity as well. This case depends on the extent of constitutional innovation; the emergence of new patterns of influence; some mixing of constitutional traditions; the growing constitutional self-confidence of a larger number of states; and the occasional resurgence of nationalist impulses. If the perception of these contradictory forces is correct, comparative constitutional method may be different in some respects, but not necessarily less challenging.

The persistence of difference affects the way in which a comparative project is conceived and given effect. Understanding of the reasons why

121. See Michaels, *supra* note 8, at 370 (on the conditions that ground comparability for the purposes of the functionalist method). More generally, see Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713 (2004).

particular constitutional arrangements exist in a particular state and of their operation in practice will often call for historical or contextual analysis or both. Frequently, nevertheless, a functional approach is appropriate for the design of a comparative project, whether supplemented by other techniques or not. In this case, the challenge is to be sure that the function under consideration is relevantly equivalent in the participating jurisdictions; to make allowance for the fact that the mechanisms through which the function is achieved may serve a variety of roles in an interconnected constitutional system; to be aware of the impact of context and culture on the way in which the function is performed.

These developments require revision of old approaches to taxonomy although it is premature to abandon them altogether. Constitutional classificatory systems should err on the side of inclusion. The aim should be to develop a taxonomy that is apt to encompass the systems of the world but that also allows for evolution, makes provision for marginal cases and does not freeze constitutional understanding around the experience of the traditional constitutional states. My present inclination is to develop a multi-layered but flexible taxonomy that combines constitutional tradition, suitably tempered by consideration of influences from other sources; with geographical region, to capture elements of culture; and with an adaptation of Mattei's classificatory framework. But all of this requires further thought.

The seventh and most challenging proposition concerns culture: the elephant in the room that discourages comparison altogether if it is given too much weight but renders comparison superficial and misleading if it is ignored. Elements of culture could be captured by the classificatory approach suggested earlier. It may also be that the significance of cultural difference is diminished to a degree both by the nature of constitutional law as state law and by the effects of globalisation. This cannot, however, be assumed. Otherwise, evaluation of the implication of culture must be left to individual project design. Meeting this challenge is assisted by the scholarly networks and information tools that also are products of globalisation, which offer mechanisms through which understanding can be sought and conclusions tested.

The final point concerns pluralism. In any state there may be legal and non-legal norms of a cultural kind that affect the operation of the Constitution in practice. But in conditions of internationalisation, supra-national and international law offer additional sources of law that affect constitutional arrangements to an extent and in a variety of ways that differ between states. It is necessary now, if it was not before, for constitutional comparativists to engage with the phenomenon of

international law, in order to fully grasp their own discipline. There is also work to be done, through collaboration between international and domestic public lawyers, to bridge the gap between the universalist assumptions of international law and the realities of constitutional difference.

REFERENCES

- Ackerman, B. (1991). *We the people, volume 1, foundations*. Cambridge, MA: The Belknap Press of Harvard University Press.
- Arato, A. (2009). *Constitution making under occupation: The politics of imposed revolution in Iraq*. New York, NY: Columbia University Press.
- Arendt, H. (1973). *On revolution*. London, England: Penguin Books.
- Bell, J. (2001). *French legal cultures*. London, UK: Butterworths.
- Bell, J. (2002). Comparing public law. In A. Harding & E. Özücü (Eds.), *Comparative law in the 21st century* (pp. 235-248). The Hague, The Netherlands: Kluwer Law International.
- Bogdandy, A. von. (2006). Constitutionalism in international law: Comment on a proposal from Germany. *Harvard International Law Journal*, 47, 223-242.
- Boix, C., & Stokes, S. C. (Eds.). (2007). *The Oxford handbook of comparative politics*. Oxford, UK: Oxford University Press.
- Brunner, BVerfGE 89.
- Byrnes, A. (2000). And some have bills of rights thrust upon them: The experience of Hong Kong's Bill of Rights. In P. Alston (Ed.), *Promoting human rights through Bills of Rights: Comparative perspectives* (pp. 318-392). New York, NY: Oxford University Press.
- 2004 Charter for the Environment (Fr).
- Central Intelligence Agency. (n.d.). The world factbook. Retrieved from <https://www.cia.gov/library/publications/the-world-factbook/index.html>
- Chen, A. H.Y. (2007). A tale of two islands: Comparative reflections on constitutionalism in Hong Kong and Taiwan. *Hong Kong Law Journal*, 37, 647-688.
- Choudhry, S. (2006). *The migration of constitutional ideas*. Cambridge, UK: Cambridge University Press.
- Choudhry, S. (Ed.). (2008). *Constitutional design for divided societies: integration or accommodation?*. Oxford, UK: Oxford University Press.
- Constitution of India, Part III, IV.
- Constitution of Iraq, arts. 2, 3, 92.
- Constitution of the Federal Democratic Republic of Ethiopia.
- Constitutional Court of Korea. (n.d.). Retrieved from <http://english.court.go.kr/>
- Constitutionmaking.org. (n.d.). Retrieved from <http://www.constitutionmaking.org/default.html>

- Costa, P., & Zolo, D. (Eds.). (2007). *The rule of law: History, theory and criticism*. Dordrecht, The Netherlands: Springer.
- Cotterrell, R. (2006). Comparative law and legal culture. In M. Reimann & R. Zimmermann (Eds.), *The Oxford handbook of comparative law* (pp. 709-738). Oxford, UK: Oxford University Press.
- Cotterrell, R. (2008). Law and culture—Inside and beyond the nation state. *Retfærd: Nordisk Juridisk Tidsskrift*, 31(4), 23-36.
- Dannemann, G. (2006). Comparative Law: Study of similarities or differences? In M. Reimann & R. Zimmermann (Eds.), *The Oxford handbook of comparative law* (pp. 383-420). Oxford, UK: Oxford University Press.
- Dupré, C. (2003). *Importing the law in post-communist transitions*. Portland, OR: Hart.
- Eoseewong, N. (2003, March). The Thai cultural constitution (C. Baker Trans.). *Kyoto Review SouthEast Asia*, 3. Retrieved from <http://kyotoreview.cseas.kyoto-u.ac.jp/issue/issue2/index.html>
- Frankenberg, G. (2006). Comparing constitutions: Ideas, ideals and ideology—toward a layered narrative. *International Journal of Constitutional Law*, 4, 439-459.
- Gardbaum, S. (2008). The myth and the reality of American constitutional exceptionalism. *Michigan Law Review*, 107, 391-466.
- Gardbaum, S. (2002). The new Commonwealth model of constitutionalism. *American Journal of Comparative Law*, 49, 707-760.
- Ghai, Y. (2005). A journey around constitutions: Reflections on contemporary constitutions. *South African Law Journal*, 122, 804-831
- Ghai, Y., & Galli, G. (2006). *Constitution building processes and democratization*. Stockholm, Sweden: International IDEA.
- Ginsburg, T., Chernykh, S., & Elkins, Z. (2008). Commitment and diffusion: How and why national constitutions incorporate international law. *University of Illinois Law Review*, 2008, 201-237.
- Ginsburg, T., Elkins, Z., & Blount, J. (2009). Does the process of constitution-making matter?. In J. Hagan (Ed.), *Annual review of law and social science: Vol. 5*. (pp. 201-223).
- Ginsburg, T., Elkins, Z., & Melton, J. (2009, December 13). The lifespan of written constitutions. *The Record Online*, Spring 2009. Retrieved from <http://www.law.uchicago.edu/alumni/magazine/lifespan>
- Glenn, H. P. (2006). Legal families and legal traditions. In M. Reimann & R. Zimmermann (Eds.), *Oxford handbook of comparative law* (pp. 421-440). Oxford, UK: Oxford University Press.

- Glenn, H. P. (2007). *Legal traditions of the world* (3rd ed.). Oxford, UK: Oxford University Press.
- Gordley, J. (2003). The universalist heritage. In P. Legrand & R. Munday (Eds.), *Comparative legal studies: Traditions and transitions* (pp. 31-45). Cambridge, UK: Cambridge University Press.
- Grondwet voor het Koninkrijk der Nederlanden [Constitution of the Kingdom of the Netherlands], arts. 91, 93.
- Harding, A. (2002). Comparative public law: Some lessons from south east Asia. In A. Harding & E. Örüçü (Eds.), *Comparative law in the 21st century* (pp. 249-266). The Hague, The Netherlands: Kluwer Law International.
- Harjono. (n.d.). The Indonesian Constitutional Court. Retrieved from <http://www.ccourt.go.kr/home/english/introduction/pdf/05.pdf>
- Hart, V. (2003, July). Democratic constitution making. *Special Report*, 107. Retrieved from <http://www.usip.org/files/resources/sr107.pdf>
- Hart, V. (2003). *Democratic constitution making*. Washington, DC: United States Institute of Peace.
- Hirschl, R. (2005). The question of case selection in comparative constitutional law. *American Journal of Comparative Law*, 53, 125-155.
- Hoecke, M. van, & Warrington, M. (1998). Legal cultures, legal paradigms and legal doctrine: Towards a new model for comparative law. *International and Comparative Law Quarterly*, 47, 495-536.
- Hong Kong Court of Final Appeal Ordinance, (1997) Cap. 484. (H.K.).
- Ibhawoh, B. (2000). Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African State. *Human Rights Quarterly*, 22, 838-860.
- Interest group: Use of foreign precedents by constitutional judges. (n.d.). Retrieved from <http://www.unisi.it/dipec/en/interestgroup.php>, <http://www.unisi.it/dipec/en/interestgroup.php>
- International Association of Constitutional Law. (n.d.). Retrieved from <http://www.iacl-aicd.org/en/index.htm>
- International IDEA. (2007). *Voting from abroad: The International IDEA handbook*. Stockholm, Sweden: Author.
- Jackson, V. C. (2001). Narratives of federalism: Of continuities and comparative constitutional experience. *Duke Law Journal*, 51, 223-287.
- Jackson, V. C., & Tushnet, M. (2002). *Defining the field of comparative constitutional law*. Westport, CT: Praeger.

- Justices of the Constitutional Court, Judicial Yuan, Taiwan. (n.d.). Retrieved from http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p01_03.asp.
- Kahn, P. W. (2003). Comparative Constitutionalism in a New Key. *Michigan Law Review*, 101, 2677-2705.
- Kahn-Freund, O. (1974). On uses and misuses of comparative law. *Modern Law Review*, 37, 1-27.
- Keitner, C. I. (Oct. 2, 2009). Rights beyond borders. Unpublished manuscript. Retrieved from <http://ssrn.com/abstract=1480886>
- Kleinheisterkamp, J. (2006). Development of comparative law in Latin America. In M. Reimann & R. Zimmermann (Eds.), *The Oxford handbook of comparative law* (pp. 261-304). Oxford, UK: Oxford University Press.
- Klug, H. (2000). *Constituting democracy*. Cambridge, UK: Cambridge University Press.
- Knop, K., Michaels, R., & Riles, A. (in press). International law in domestic courts: A conflict of laws approach. *American Society of International Law*.
- Krisch, N. (2009). *The case for pluralism in postnational law*. Unpublished manuscript, London School of Economics and Political Science. Retrieved from <http://ssrn.com/abstract=1418707>
- Legrand, P. (2003). The same and the different. In P. Legrand & R. Munday (Eds.), *Comparative legal studies: Traditions and transitions* (pp. 240-311). Cambridge, UK: Cambridge University Press.
- Legrand, P. (2008). Comparative legal studies and the matter of authenticity. *Journal of Comparative Law*, 1(2), 365-460.
- Loewenstein, K. (1957). *Political power and the government process*. Chicago, IL: University of Chicago Press.
- Londraw, F. de. (in press). Dualism, domestic courts, and the rule of international law. In M. Sellers (Ed.), *Ius Gentium*. Dordrecht, The Netherlands: Springer.
- Loughlin, M., & Walker, N. (Eds.). (2007). *The paradox of constitutionalism: constituent power and constitutional form*. Oxford, UK: Oxford University Press.
- MacCormick, N. (2007). *Institutions of law*. Oxford, UK: Oxford University Press.

- MacFarlane, P. (2006). Some challenges facing legal strengthening projects in small Pacific Island states. *Journal of Commonwealth Law and Legal Education*, 4, 103-112.
- Marbury v. Madison, 5 U.S. 137 (1803).
- Mattei, U. (1997). Three patterns of law: Taxonomy and change in the world's legal systems. *American Journal of Comparative Law*, 45, 5-44.
- Menski, W. (2006). *Comparative law in a global context*. Cambridge, UK: Cambridge University Press.
- Menski, W. (2009). Indian secular pluralism and its relevance for Europe. In R. Grillo, R. Ballard, A. Ferrari, A. J. Hoekema, M. Maussen, & P. Shah (Eds.), *Legal practice and cultural diversity* (pp. 31-47). Surrey, UK: Ashgate.
- Michaels, R. (2006). The functional method of comparative law. In M. Reimann & R. Zimmermann (Eds.), *The Oxford handbook of comparative law* (pp. 339-382). Oxford, UK: Oxford University Press.
- Moehler, D. (2008). *Distrusting democrats: Outcomes of participatory constitution making*. Ann Arbor, MI: University of Michigan Press.
- Munday, R. (2003). Accounting for an encounter. In P. Legrand & R. Munday (Eds.), *Comparative legal studies: Traditions and transitions* (pp. 3-30). Cambridge, UK: Cambridge University Press.
- Murray, C. (2006). Republic of South Africa. In K. Le Roy, C. Saunders, & J. Kincaid (Eds.), *Legislative, executive and judicial governance in federal countries* (pp. 259-288). Quebec, Canada: McGill-Queen's University Press.
- National Human Rights Consultation. (2009, September). Report. Retrieved from http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads
- Nelken, D., & Feest, J. (Eds.). (2001). *Adapting legal cultures*. Portland, OR: Hart.
- Nijman, J., & Nollkaemper, A. (Eds.). (2007). *New perspectives on the divide between national and international law*. Oxford, UK: Oxford University Press.
- Noda, Y. (1989). *Introduction to Japanese law* (A. H. Angelo, Trans.). Tokyo, Japan: University of Tokyo Press. (Original work published 1976)
- Öhlinger, T. (2003). The genesis of the Austrian model of constitutional review of legislation. *Ratio Juris*, 16, 206-222.

- Örücü, E. (2004). *The enigma of comparative law: variations on a theme for the twenty-first century*. Boston, MA: Martinus Nijhoff.
- Örücü, E. (2004). Family trees for legal systems: Towards a contemporary approach. In M. van Hoecke (Ed.), *Epistemology and methodology in comparative law* (pp. 359-376). Portland, OR: Hart.
- Peters, A. (2007). The globalization of state constitutions. In J. Nijman & A. Nollkaemper (Eds.), *New perspectives on the divide between national and international law* (pp. 251-308). New York, NY: Oxford University Press.
- Plessis, J. du (2006). Comparative law and the study of mixed legal systems. In M. Reimann & R. Zimmermann (Eds.), *The Oxford handbook of comparative law* (pp. 477-512). Oxford, UK: Oxford University Press.
- Prado, M. M., & Trebilcock, M. J. (2009). Path dependence, development, and the dynamics of institutional reform. *University of Toronto Law Journal*, 59, 341-379.
- Ramraj, V. (2009, September). Constitutional tipping points: Sustainable constitutionalism in theory and practice. Paper presented at the Third Asian Forum for Constitutional Law, National Taiwan University, Taipei, Taiwan.
- Rao, A. (2009). *The caste question*. Berkeley, CA: University of California Press.
- Reimann, M., & Zimmermann, R. (Eds.). (2006). *The Oxford handbook of comparative law*. Oxford, UK: Oxford University Press.
- Relocation of the Capital City Case, Judgment of Oct. 21, 2004, 2004 Hun-Ma 554, 566 (Const. Ct.).
- Rosen, L. (2003). Beyond compare. In P. Legrand & R. Munday (Eds.), *Comparative legal studies: Traditions and transitions* (pp. 493-510). Cambridge, UK: Cambridge University Press.
- S. AFR. CONST. 1996, ch.2, art. 39(1).
- Sacco, R. (1991). Legal formants: A dynamic approach to comparative law (I). *American Journal Comparative Law*, 39, 1-34.
- Sen, A. (2006). *Identity and violence: the illusion of destiny*. New York, NY: W. W. Norton.
- Sieyès, E. J. (1964). *What is the third estate?* (M. Blondel Trans., & S.E. Finer Eds.). London, UK: Phaidon Press.
- Solange I, BVerfGE 37.
- Solange II, BVerfGE 73.
- Solange III, 2BvE 2/08.

- Steiner, H. J., Alston, P., & Goodman, R. (2008). *International human rights in context: Law, politics, morals* (3rd ed.). Oxford, UK: Oxford University Press.
- Sue v. Hill (1999) 199 C.L.R. 462.
- Sundberg, A. (2008, April). Diaspora voting rights in 214 countries of the world. Retrieved from <https://www.overseasvotefoundation.org/initiatives-summit2008-proceedings>
- Sundberg, A. (2008, April). Diasporas represented in their home country parliaments. Retrieved from <https://www.overseasvotefoundation.org/initiatives-summit2008-proceedings>
- Sunstein, C. R. (2002). *Designing democracy: What constitutions do*. New York, NY: Oxford University Press.
- Sunstein, C. R. (1996). On the expressive function of law. *University of Pennsylvania Law Review*, 144, 2021-2053.
- Supreme Court of Israel. (n.d.). Foreign clerkships with the Supreme Court of Israel. Retrieved from http://elyon1.court.gov.il/eng/Clerking_opportunities/main.html
- Symposium, Constitutionalism in an era of globalization and privatization. (2008). *International Journal of Constitutional Law*, 6, 371-711.
- Symposium, The evolving concept of citizenship in constitutional law. (in press). *International Journal of Constitutional Law*, 8.
- Teubner, G. (1998). Legal irritants: Good faith in British law or how unifying law ends up in new divergences. *Modern Law Review*, 61, 11-32.
- Tushnet, M. (1999). The possibilities of comparative constitutional law. *Yale Law Journal*, 108, 1225-1309.
- Tushnet, M. (2006). Comparative constitutional law. In M. Reimann & R. Zimmermann (Eds.), *Oxford Handbook of Comparative Law* (pp. 1225-1258). Oxford, UK: Oxford University Press.
- Tushnet, M. (2008-2009). The inevitable globalization of constitutional law. *Virginia Journal of International Law*, 49, 985-1006.
- Twining, W. (2000). *Globalisation and legal theory*. Cambridge, UK: Cambridge University Press.
- Twining, W. (2009). *General jurisprudence*. Cambridge, UK: Cambridge University Press.
- United Nations, Department of Social and Economic Affairs. (n.d.). International migrant stock: The 2008 revision. Retrieved from <http://esa.un.org/migration/>

- United Nations. (n.d.). Growth in United Nations membership, 1945-present. Retrieved from <http://www.un.org/en/members/growth.shtml>
- Valcke, C. (2004). Comparative law as comparative jurisprudence—The comparability of legal systems. *American Journal of Comparative Law*, 52, 713-740.
- Watson, A. (2004). Legal culture v. legal tradition. In Mark van Hoecke (Ed.), *Epistemology and methodology in comparative law* (pp. 1-6). Portland, OR: Hart.
- Yeh, J.-R., & Chang, W.-C. (2008). The emergence of transnational constitutionalism: Its features, challenges and solutions. *Penn State International Law Review*, 27, 89-124.
- Yeh, J.-R., & Chang, W.-C. (2009). The changing landscape of modern constitutionalism: East Asian perspective. *National Taiwan University Law Review*, 4, 145-183.
- Ziller, J. (2009). Solange III, or the Bundesverfassungsgericht's 'Europefriendliness'.
- On the decision of the German Federal Constitutional Court over the ratification of the Treaty of Lisbon (A. J. Aliverti Trans.). Retrieved from <http://ssrn.com/abstract=1474698>
- Zweigert, K., & Kötz, H. (1997). *An introduction to comparative law* (3rd ed.). Oxford, UK: Oxford University Press.