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Accompanying the spread of constitutional government around the world has been a profound interest in the comparative aspects of constitutional law. Scholars have catalogued the differing features of national constitutions and examined how different constitutional systems resolve common legal issues. So, too, judges faced with legal questions have sought guidance in the decisions of constitutional and supreme courts of other nations. While comparative constitutional *law* is therefore a well-established field, less attention has been paid so far to the comparative dimensions of constitutional *history*.

This is a major shortcoming. Authoritative comparative legal scholars have repeatedly pointed out the crucial importance of history in comparative studies. Pierre Legrand, for example, argues that the quality of comparison "not only depends on the brute knowledge" of foreign law, but also "on the depth of a reflection which requires [the comparative scholar] to move to planets that are *a priori* unknown to him, such as anthropology, linguistics, sociology, history, cognitive psychology, and philosophy".[1] Without such an interdisciplinary approach, Legrand contends, the comparative scholar risks "regard[ing] social problems and their legal treatment as occurring in a cultural vacuum", perpetuating "the kind of dreary positivism which relegates comparative legal studies to a technical exercise whose output is deeply flawed […]"[2]. Similarly, Peter Häberle underscores that research in comparative constitutional law demands taking into consideration the "cultural diversity" of constitutional experience[3]. A comparison "among cultures" itself requires sensitivity to historical factors and, when done successfully, allows comparative scholars to reach a deeper understanding not only of the law in the books but also of the law in action[4].

Prominent Italian scholars have long urged attention to the historical dimension of comparative legal studies. Gino Gorla, for example, paraphrasing Frederic William Maitland, argues that "comparison involves history". In his opinion,

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[1] PIERRE LEGRAND, *Le droit comparé* (Presses Universitaires de France 1999) 27.

[2] PIERRE LEGRAND, 'The Same and the Different' in PIERRE LEGRAND & RODERICK MUNDAY (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 276-277.

[3] See PETER HÄBERLE, *Verfassungslehre als Kulturwissenschaft* (Duncker & Humblot 1998) 28 ff.

[4] See PETER HÄBERLE, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates. Methoden und Inhalte, Kleinstaaten und Entwicklungsländer* (Duncker & Humblot 1992) 3 ff. With regard to the distinction between law in the books and law in action see HAROLD C. GUTTERIDGE, *Comparative Law: An Introduction to the Comparative Method of Legal Study & Research* (Cambridge University Press 1946); TULLIO ASCARELLI, 'Interpretazione del diritto e studio del diritto comparato' in *Saggi di diritto commerciale* (Giuffrè 1955) 508; KARL H. NEUMAYER, 'Law in the Books, Law in Action et les méthodes du droit comparé' in MARIO ROTONDI (ed.), *Buts et méthodes du droit comparé* (Cedam 1973) 505 ff.

historical perspectives are essential to understanding the "spirit of each legal system"[5]. Paolo Ridola also stresses the need to study constitutional law from an historical-comparative perspective: only in this way, according to Ridola, is it possible to move beyond formalities and fully understand different constitutional "experiences"[6]. Angelo Antonio Cervati stresses that "understanding a constitutional system always requires an historical sensitiveness and a capacity to identify the fundamental values explaining the institutional choices, directing the interpretation of the norms, and holding the whole legal system currently in force"[7]. Likewise, in his "Introduction to Comparative Constitutional Law", Giovanni Bognetti argues that: "the comparative constitutional scholar, more than other comparative scholars, […] can and should take account of the historical data provided by other disciplines such as the history of political thought, political science, sociology of law, political history, and so on". According to Bognetti, "[a]ll these data, provided by various disciplines, are necessary for the comparative constitutional scholar, who will find them extremely useful and indispensable"[8]. It is no accident that the subtitle of Bognetti's last book, "The American Constitution and Italian Constitutionalism", is "An Essay in Comparative Constitutional History"[9].

Despite calls for a stronger historical approach, comparative constitutional history remains an underdeveloped field. Few scholars identify their major research area as comparative constitutional history and the field lacks the large and prominent professional organizations that exist for scholars of comparative constitutional law.

Beginning in 2014, researchers at the University of Illinois College of Law, the University of Bologna School of Law, and the Center for Constitutional Studies and Democratic Development (CCSDD) have aimed to energize the comparative study and analysis of constitutional history by organizing a regular series of academic conferences on the topic. These conferences, which bring together scholars from around the world, alternate between Bologna and Chicago[10]. The present volume contains a set of essays that were first prepared for and presented

[5] GINO GORLA, *Diritto comparato e diritto comune europeo* (Giuffrè 1981) 42.

[6] See in particular PAOLO RIDOLA, *Esperienza Costituzioni Storia. Pagine di storia costituzionale* (Jovene 2019).

[7] ANGELO ANTONIO CERVATI, *Per uno studio comparativo del diritto costituzionale* (Giappichelli 2009) 21.

[8] GIOVANNI BOGNETTI, *Introduzione al diritto costituzionale comparato* (Giappichelli 1994) 178-179.

[9] GIOVANNI BOGNETTI, *The American Constitution and Italian Constitutionalism. An Essay in Comparative Constitutional History* (Clueb 2008).

[10] For more information on the conference series, see https://www.ccsdd.org/constitutionalhistory.cfm

at the third conference on "Constitutional History: Comparative Perspectives", held in Bologna on November 13 and 14, 2017.[11]

The chapters in this volume demonstrate that comparative constitutional history holds considerable promise for engaging and innovative work along several key avenues of inquiry. Central to comparative work in constitutional history is an understanding of the origins and design of constitutional governments and of the sources that have impacted the ways in which constitutional systems began and evolved. Four chapters in this volume take up these issues (*Part 1*). Mark Somos shows the value of historical studies of the migration of legal ideas across constitutional systems. He reports on an under-appreciated exchange between Germany and the United States in the early part of the nineteenth century: collaborations between the Göttingen School and the American historian George Bancroft that brought to the United States the Göttingen approaches to comparative constitutional studies and influenced Bancroft's own famous *History of the United States*—with, in turn, a feedback influence upon the writings out of the Göttingen School on such issues as colonialism and international political economy.

Gohar Karapetian is likewise interested in her chapter on sources of legal concepts but she focuses also on how such concepts become entrenched as legal rules. Karapetian takes up one of the cornerstones of constitutionalism: citizenship. By examining how two European countries, France and the Netherlands, have formed and implemented very different conceptions of the citizenship status of residents of their overseas territories, Karapetian demonstrates that as a result of different historical circumstances, citizenship and its accompanying rights can radically vary even among countries from a single region.

Justin Frosini and Viktoriia Lapa offer a detailed account of the origins and significance of the preamble to the Ukrainian Constitution. Their careful case study sheds light on the struggles that lie behind the development of the constitution in Ukraine. More broadly, these authors demonstrate the rich significance that preambles hold for understanding the drafting and adoption of constitutions around the world and for discerning constitutional meaning.

Miguel Manero de Lemos tackles a set of complex issues related to the constitutional status of the Basic Law of Hong Kong. His chapter traces how, within a few decades after the return of Hong Kong to the People's Republic of China (PRC), the views of PRC officials on the meaning of the 1984 Joint Declaration with Great Britain and the ensuing 1990 Basic Law have radically shifted so as to deny treaty obligations mandating a separate constitution for Hong

[11] The essays presented at the second Illinois-Bologna conference, held in Chicago on April 12 and 13, 2016, were published in the *University of Illinois Law Review*, vol. 2017, no. 2.

Kong and to subordinate the Basic Law to the PRC Constitution. Highlighting an ongoing struggle between common law and socialist methods of interpretation that has contributed to the drift in legal meaning, Lemos examines some paths forward that may preserve the original plan for one nation with two systems.

Every country that adopts a constitution confronts basic questions of how to allocate powers among branches of government and governmental actors—and how to ensure that powers so allocated remain within their designated domains. Two chapters in this volume (*Part 2*) examine different approaches to allocating power and the results, at times unanticipated, of choices made. Francesco Biagi's chapter demonstrates the difficulties of constitutional reform when, as a result of long historical practice, the executive branch is able to dominate over other governmental actors. In examining the systems of separation of powers in North Africa and the Middle East following the 'Arab Spring', Biagi shows that most Arab constitutions have preserved an extremely high concentration of power in the head of state—with the result that illiberal regimes have continued to rule. Biagi shows how in the countries he studies the persistence of weak separation of powers has resulted from a lingering influence of prior constitutional traditions, the use of top-down reform processes in seeking constitutional change, and some distinct external forces that have undermined efforts to escape from an authoritarian past. Biagi concludes that except for Tunisia, where, for reasons he explains, democratic reform has been more successful, concentrated executive power has largely contributed to hindering the positive outcome of the transition processes.

Catherine Andrews examines the development in Mexico in the early nineteenth century of institutional mechanisms to protect the constitutional order from abuses of power. Rejecting conventional accounts that emphasize the influence of the U.S. Constitution, Andrews reports instead that in its constitutional arrangements Mexico has been more heavily influenced by developments in France and Spain, with Mexico itself reworking devices developed in those two countries for maintaining the integrity of constitutions including firmly separated powers.

Three chapters focus on judicial authority and its limits (*Part 3*). Gonçalo de Almeida Ribeiro seeks to explain why the system of judicial review in Portugal differs from that of other European nations. In particular, as he notes, ordinary courts in Portugal themselves conduct judicial review (rather than leaving it to a specialized constitutional court); decisions of ordinary courts may then be appealed to the constitutional court; but, with few exceptions, a decision of the constitutional court has only *inter-partes* effect. These features place the Portuguese system of constitutional justice in a peculiar middle ground between the decentralized model, epitomized by American-style judicial review, and the centralized model, the dominant form in Europe. Ribeiro rejects conventional

accounts that trace the modern system of judicial review in Portugal to established practices pre-dating the creation of constitutional courts in Europe. Instead, he explains, the existing system originates in efforts following the Revolution of April 25, 1974 to balance revolutionary and democratic elements in the constitutional order and to reduce the risks of militarization. Ribeiro contends that, as a product of historical circumstances, the Portuguese system lacks any theoretical coherence and that the consequence is a series of difficulties in the operation of the Constitution that have proven challenging to overcome.

In recent years there has been growing attention to courts reviewing not just ordinary legislation for its compatibility with the constitution but also — under the doctrine of unconstitutional constitutional amendments — examining whether amendments to a constitution itself are lawful. Mario Alberto Cajas-Sarria brings new insights to this area through his close examination of practices in Colombia. Today, the Colombian Constitutional Court is known for aggressively asserting powers of judicial review including the power to review constitutional amendments. Cajas-Sarria shows, however, that contrary to most understandings of the practice, the origins of judicial review of constitutional amendments in Colombia originate not in recent global trends but rather in concerns, several decades ago, on the part of Colombian judges with constitutional amendments that would limit judicial authority.

Fabian Duessel examines the origins and evolution of the mechanism of constitutional complaint — allowing an individual to directly file a claim with a constitutional court to remedy a violation of fundamental rights — in South Korea and Taiwan. As Duessel explains, comparisons between these two countries are useful because they share some important similarities, including a legacy of Japanese colonialism, strong post-World War II influence of the United States, authoritarianism during the Cold War, successful democracy movements in the 1980s, and, today, active constitutional courts. Duessel reports that the legal systems of both South Korea and Taiwan are heavily influenced by practices in Germany where the constitutional complaint is a key mechanism for protecting individual rights. Nonetheless, Duessel finds that while both South Korea and Taiwan have some form of constitutional complaint, the mechanism in both nations has traditionally been considerably weaker than it is in the German model. In addition, he shows, there are important differences in how constitutional complaints operate in South Korea and Taiwan — and the likely future trajectory of this mechanism in each country. Duessel highlights the significance of a new law adopted in Taiwan in 2019 (to take effect in 2022) that provides for a potentially robust form of constitutional complaint in that country. The result, he suggests, is that Taiwan may move closer to the German model in the future. By comparing two East Asian democracies with significant similarities, Duessel's chapter sheds

light on the ways in which on-the-ground conditions influence the evolution of legal mechanisms imported form another system.

The chapters in this volume focus on different historical periods and different countries and they take up distinct issues. Nonetheless, the analysis the essays provide and the conclusions they draw bear on basic questions of the design, operations, and effects of constitutions — questions that are in many respects universal and timeless. Not surprisingly, while the chapters all make valuable contributions to our understandings of constitutions, no author claims to have uttered the final word. The volume thus also serves to invite further study of the comparative aspects of constitutional history.