
Book Reviews

Ran Hirschl. *Comparative Matters. The Renaissance of Comparative Constitutional Law*. Oxford University Press, 2014. Pp. xii+304. £ 29.99. ISBN: 9780198714514.

1. An emblematic *double entendre*

The title's implicit *double entendre* is both programmatic and emblematic for Ran Hirschl's most recent book. Comparative matters *really do matter*. And they do so in a much broader and much more encompassing way than commonly pursued by studies in comparative law. Moving on "(f)rom comparative constitutional law to comparative constitutional studies" (at 151 *et seq.*), Hirschl favors nothing less than a holistic approach suggesting "that for historical, analytical, and methodological reasons, maintaining the disciplinary divide between comparative constitutional law and other closely related disciplines that study various aspects of the same constitutional phenomena artificially and unnecessarily limits our horizons" (at 13). To some extent, Hirschl's methodological toolkit—and, just a footnote *ad personam*: trained in political sciences and constitutional law, the author is most capable of getting involved in such an endeavor—resembles the concept of law comparison which Peter Häberle is famous for in the German epistemic community (and beyond). Where Häberle conceptualizes "legal comparison as cultural comparison" ("Rechtsvergleich als Kulturvergleich"¹) and calls for a context-sensitive methodology, Hirschl has a more express focus on the empirical dimension and the methods of political sciences, but both attempt to reshape and extend "the under-

standing of the 'comparative' in comparative constitutional law—its various rationales, methods, limitations, and possibilities" (at 284). There are quite a few critics who find it overly complex (and practically impossible) to rely on the combined methods and results stemming from such different disciplines as political sciences, social sciences, and the humanities. However, Hirschl—and the same, by the way, holds true for Häberle—does not contend to have found the perfectly "workable" combination of methods—let alone an exclusive set—or to have solved all the empirical puzzles that drive him. He is well aware that quantitative critiques could challenge his qualitative case selection, and he purposefully does not follow on every recent trend in political sciences. The aim of his selective *methodological pluralism* is much more modest and thus convincing: Hirschl wants to provide a roadmap to examining the analytical foundations and practical implications, the epistemology, the contents, and the boundaries and not least the methodologies of comparative constitutional law "in context."

2. How universal is comparative constitutional law?

This ambitious attempt draws on some of Hirschl's previous, well-known studies. *Comparative Matters* is the last installment (or, to put it another way, the summarizing "opus magnum") in a trilogy starting with *Towards Juristocracy* in 2004 and followed by *Constitutional Theocracy* in 2010. All three books are relevant in their own way to the process of mapping the comparative field, described above, which includes a critical focus on the influential actors, such as courts or epistemic elites, and the (constitutional) narratives they rely on. Hirschl, to use his own words, undertakes a "tri-

¹ PETER HÄBERLE, VERFASSUNGSLEHRE ALS KULTURWISSENSCHAFT (2nd. ed. 1998).

partite expedition into the intersecting worlds of constitutional law and comparative politics, past and present, with side-trips into religion, economics, sociology, and legal theory" (at v). The plural dynamics of this expedition reflect the book's structure and not surprisingly lead to its epilogue's rather open (nevertheless directive) question: "Quo vadis, comparative constitutional law" (at 282 *et seq.*). Who thus expects the "quintessential answer," is going to be disappointed. Who, on the contrary, fears a pluralist "anything goes," has completely misconceived the author's intentions and the critical account he provides. Already in the first chapter, aware of the puzzling empirical underpinnings, Hirschl chooses a "view from the bench" and analyzes how constitutional courts (the "peak ones", so Hirschl's rather unusual but quite telling expression, as well as the lesser known ones) practice comparative constitutional law and handle the case selection. The double leitmotif of the following two chapters on the lessons learned from pre-modern religion law (at 77 *et seq.*) and engaging the constitutive matters of others (at 112 *et seq.*)—consciously speaking of "others" as opposed to the "self," Hirschl refers to other legal cultures and systems—might be "history matters," on the one hand, and "get[ting] to know yourself by getting to know the others," on the other hand. Chapter 4 marks the decisive *conceptual momentum* as outlined above: the turn from (traditional or classical) comparative constitutional law to interdisciplinary comparative constitutional studies. Lastly, Chapters 5 and 6 substantiate the turn—in the words of the author, "an attempt to disperse some of the mist surrounding comparative constitutional studies' epistemological and methodological matrix"—first, by raising the question, "How universal is comparative constitutional law?" (at 192 *et seq.*) and, second, by focusing on the crucial issues of case selection and research design in comparative constitutional studies (at 224 *et seq.*).

3. Comparative law in context

Using, among others, the Constitutional Court of Israel as an example (very self-assured courts like the US Supreme Court are rather

reluctant and skeptical towards comparative practice, see at 29), the author discovers a considerable "selection bias" regarding the rationales, motives, and strategies of comparative arguments (just a "fashionable mode" or a strategic incorporation of international standards by new or volatile democracies to signal their "locking-in" to the liberal and democratic world, see at 54). Comparative approaches, of course, involve questions of power and interest. Whoever therefore disregards them as subjective or, even worse, arbitrary policy choices by courts which should be nothing else than Montesquieu's "bouche de la loi", is quite mistaken. All modes of interpretation depend on, as Hans-Georg Gadamer² and Josef Esser³ famously pointed out, a judge's *Vorverständnis*, or prior understanding, and thus can never be completely "freed" from subjective moments and the subtexts of political power and policy interests. In Chapter 2, Hirschl reaches far back in history to contextualize modern debates with their (even pre-modern) resemblances. He strongly believes in the continuous relevance of early comparative approaches, for example in religious legal systems, and intends to discover the "wealth of knowledge and degree of theoretical sophistication in the . . . body of opinions" (at 79). This intellectually stimulating journey from "Plato to NATO"⁴ is not without risk. The sword of Damocles hanging over it is simply called eclecticism.

Hirschl refers to Jewish law, which, because of the "diasporic state of the Jewish people," has developed "a complex relationship with its legal surroundings oscillating between principled estrangement and pragmatic engagement" (at 78). He also references ancient Roman law, the Islamic Sharia, and prominent figures such as Hugo Grotius and John Selden (at 91), the "fundamentalist approaches to interpreting the New Tes-

² HANS-GEORG GADAMER, *WAHRHEIT UND METHODE* (5th ed. 1986).

³ JOSEF ESSER, *VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDUNG* (1970).

⁴ DAVID GRESS, *FROM PLATO TO NATO. THE IDEA OF THE WEST AND ITS OPPONENTS* (1998).

tament” which are quite common in North American Christianity (at 108). There are other examples that might have very well been added to the list. The legitimacy of religious law might be quite different from that of secular law. However, is inventive eclecticism such an unsettled approach? Specifically, should a reader demand stricter selection criteria and be confused when the author jumps in Chapter 3 from the age of discovery to identifying Montesquieu as a comparativist (at 125 *et seq.*) and then builds an easy bridge from *De l'esprit des lois* (1748) to Simon Bolivar and “other 19th-century innovators” (at 133)? A much better response would be to enjoy the intellectual curiosity, since the author not only reveals his criteria for being selective but also plausibly identifies the very “epistemological shifts” in comparative constitutionalism that are driven by “need, intellect, and politics” (at 149). Peter Häberle, of course, would add another driving force that is also very present in Hirschl’s writings: *culture*. Religious laws and the age of enlightenment-rationalism, as different as they may be, share, for very different reasons, a common history of opening up to “others” and to “the other.” To conceive this opening-up not only from a doctrinal, but also from a much more settled and at the same time ample perspective, is the very purpose of Chapter 4.

4. Comparative turns and cultural reflections

In Hirschl’s book, holistic comparison leaves the ivory tower of pure legal thought as well as the narrow world of law-school comparisons and other fruitless semantic exercises. Comparative intentions, in other words, meet the real world, and thus have to submit themselves to a reality check. In the real world, law depends on the context. It is embedded in culture; it is an “emanation of culture,” to quote once again Peter Häberle.⁵ Those who do face the reality, however, must look to the social sciences (at 166 *et seq.*). Hirschl works

with theories of judicial behavior (at 166 *et seq.*), contextualizes the rise of constitutionalism and judicial review with many transformative processes that took place after World War II, and especially post-1989/1990 when the Iron Curtain came down. Hirschl makes his methodological assumptions very clear: “Many of the tools necessary to engage in the systematic study of constitutionalism across polities can be found in the social sciences” (at 15). The “comparative turn” and what some describe as the “empirical turn” in legal studies might very well go hand in hand. The concrete research design (including the selection of case studies), however, is another and a much more complex question. And, preliminary to that question, an even trickier question arises, namely the age-old problem of universality. Any comparative interdisciplinary study of constitutionalism is confronted with the dichotomy of classic universalism versus cultural relativism (or particularism) (at 192 *et seq.*), and it has to take into account the postcolonial studies movement. It goes without saying that the “Global North” has to be very well aware of the “Global South” critique (at 205 *et seq.*). Case selection might follow the “most similar cases” principle (at 245 *et seq.*), the “most different cases” principle (at 253 *et seq.*), the “prototypical cases” principle (at 256 *et seq.*), the most “most difficult cases” principle (at 260 *et seq.*), or the “outlier cases” principle (at 264 *et seq.*). Hirschl’s approach, in any case, subscribes to qualitative rather than quantitative methods.

5. Comparative matters—A roadmap

Hirschl’s insistence on the qualitative approach is the reason why lawyers and political scientists might read the book through different lenses. The political scientist, on the one side, will identify ongoing controversies, if not quarrels, between the advocates of qualitative case-oriented and quantitative research and, depending on the position adopted, critically challenge or affirmatively subscribe to the author’s

⁵ PETER HÄBERLE, DER KOOPERATIVE VERFASSUNGSSTAAT— AUS KULTUR UND ALS KULTUR 462 (2013).

methodological choice. She or he must nevertheless admit that Hirschl takes a stand. For most lawyers, on the other side, quantitative research is a rather uncharted territory. Even while being well aware of the “astounding spread of constitutionalism and judicial review” (at 1)—from 1989/90 at the latest—and the “unprecedented comparative turn” (*id.*) that comes with it, lawyers may be disturbed by another outcome of Hirschl’s landmark research: the simple idea that “comparative constitutional inquiries are as much a political enterprise as they are a scholarly or jurisprudential one” (at 7). At the end of the day, whoever engages in constitutional comparison remains to a further or lesser extent a political actor. In particular, courts do make no exception. Furthermore, any comparative study carries the risk of “cherry picking.” Hirschl takes critically into account all these potential shortcomings. He reminds us that global constitutionalism consists of more than a collection of court decisions around the world. He is neither a naïve advocate of overly idealistic universalism nor simplistic contextualism. He—as elegant in his writings as convincing in his argumentation—invites the comparative lawyer to proceed methodologically beyond legal doctrine *stricto sensu*. Knowing that an age of legal pluralism requires a diverse and interdisciplinary, rather than rigorous but disciplinarily limited, methodology, one should follow this stimulating invitation with an open mind. And the final conclusion? Hirschl’s book sets an inspiring agenda for further research and gives proof that a *road-map* can also be a *masterpiece*.

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doi:10.1093/icon/mov047

Moshe Cohen-Eliya & Iddo Porat.
Proportionality and Constitutional Culture.
Cambridge University Press, 2013. Pp.
xiii + 168. \$40. ISBN: 9781107605718

1. Introduction

Proportionality is unquestionably the dominant mode of resolving public law disputes in the world today. Proportionality, we might say, has assumed global proportions. High courts all over the world are adopting its methods. If not yet taken up, its methods are recommended as a salve to bring legitimacy to new and controversial modes of dispute resolution.¹ Cohen-Eliya and Porat helpfully cast doubt on claims about proportionality’s universality. They do so by focusing, Montesquieu-like, on the particularity of national constitutional cultures.

The authors offer a trans-systemic account of proportionality in constitutional law with a focus on Germany and the United States. There are additional brief excursions to Israel and Canada. Cohen-Eliya and Porat aim to help us determine the degree to which it can be said that legal systems are converging toward a single standard of review in constitutional cases. Conversely, they help us understand the extent to which distinctive constitutional cultures might stand in the way of that convergence. This is a brief book about a large subject that is admirable in its ambitions.

2. Constitutional culture in the balance

The authors claim at the outset that the German tradition of proportionality analysis and the US method of balancing are similar—that they reveal ‘no substantial analytical differences’

¹ As in the realm of international investment arbitration: see Alec Stone Sweet, *Investor–State Arbitration: Proportionality’s New Frontier*, 4 *LAW & ETHICS HUM. RTS* 47 (2010).