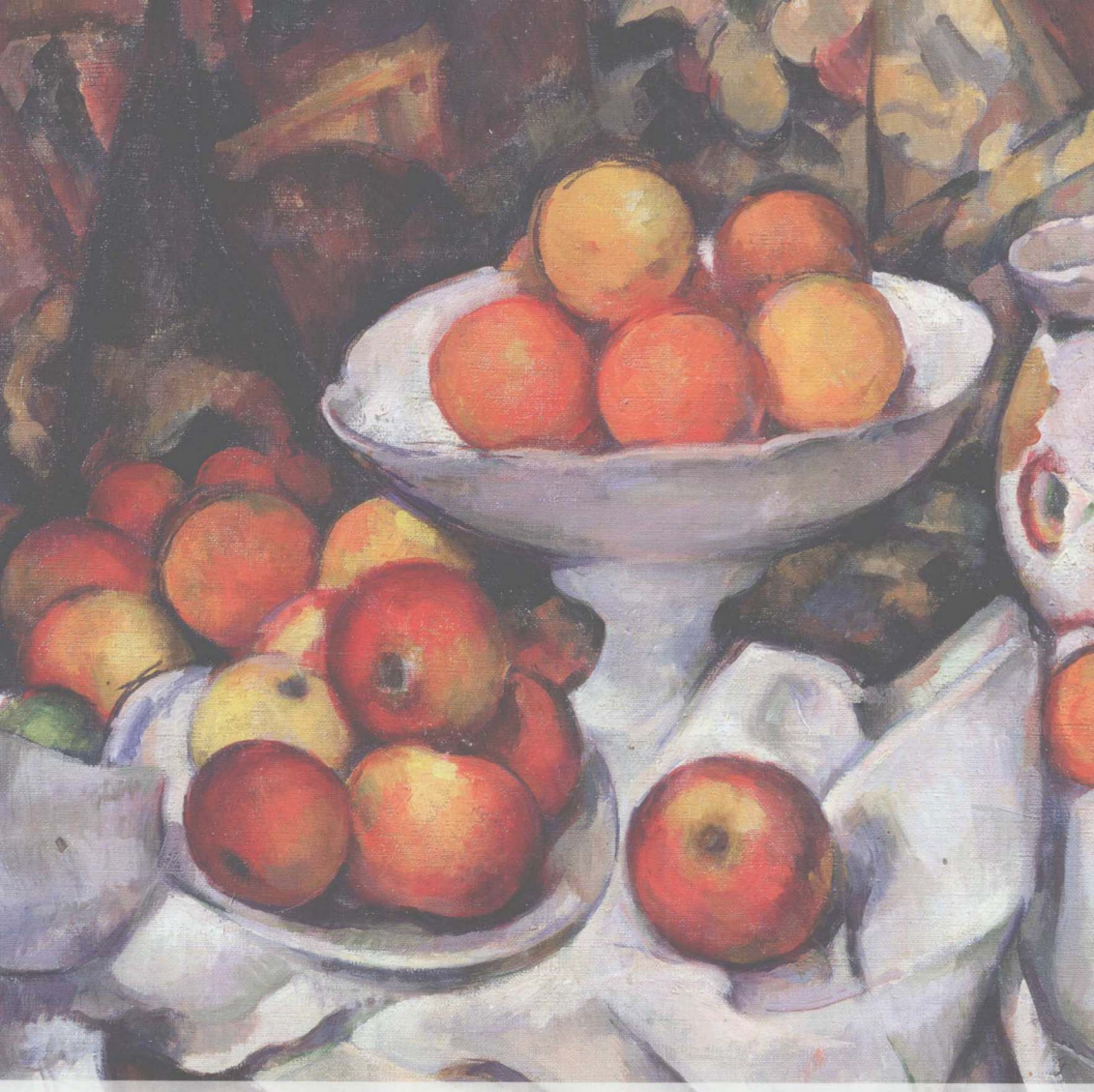

COMPARATIVE MATTERS

The Renaissance of Comparative Constitutional Law

Ran Hirschl

OXFORD

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List of Abbreviations

AIR	All India Reporter [India]
AKP	Adalet ve Kalkınma Partisi (Justice and Development Party [Turkey])
ALAC	American Laws for American Court
BJP	Bharatiya Janata Party
BRICS	Brazil, Russia, India, China, and South Africa
BVerfG	Bundesverfassungsgericht [Decisions of the German Federal Constitutional Court]
C.A.	Court of Appeal [Israel]
CCSA	Constitutional Court, South Africa
CFA	Court of Final Appeal [Hong Kong]
CFI	Court of Final Appeal [Hong Kong]
CLJ	Current Law Journal [Malaysia]
ECHR	European Convention on Human Rights [Council of Europe]
ECtHR	European Court of Human Rights [Council of Europe]
ESRs	economic and social rights
EUI	European University Institute
G.R.	General Register [Philippines]
HCJ	High Court of Justice [Israel]
HDI	Human Development Index
IMF	International Monetary Fund
IsrLR	Israel Law Review [Israel]
MLJ	Malaysia Law Journal [Malaysia]
NWFP	North-West Frontier Province

P.D.	Piskei Din [Israel]
PEI	Prince Edward Island
P.L.D.	All Pakistan Legal Decisions [Pakistan]
PPP	Pakistan People's Party
SC	Supreme Court [India]
SCC	Supreme Constitutional Court [Egypt] Supreme Court Cases [India] Supreme Court of Canada [Canada]
SCI	Supreme Court of Israel [Israel]
SCR	Supreme Court Reports [Canada]
TakEl	Takdin Elyon, Supreme Court Law Reports [Israel]
TCC	Turkish Constitutional Court [Turkey]
UGSC	Uganda Supreme Court [Uganda]
UKHL	United Kingdom House of Lords [United Kingdom]
UKSC	United Kingdom Supreme Court [United Kingdom]
UNDP	United Nations Development Programme
U.S.	U.S. Supreme Court reports [United States]

Acknowledgments

This voyage across the seven seas of comparative constitutionalism is the third and final part of a longer tri-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. It has been the intellectual journey of a lifetime. *Towards Juristocracy* (Harvard University Press, 2004) was the expedition's beginning, followed by *Constitutional Theocracy* (Harvard University Press, 2010); I now conclude with *Comparative Matters*.

Writing this wide-ranging book and meditating upon its interdisciplinary themes has been a true labor of love for me. However, it could not have been completed without the support of many friends and colleagues who provided valuable references, pinpoint citations, insightful examples, thoughtful new directions, or simply overall good advice.

First, thanks must go to the many scholars, jurists, and students who have helped to turn the study of comparative constitutionalism into one of the most intellectually vibrant areas of contemporary legal scholarship. It is largely due to the field's tremendous growth that a book of this scope and nature could have been written.

My work on this book began while I was a Maimonides Fellow at NYU's Institute for the Advanced Study of Law and Justice then headed by Joseph H. H. Weiler. It is my hope that a distant echo of the fellowship namesake's intellectual grandeur and striking combination of the universal and the particular may still be heard in these pages.

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Comparative Constitutional Studies," *International Journal of Constitutional Law* 11 (2013): 1–12.

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Ran Hirschl
April 2014

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Introduction

The C Word

In the late 1990s, when I was writing my PhD dissertation at Yale University, comparative constitutional law was still at its early revival stages. News about the constitutional transformation of Europe or dilemmas of constitutional design in the post-communist world made headlines. But what was not then obvious to many was the full extent of the astounding global spread of constitutionalism and judicial review, and the ever-increasing reliance on constitutional courts worldwide for addressing some of the most fundamental predicaments a polity can contemplate.[1] Likewise, the profound understanding, now quite common, that this is one of the most noteworthy developments in late 20th- and early 21st-century government was still in its infancy.

The field's early-day difficulties were readily evident. Very few relevant sources were available online, and those that were had to be accessed through a complex dial-in process using a large, noisy, and unreliable modem (we called it the "old unfaithful")—by far the most expensive item in our rather modest graduate housing unit. To access and review constitutional jurisprudence by courts overseas, I had to borrow a rusty master key from the chief librarian, and travel some 20 miles southwest to a mid-size gray office building in the rather unspectacular city of Bridgeport, CT, where Yale Law Library stored its comparative law collection at the time. A slow, squeaky elevator ride took me to the ninth floor, where executive ordinances from Botswana, Indian legislation from the 1960s, and landmark rulings from Germany, were packed in huge carton boxes. To peruse the comparative constitutional law materials not available at that storage site

[1] In the European context, J. H. H. Weiler's influential article, "The Transformation of Europe," *Yale Law Journal* 100 (1991): 2403–83 is widely considered an early game changer. In the global context things are less clear, but Bruce Ackerman's "The Rise of World Constitutionalism," *Virginia Law Review* 83 (1997): 771–97, may be considered an early field definer.

required traveling to Cambridge, MA, where the law library of that other great university is located. I can recall countless train rides from New Haven to Boston and back to eagerly read court rulings from New Zealand, Israel, Hungary, or South Africa—many of which were freshly catalogued, although the decisions they contained had been made and subsequently published many months earlier. This was an intellectually gratifying labor of love, yet not the most user-friendly experience. It served as a mundane, small-scale testament to the difficulty of making comparative constitutional law an accessible and exciting endeavor for the greater majority of lawyers, judges, and scholars. Back at my New Haven "home court," the razor-sharp, genuinely cosmopolitan, and knowledge-thirsty intellectual community was incredibly supportive. Yet even with the most generous conversation companions who were truly interested in listening to my enthusiastic accounts of what some British scholars or Canadian jurists had to say about the parts of the constitutional universe that lie beyond US territory, the conversation quickly reverted back to familiar home turf.

This intellectual pursuit has, of course, changed considerably. Over the last few decades, the world has witnessed the rapid spread of constitutionalism and judicial review. Over 150 countries and several supranational entities across the globe can boast the recent adoption of a constitution or a constitutional revision that contains a bill of justiciable rights and enshrines some form of active judicial review. Consequently, constitutional courts and judges have emerged as key translators of constitutional provisions into guidelines for public life, in many instances determining core moral quandaries and matters of utmost political significance that define and divide the polity.

This global transformation has brought about an ever-expanding interest among scholars, judges, practitioners, and policymakers in the constitutional law and institutions of other countries, and in the transnational migration of constitutional ideas more generally. From its beginnings as a relatively obscure and exotic subject studied by a devoted few, comparative constitutionalism has developed into one of the more fashionable subjects in contemporary legal scholarship, and has become a cornerstone of constitutional jurisprudence and constitution-making in an increasing number of countries worldwide.[2]

[2] For a compact introduction to the field's main themes and theoretical advances over the past few decades presented by one of the field's pre-eminent scholars, see Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Hart Publishing, 2014).

Everyday indicators of this unprecedented comparative turn are many. Virtually all reputable peak courts across the globe maintain websites where thousands of rulings, including those released earlier the same day, may be browsed with ease and downloaded within seconds. New world-wide-web portals allow jurists, scholars, and policymakers to retrieve and compare the entire corpus of constitutional texts around the world, from the late 18th century to the present. Lively discussions about current developments in constitutional law, theory, and design feature centrally in blogs devoted exclusively to comparative constitutionalism. And the comparative revolution has certainly not been limited to the digital world: scholarly books dealing with comparative constitutional law are no longer considered a rarity; new periodicals and symposia are dedicated to the comparative study of constitutions and constitutionalism; and top-ranked law schools in the United States and elsewhere have begun to introduce their students to a distinctly more cosmopolitan and comparatively informed view of constitutional law and legal institutions. Meanwhile, prominent constitutional court judges commonly lecture about, write on, and refer to the constitutional laws of others. And constitutional drafters from Latin America to the Middle East openly debate comparative constitutional experiences in making their choices about what constitutional features to adopt or to avoid. In many respects, then, these are the heydays of comparative constitutionalism.

And yet, despite this tremendous renaissance, the "comparative" aspect of the enterprise, as a method and a project, remains undertheorized and blurry. Fundamental questions concerning the very meaning and purpose of comparative constitutional inquiry, and how it is to be undertaken, remain largely outside the purview of canonical scholarship.[3] Colloquially, the word "comparative" is often used in the sense of "relative to" (e.g. "he returned to the comparative comfort of his home") or to refer to words that imply comparison (e.g. "better," "faster," etc.). The scientific use of "comparative" is defined in the *Oxford English Dictionary* as "involving the systematic observation of the similarities or dissimilarities between two or more branches of science

[3] A few initial attempts to deal with these questions are: Vicki Jackson, "Methodological Challenges in Comparative Constitutional Law," *Penn State International Law Review* 28 (2010): 319–26; Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law," *American Journal of Comparative Law* 53 (2005): 125–55; Mark Tushnet, "The Possibilities of Comparative Constitutional Law," *Yale Law Journal* 108 (1999): 1225–309.

or subjects of study." These definitions seem intuitive enough—yet, the meaning of the *comparative* in comparative constitutional law has proven quite difficult to pin down.

Since its birth, comparative constitutionalism has struggled with questions of identity. There is considerable confusion about its aims and purposes, and even about its subject—is it about constitutional systems, constitutional jurisprudence, constitutional courts, or constitutional government and politics? It also remains unclear whether comparative constitutional law is or ought to be treated as a subfield of comparative law, a subfield of constitutional law, or an altogether independent area of inquiry. Is the age-old debate in comparative law between "universalists" and "culturalists" relevant to the study of phenomena as widespread as constitutionalism and judicial review, and if so, how? Is there a conceptual affinity between comparative constitutional law and other comparative disciplines (e.g. comparative politics, comparative literature, comparative religion, comparative biochemistry and physiology; comparative psychology)? And what to make of the fact that the constitutional lawyer, the judge, the law professor, the normative legal theorist, and the social scientist all engage in comparison with different ends in mind?

Adding to the confusion is that self-professed "comparativism" sometimes amounts to little more than a passing reference to the constitution of a country other than the scholar's own or to a small number of overanalyzed, "usual suspect" constitutional settings or court rulings. The constitutional experiences of entire regions—from the Nordic countries to sub-Saharan Africa to Central and South East Asia—remain largely uncharted terrain, understudied and generally overlooked.[4] Selection biases abound. The result is that purportedly

[4] For conscious attempts to expand the circle of studied cases, see, e.g., Albert Chen, ed., *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, 2014); Rosalind Dixon and Tom Ginsburg, eds., *Comparative Constitutional Law in Asia* (Edward Elgar, 2014); Roberto Gargarella, *Latin American Constitutionalism* (Oxford University Press, 2013); "Perspectives on African Constitutionalism," *International Journal of Constitutional Law* 11 (2013): 382–446; Ran Hirschl, "The Nordic Counter-Narrative: Democracy, Human Development and Judicial Review," *International Journal of Constitutional Law* 9 (2011): 449–69; Jiunn-rong Yeh and Wen-Chen Chang, "The Emergence of East Asian Constitutionalism: Features in Comparison," *American Journal of Comparative Law* 59 (2011): 805–39; Ran Hirschl, *Constitutional Theocracy* (Harvard University Press, 2010); and "Symposium: The Changing Landscape of Asian Constitutionalism," *International Journal of Constitutional Law* 8 (2010): 766–976.

universal insights are based on a handful of frequently studied and not always representative settings or cases. Instrumentalist considerations such as availability of data or career planning often determine which cases are considered. Descriptive, taxonomical, normative, and explanatory accounts are often conflated, and epistemological views and methodological practices vary considerably. Some leading works in the field continue to lag behind in their ability to engage in controlled comparison or trace causal links among germane variables and, consequently, in their ability to advance, substantiate, or refute testable hypotheses. The field's potential to produce generalizable conclusions, or other forms of nomothetic, ideally transportable knowledge is thus hindered. Meanwhile, comparative constitutional scholarship that favors contextual, idiographic knowledge seldom amounts to a true, inherently holistic, "thick description" the way Clifford Geertz—a grand champion of thorough, contextual "symbolic interpretation"—perceived it and preached for. Given the prevalence of "armchair" constitutional research carried out with little or no fieldwork or systematic data collection, and the absence of an established tradition of rigorous and anonymous peer review in many leading law reviews, it is no surprise that the outcome is a loose and under-defined epistemic and methodological framework that seems to be held together by a rather thin intellectual thread: interest of some sort or another in the constitutional law of polity or polities other than the observer's own.

This book, then, takes as its premise a simple fact: the unprecedented revival of comparative constitutional studies rides on a fuzzy and rather incoherent epistemological and methodological matrix. In fact, comparative constitutional studies lack a core work that clarifies the essence of the term "comparative" as a project and a method. My hope—from the outset, an ambitious one—is that this book will help to fill that gap. In what follows, I chart the intellectual history and analytical underpinnings of comparative constitutional inquiry, probe the various types, aims, and methodologies of engagement with the constitutive laws of others through the ages, and explore how and why comparative constitutional inquiry has been, and perhaps ought to be more extensively, pursued by academics and jurists worldwide.

Structure of the book: what drives comparative constitutional inquiry and how are we to study it?

The book is divided into two main parts, each comprising three chapters. In the first part (Chapters 1 to 3) I explore what may be learned by looking into the rich history of engagement with the constitutive laws of others. What has driven comparative constitutional journeys through the ages? And why, at given times and places, have certain communities, thinkers, or courts embarked on them, while others have rejected them? Convergence, resistance, and selective engagement (to paraphrase Vicki Jackson's terminology) with the constitutive laws of others, past and present, reflect broader tensions between particularism and universalism, and mirror struggles over competing visions of who "we" are, and who we wish to be as a political community. Comparative constitutional encounters are thus at least as much a humanist and sociopolitical phenomenon as they are a juridical one. Specifically, I identify the interplay between the core factors of *necessity*, *inquisitiveness*, and *politics* in advancing comparative engagement with the constitutive laws of others through the ages. The second part (Chapters 4 to 6) revisits the disciplinary boundaries between comparative constitutional law and the social sciences. Drawing on insights from social theory, religion, political science, and public law, I argue for an interdisciplinary study of comparative constitutionalism, an approach that would be both richer and more fitting for understanding the studied phenomenon than accounts of "comparative constitutional law" and "comparative politics" as two separate entities. The future of comparative constitutional inquiry as a field of study, I argue, lies in relaxing the sharp divide between constitutional law and the social sciences, in order to enrich both.

The first main focus of this book is to highlight the interplay between necessity, inquisitiveness, and politics that surrounds the formal constitutional sphere in advancing comparative engagement with the constitutive laws of others through the ages. Constitutional journeys are driven by the same rationales as other types of journey. Hunter-gatherers are constantly on the go in search of food, water, and shelter. Their forays are driven by necessity. Likewise, few would sneak through the Mexico–US border or gamble their lives on the rough Australian seas without being driven by economic or physical survival instincts or, more generally, by a quest for better life

opportunities. What seems to be common to Copernicus' study of the skies, Charles Darwin's journey to the Galápagos Islands, and Thor Heyerdahl's voyage across the Pacific Ocean onboard his self-built raft (Kon-Tiki), are driven largely by sheer intellectual curiosity and scientific inquisitiveness. The space race of the 1960s and 1970s involved a series of risky voyages driven by a thirst for new knowledge alongside easily identifiable political interests and a quest for domination.

Similar rationales seem to have driven constitutional voyages. Survival instincts may push minority communities to develop a matrix for selective engagement with the laws of others in order to maintain their identity in the face of powerful convergence pressures. Intellectual curiosity may drive scholars to investigate new constitutional settings and develop novel concepts, arguments, and ideas with respect to the constitutional universe. Comparative engagement may also be—indeed, often is—driven by a desire to advance a concrete political agenda or an ideological outlook.

Of these three rationales for comparative constitutional engagement, politics is a crucial and yet infrequently acknowledged feature, a background setting that may seem to be invisible unless it is brought to the fore. From Jean Bodin's quest to transform the political and legal landscape of 16th-century France via comparative public law inquiry to Simón Bolívar's love–hate relations with French and American constitutional ideals, and to the Israeli Supreme Court's attempt to define the country's collective identity by making voluntary reference to foreign precedents, comparative constitutional inquiries are as much a political enterprise as they are a scholarly or a jurisprudential one. More broadly, I argue that the specific scope and nature of engagement with the constitutive laws of others in a given polity at a given time cannot be meaningfully understood independent of the concrete sociopolitical struggles, ideological agendas, and "culture wars" shaping that polity at that time.

This argument is pursued in three steps: (i) an exploration of how constitutional courts and judges conceive of the discipline of comparative constitutional law, what weight they accord to it, and how, why, and when they use it; (ii) a sketch of doctrinal innovation and adaptation in the pre- and early-modern, predominantly religious world as a response to encounters with the constitutive laws of others; and (iii) a thumbnail history of constitutional comparisons from the birth of the systematic study of constitutions across polities in the mid-16th century

to contemporary debates about the legitimacy and usefulness of comparative constitutional law.

Chapter 1, "The View from the Bench: Where the Comparative Judicial Imagination Travels," explores how constitutional courts and judges—the key purveyors and consumers of comparative constitutional jurisprudence—conceive of the discipline of comparative constitutional law, what methods they use to engage with it, and how and why they vary in their approach to it. I begin by outlining the key empirical findings on *voluntary* foreign citations and examine what these findings may tell us about how and why constitutional courts engage with comparative constitutional law. The evidence with respect to foreign citation patterns is surprisingly scarce, and draws on the experience of only a handful of peak courts. However, the evidence does suggest that certain courts refer to foreign jurisprudence more frequently than others. It shows that there are areas of constitutional jurisprudence that are more informed by national idiosyncrasies and contingencies than others. In the area of rights, it would appear, cross-jurisdictional reference is more likely to occur than it is in areas such as aspirational or organic features of the constitution. The evidence also points to a decline in the status of British and American constitutional cases as common points of reference for constitutional courts worldwide, and perhaps to a corresponding rise in the international stature of other peak courts—most notably the Supreme Court of Canada, the German Federal Constitutional Court, and the European Court of Human Rights.

What explains the judicial thinking behind the selection of a reference to a given foreign court? The general literature on the subject stresses the importance of factors that include the following: global convergence and the inevitability of engagement with foreign jurisprudence; judicial prestige- or legitimacy-enhancing factors; and structural features (e.g. constitutional provisions that call for foreign citations, linguistic permeability, a legal tradition or trajectory of legal education that affects a given apex court's ability and willingness to cite foreign jurisprudence). Whereas these accounts provide illuminating explanations for the rise and variance in the practice of global judicial dialogue, they leave out a crucial factor: the sociopolitical context within which constitutional courts and judges operate, and how this affects whether and where the judicial mind travels in its search for pertinent foreign sources to reference.