

## Comparative Constitutional Law as a Social Science? A Hegelian Reaction to Ran Hirschl's Comparative Matters\*

By *Armin von Bogdandy*\*\*

**Abstract:** This contribution reviews Ran Hirschl's book "Comparative Matters" to discuss the discipline of comparative constitutional law. It contrasts his social science approach, informed by comparative politics, with a more lawyerly approach he very much critiques. The latter considers law above all as a phenomenon distinguished by intersubjectivity and normativity, directed at the understanding of normative, validity claiming acts as well as the construction and maintenance of normative meaning. This approach stands in contrast to Hirschl's approach, which derives from political economy and aims at social-scientific explanation. This contribution questions whether and how causal identification is possible in such complex phenomena as comparative constitutionalism. It also points out that the challenges confronting inner-European comparison are to be distinguished from those of the global comparative law at which Hirschl aims.

\*\*\*

### *I. A Challenging Intervention*

Hirschl's *Comparative Matters* has a wonderfully multivalent title and a truly ambitious aim: describing contemporary comparative constitutional law as epistemologically and methodologically diffuse, if not incoherent, it seeks to raise it to the level of the other social sciences (p. 5). It therefore resituates the discipline of comparative constitutional law in order to address the challenges of the twenty-first century – seen as an era of comparative law (p. 18). The broader purpose is to advance, and transform, the entire discipline of constitutional law (p. 80, 204).

Hirschl's voice carries great weight: He was educated in law and political science in Israel and the United States, is the author of two widely received comparative books,<sup>1</sup> occupies the prestigious Canada Research Chair in Constitutionalism, Democracy and Development at the University of Toronto, and is an editor of perhaps the most important journal in

\* *Ran Hirschl*, *Comparative Matters*. The Renaissance of Comparative Constitutional Law, Oxford 2014. A German version of this article has been published in *Der Staat* 1/2016. Translated by Blake Emerson.

\*\* Max Planck Institute for Comparative Public Law and International Law, Heidelberg. Email: bogdandy@mpil.de.

1 *Ran Hirschl*, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge 2004; *Ran Hirschl*, *Constitutional Theocracy*, Cambridge 2010.

the field—the *International Journal of Constitutional Law*.<sup>2</sup> Thus it is no wonder that the 284 pages, divided into six dense but nonetheless very readable chapters, provide the reader with many keen observations and ideas. Even if, at the end of the day, one is not convinced of his program, the gain in knowledge is epistemologically, methodologically, and substantively significant. Hirschl can inspire representatives of (critical) hermeneutic, (normative) humanities-based (*geisteswissenschaftliche*),<sup>3</sup> doctrinal, or functionalist approaches to improve their theoretical foundations, methodological approach and research orientation. One can interpret Hirschl's sometimes polemic tone against traditional practices as a useful provocation, which intensifies disagreements and can produce valuable insights.

The following considerations are based upon a Hegelian understanding of law as an expression of "objective spirit."<sup>4</sup> Legal scholarship is thus concerned with a phenomenon distinguished above all by intersubjectivity and normativity. As a result, the *understanding* of normative validity claiming acts as well as the *construction* and maintenance of normative *meaning* stands at the center of legal research. This approach stands in sharp contrast to Hirschl's approach, which derives from political economy and aims at social-scientific *explanation*, rather than understanding. It affords a critical standpoint from which weaknesses appear in Hirschl's approach.

## II. *Constitutional Courts: An Ambiguous Focal Point*

The six chapters are divided into two large sections: the first three chapters describe phenomena of comparative law in various fields of research which are, unfortunately, not systematically aligned. The last three chapters contain Hirschl's epistemological and methodological program. The book begins with comparative law through the high or 'peak' courts. According to the author, "judicial review," meaning the judicial control of statutory law, is the most important mechanism of the constitutional era (p. 1). The focus on courts appears very much in line with the tradition of the common-law, which is bound to the notion that the judiciary, and not the legislative or executive branches or the people, stands at the center of the legal system.

2 Hirschl's basic statement elaborated in the book is briefly summarized in his editorial upon presenting this position: *Hirschl*, From comparative constitutional law to comparative constitutional studies, *International Journal of Constitutional Law* 11 (2013), p. 1.

3 "Geisteswissenschaft" is a difficult concept. For a brief statement see *Carl Friedrich Gethmann/Dieter Langewiesche/Jürgen Mittelstraß/Dieter Simon/Günter Stock*, Manifest Geistwissenschaft, Berlin-Brandenburgische Akademie der Wissenschaften, Berlin 2005, p. 13.

4 For some notes on the current relevance of this concept and a Hegelian legal theory, see *Michael Quante*, *Die Wirklichkeit des Geistes. Studien zu Hegel*, Berlin 2011; *Klaus Vieweg*, *Das Denken der Freiheit: Hegels Grundlinien der Philosophie des Rechts*, Paderborn 2012; *Terry Pinkard*, *Hegel's Naturalism: Mind, Nature, and the Final Ends of Life*, New York 2012; *Axel Honneth*, *Das Recht der Freiheit: Grundriß einer demokratischen Sittlichkeit*, Berlin 2013; *Ludwig Siep*, *Der Staat als irdischer Gott: Genese und Relevanz einer Hegelschen Idee*, Tübingen 2015.

The author usually labels these courts generically as constitutional courts (p. 1 and *passim*). This terminology obscures the important differences between Supreme Courts with general jurisdiction (as in India, Norway, the United States, perhaps also the European Court of Justice) and specifically constitutional courts (as in Germany, Columbia, South Korea, perhaps also the European Court of Human Rights). If one considers the centrality of this difference in continental European thought (Kelsen!)<sup>5</sup> and its many practical implications,<sup>6</sup> then the author's distance to what many see as essential distinctions becomes obvious.

Engagement with comparative arguments by peak courts on constitutional questions has served as a key factor in the rise of comparative scholarship. The author succinctly summarizes the relevant English-speaking research. The bottom line of such research is that the increasing relevance of transnational sources does not imply a general tendency towards convergence. With reference to Vicki Jackson, Hirschl rather identifies three principal forms of contact: resistance, convergence, and a middle path (which he endorses) namely, outcome-neutral engagement (p. 241).<sup>7</sup>

On this basis, he turns to the question of why this legal comparison takes place. His central claim is that peak courts use comparative law to influence the political identity of a society (p. 44 *et seq.*). As evidence he submits a gripping description and interpretation of the impressive work of the Israeli Supreme Court since 1995. Hirschl explains the praetorian introduction of statutory control as well as the principally liberal-democratic orientation of this Supreme Court as an effort to defend the value-orientation of the old, western-inspired elite Israelis – an elite which increasingly finds itself in the minority.

This is an undoubtedly plausible and penetrating observation.<sup>8</sup> It remains an open question, however, how the motive of shaping political identity relates to other possible

- 5 Cf. for example *Pedro Cruz Villalón*, *La formación del sistema europeo de control de constitucionalidad (1918-1939)*, Madrid 1987, p. 31-35, p. 277 ff.; *Tania Groppi* ¿Existe un modelo europeo de justicia constitucional?, *Revista de derecho político* 62 (2005), p. 33. On the significance of this difference concerning the challenges of European integration, see the pioneering work by *Victor Ferreres Comella*, *Constitutional Courts and Democratic Values*, New Haven 2009, p. 111 ff.
- 6 See *Olivier Jouanjan*, *Verfassungsrechtsprechung in Frankreich*, and *Giovanni Biaggini*, *Verfassungsgerichtsbarkeit in der Schweiz*, in: Armin von Bogdandy/Christoph Grabenwarter/Peter M. Huber (eds.), *Ius Publicum Europaeum VI: Verfassungsgerichtsbarkeit*, Heidelberg 2015, § 101 and § 107.
- 7 Similar typologies are to be found in *Mattias Wendel*, *Richterliche Rechtsvergleichung als Dialogform: Die Integrationsrechtsprechung nationaler Verfassungsgerichte in gemeineuropäischer Perspektive*, *Der Staat* 52 (2013), p. 339, 344ff.; *Tania Groppi* and *Marie-Claire Ponthoreau*, *The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future*, in: Tania Groppi/Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford 2013, p. 411, 424ff.
- 8 On the German debate concerning the identity-shaping functions of constitutional courts, see *Uwe Volkmann*, *Grundzüge einer Verfassungslehre der Bundesrepublik Deutschland*, Tübingen 2013, p. 179f., 184f.

motives of legal comparison by constitutional courts,<sup>9</sup> and, perhaps more importantly, whether Hirschl's statement is truly as generalizable as he seems to claim. References to similar lines of jurisprudence in a few other countries, such as Pakistan, do not dispel this doubt. It should be emphasized that Hirschl's interpretation is, methodologically, fully in line with the usual interpretative-speculative approach which here, as so often, is very fruitful. But the requirements of a causal finding, which are stated later in the book, are not observed or used. The chapter thus convincingly shows that the citation of jurisprudence from certain other legal orders can be interpreted as an expression of cultural affinity. But it omits any contextualization with reference to other factors.

Perhaps even more importantly, Hirschl does not analyze or evaluate possible forms of doctrinal operationalization of comparative arguments. This is, however, perhaps the most burning issue, captured by U.S. Justice Scalia's complaint about rather arbitrary "cherry picking"<sup>10</sup> from other national jurisdictions.<sup>11</sup> Is Hirschl's silence to be understood as "anything goes", that Scalia's critique is, for him, beside the point?

### *III. Historical Theories and the Canadian Model*

The next two chapters present diverse and bygone examples of comparative law in order to counter an alleged historical forgetfulness of constitutional comparison (p. 80). Hirschl first describes how Jewish law in the diaspora adapted to its legal environments and then outlines the conflict between mediaeval church law and the emerging law of states. He leads the reader through fascinating historical landscapes and captures noteworthy legal phenomena. However, the gain in knowledge for the primary question he has posed himself remains vague, namely, the challenge of global constitutionalism (p. 79). To be sure, a path is needed for meaningful adaptation without a threatening loss of identity, and the idea of "principled pragmatism" (p. 78) can serve as a guiding light. But this torch shines too dimly to illuminate current questions.

9 See *Christoph Grabenwarter*, Zusammenfassung der Ergebnisse der vorangegangenen Sitzungen, in: *Verfassungsgerichtshof der Republik Österreich* (ed.), *Die Kooperation der Verfassungsgerichte in Europa. Aktuelle Rahmenbedingungen und Perspektiven*, Wien 2014, p. 174, as well as the contributions of *Maria Berger*, *Peter M. Huber* and *Marta Cartabia*, *ibidem*, p. 97, 109, 113; *Nick Huls*, *The Ebb and Flow of Judicial Leadership in the Netherlands*, *Utrecht Law Review* 8 (2012), p. 129.

10 Cf. Justice Scalia's famous minority opinion in *Roper v. Simmons*, 543 U.S. 551, 622-628 (2005); similar, *Zoltán Szente*, Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999-2010, in: *Groppi/Ponthoreau* (Fn. 7 p. 253, 265). On the U.S. American debate see *Norman Dorsen*, The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer, *International Journal of Constitutional Law* 3 (2005), p. 519, 521.

11 See, e.g. *Mattias Wendel*, Comparative reasoning and the making of a common constitutional law, *International Journal of Constitutional Law* 11 (2013), p. 981.

Theoretical or doctrinal concepts which might concretize or legally implement the idea of a “principled pragmatism” are barely articulated. With reference to Hirschl’s social-scientific orientation, it should be noted that this broad historical investigation does not measure up to the standard of empirical causal findings. This raises doubt as to whether the orientation towards causal questions really allows one to exploit fruitfully all those dimensions that are important in the study of law. In fact one can only barely grasp the notion of “principled pragmatism” with such a paradigm, which depends on the construction, judgment, and evaluation of reasons.<sup>12</sup> Even if empirical causal insights are sometimes a key ingredient for a pragmatic jurisprudence, such insights are only necessary but certainly not sufficient to understand, interpret, and apply law.

The third chapter widens the intellectual pedigree of comparative law in that it presents canonical political thinkers as comparative legal scholars. Even though this “intellectual history of comparative constitutional inquiry” leaves out many important thinkers, the reader nonetheless finds insightful introductions to Jean Bodin, Francis Bacon, Gottfried Wilhelm Leibniz, John Seldon, Montesquieu, and Simon Bolivar. However, the pointed emphasis leads to some truncated treatments. For example, the extreme presidentialism which Hirschl finds in Bolivar was conceived for the particularly difficult case of Bolivia, but was not Bolivar’s general recommendation.

Hirschl also sketches the current debates on comparative constitutional law in Canada and the United States. The fundamental openness of Canada stands in sharp contrast to the particularism of its southern neighbor. The divergent constitutional-political climates are succinctly articulated with reference to their larger context. Canada serves as a shining exemplar, especially with regard to its successful democratic multiculturalism and an inclusive, innovative, and intelligent Supreme Court. One gets the impression from many passages in the book that Hirschl considers Canada to be the global model case of constitutionalism.

#### *IV. On the Multiplicity of Methods and Their Value*

How should comparative constitutional inquiry proceed? Chapters 4 to 6 in the second half of the book focus on this question. One cannot dispute Hirschl’s claim that there is not only one, but rather several very different forms of constitutional comparison with corresponding methods and research designs, varying according to the aim of the research. Just as inarguable is his recommendation that research should not, as far as possible, rely upon a single method, but rather should proceed by the “method of triangulation” (p. 277). In particular he identifies eight types of constitutional comparison: (1) research on a foreign legal order; (2) genealogical or taxonomical classification; (3) comparison to find the “best solution” to a given problem (functional comparative law); (4) comparative law to serve as a reflection

12 Christoph Möllers and Hannah Birkenkötter, Towards a new conceptualism in comparative constitutional law, or reviving the German tradition of the Lehrbuch, *International Journal of Constitutional Law* 12 (2014), p. 603, 607.

on one's own legal order; (5) comparative law to illustrate theoretical assumptions; (7) "small-N" analyses in a social-scientific style to find causal relationships and finally; (8) "large-N" studies which find correlations based on statistical analysis (s. 193, 225).

Three approaches are for Hirschl particularly promising for the new era of comparative law: first, the study of foreign law in the sense of the ideographer—the context comprising integrated representation in the sense of Clifford Geertz's "thick description"; second, comparative law for the purpose of concept development transcending individual legal orders (Vicky Jackson, Gary Jacobsohn, Mark Tushnet); and third, a social-scientifically grounded process which aims to make causal findings. Hirschl postulates the last as the key for the advancement of the discipline of comparative constitutional law.

#### V. *The Core Program and its Problems*

The title of the fourth chapter succinctly formulates this program: "From comparative constitutional law to comparative constitutional studies." Some remarks beforehand: Though I have doubts about Hirschl's joining of comparative constitutional law and comparative political science, I do not contest that a close interaction with social sciences is often supremely productive for legal scholarship.<sup>13</sup> Thus comparative law can learn much from pertinent regional studies.<sup>14</sup> It is also clear that the interaction between the two must be theoretically justified and controlled. My divergence from Hirschl begins with his premise that comparative politics should provide leadership for comparative constitutional law. He justifies this proposal by asserting a deficit of traditional comparative legal research vis-à-vis the political-scientific comparison of political systems. According to him, only political scientists formulate theoretical models and reach concrete findings as to how the constitutional law influences political events. For him, the primacy of political science is based further upon the fact that it reveals the foundations of successful constitutional comparison. Political-scientific theories explain, according to Hirschl, judicial action (judges act like "any other economic actor: as self-interested individuals," p. 168), the global success of judicial review ("culminations of elite bargains," p. 174), and the "political effects of constitutional designs" (p. 179). Political science further relativizes a supposed juristic naïveté concerning the importance of fundamental rights protection for liberal democracy (p. 179). Not the least, the methodological stringency of political science distinguishes it from the "amor-

13 As an example, see *Heinrich Triepel*, *Die Hegemonie. Ein Buch von führenden Staaten*, Stuttgart 1938, p. 1. On the current state of the discussion, see *Thomas Gutmann*, *Intra- und Interdisziplinarität: Chance oder Störfaktor?*, in: Eric Hilgendorf/Helmuth Schulze-Fielitz (eds.), *Selbstreflexion der Rechtswissenschaft*, Tübingen 2015, p. 93, 100 ff. On comparative constitutionalism in particular, see *Günter Frankenberg*, *Comparing constitutions: ideas, ideals, and ideology*, *International journal of constitutional law* 4 (2006), p. 439.

14 Cf. *Thomas Duve*, *Internationalisierung und Transnationalisierung der Rechtswissenschaft*, in: Dieter Grimm/Alexandra Kemmerer/Christoph Möllers (eds.), *Rechtsweg. Kontextsensible Rechtswissenschaft vor der transnationalen Herausforderung (Recht im Kontext, Band 2)*, Baden-Baden 2015, p. 167, 188.

phous methodological matrix” of most constitutional comparison (p. 186, 278). The social sciences set the bar over which a cutting edge comparative constitutional law must spring, and can spring, if it heeds Hirschl’s lessons. It should be noted, however, that Hirschl’s understanding of political science describes only a part of the discipline and that serious doubts have been raised within political science concerning the validity of the various methods he endorses.<sup>15</sup>

#### *VI. Universalism and North American Interpretative Authority*

Before the author presents these lessons, he investigates a core epistemological question: On what level of abstraction can comparative legal statements justifiably be made? The heading captures the question succinctly: “How universal is comparative constitutional law?” The universalist position, which assumes that global generalization is possible, contrasts with the particularistic position, which flatly denies this (p. 197). These positions correspond with the contrast between “global constitutionalists” and “constitutional sovereigntists” (p. 99). All further epistemological and methodological commitments depend upon the positioning with respect to this basic question.

However, Hirschl’s position is not entirely clear. Thus he outlines a possible and, for him, preferable middle way between universalism and particularism – a “constitutional pluralism.” He considers the *Maastricht* judgment of the German Federal Constitutional Court to be its foundational document (p. 200). But what does such a constitutional pluralism mean for the question of reliable universalization?<sup>16</sup> Even if an explicit position in the sense of universalism is missing, this seems to be Hirschl’s position. Thus he postulates that global constitutional comparison is possible and that it can make general claims: “There is now sufficient unity within the constitutional universe to allow for credible comparisons” (p. 19, see also p. 282, 284), similar to the discipline of comparative politics. This universality corresponds to the principle of economic rationality which Hirschl embraces and which, of course, claims to have global applicability. Against this background, it is important to note that such an universalistic approach does not imply general convergence, which Hirschl plausibly denies.

15 For a critique of studies based on observational data, as opposed to randomized, controlled experiments, see *Alan S. Gerber et al.* The Illusion of learning from Observational Research, in: Ian Shapiro et al.(eds.), *Problems and Methods in the Study of Politics*, Cambridge 2004. I am grateful to Blake Emerson for indicating me this literature.

16 On this broad discussion, see *Daniel Halberstam*, *Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance*, in: Avbelj/Komárek (eds.) *Constitutional Pluralism in the European Union and Beyond*, Oxford 2012, p. 85, 94ff. *Aida Torres Pérez*, *En defensa del pluralismo constitucional*, in: Eduardo Ferrer Mac-Gregor (ed.), *Diálogo jurisprudencial en derechos humanos entre tribunales constitucionales y cortes internacionales*. In memoriam Jorge Carpizo, generador incansable de diálogos, Valencia 2013, p. 457. *Rainer Wahl*, *Die Rechtsbildung in Europa als Entwicklungslabor*, *JZ* (2012), p. 862, 868 f.

This paradigm of economic rationality firmly grounds Hirschl's universalism in its North American intellectual context. North America is also pivotal in another sense: Irrespective of the book's global claims, Hirschl considers only English-speaking texts, accepted by "Ivy League" publishers. This is especially noteworthy because Hirschl succinctly and affirmatively expresses the critique of the "global south" on comparative constitutional law as elaborated by the "global north." (p. 205 ff.). To be sure, the book deals with material from such states as Egypt, India, Kuwait, Malaysia, Pakistan, the Philippines, South Africa, and Uganda. But the interpretive authority remains in the global north, or more particularly in the Anglo-American north. Interpretive attempts from outside are hardly considered. This way, a dialectic reemerges, wherein every universalism is always a kind of particularism.<sup>17</sup>

### VII. *Causal vs. Hermeneutic Methods*

The sixth chapter turns to the methods of "case selection" and "research design" which are meant to lead to a verifiable statement in the social-scientific sense. A "case" in this sense need not be a judicial decision, but any legal material. Hirschl does not tire of emphasizing that one must go beyond the comparison of constitutional court decision as well as beyond the study of a handful of canonical decisions of global comparative constitutionalism. Indeed, he presents a valuable alternative (p. 285-89). However, his list of decisions leaves out countries that are important for contemporary constitutionalism and especially for constitutional court activism, like Italy, Spain, and Hungary.

The aim of any ambitious comparative research is, according to Hirschl, "to explain" (p. 226). This is offered as the principle course to transcend mere description, classification, or justification and to arrive at claims which in a profound sense can be understood as true (p. 243). I categorically disagree with this claim, as it denies that there are other forms of deep knowledge beyond description and classification, and alongside causal explanations: the hermeneutical understanding of intersubjective phenomena – in this case the phenomena of objective spirit.

I do not agree with the paramount significance which Hirschl's account gives to causality. Hirschl appeals to David Hume's statement that causality, as the "cement of the universe," is the key to perfect knowledge (p. 242). But German idealism between Kant and Hegel already convincingly showed that causality is only one category of human understanding, and that it would be an error to give it the highest or even the only place. Thus the concept of causality is followed in Hegel's *Science of Logic* by reciprocity (*Wechselwirkung*).<sup>18</sup> This category supports the aim of a hermeneutic procedure of comparative law which is not oriented towards isolatable relations of cause and effect, but rather towards an

17 Jacques Rancière, *La mécontente*, Paris 1995, p. 188.

18 Georg Wilhelm Friedrich Hegel, *Wissenschaft der Logik*, Volume 2, in: Georg Lasson (ed.) 1934 (1813), p. 202.

understanding which arises from a synthesis of a multiplicity of elements in their manifold relationships.

My skepticism does not go so far as Bertram Russel, who says, “The law of causality is... a relic of a bygone age, surviving, like the monarchy, only because it is erroneously supposed to do no harm.”<sup>19</sup> A hermeneutic approach does not negate the meaningfulness of research on causal relations. But it warns against making such questions the supreme aim of research. The hermeneutic approach is also relatively more critical when it comes to assessing claims of causal explication. It sees a hard-and-fast causal finding as very difficult to make in such a complex field as is the constitutional legal order.

The method Hirschl proposes is the foundation for a set of research principles which aim to enable the isolation of particular variables. Hirschl lists as criteria for the identification of comparable legal phenomena the “most similar case principle,” the “most different case principle,” and the “prototypical case principle,” (Weber’s ideal-type) (p. 244). Comparative law scholars who do not aim for causal explanation but rather towards hermeneutic understanding can glean from this typology valuable insights. However, Hirschl’s book does not offer a guide for operationalization in concrete research designs.<sup>20</sup> It therefore remains an open question whether and how causal identification is possible in such complex phenomena as comparative constitutionalism.

In the study carried out by David Kosar, who is cited as an example by Hirschl,<sup>21</sup> it can be seen that causal identification is possible in certain cases. Kosar investigates the development of the judiciary after the breakup of Czechoslovakia, when only the Slovak Republic introduced judicial self-government on the model of Italy. The subsequent different developments of the third branch in the two countries can indeed be causally explained through the variable of judicial self-government in a situation where, previously, there existed one judiciary, and the two culturally similar states otherwise experienced an analogous development in the European Union and the Council of Europe. However, this seems like an unusual, historically all-too-infrequent constellation which underscores doubt about the possibility of causal claims in other cases.

Hirschl does little to dispel such doubts at the theoretical level. Instead, he illustrates his approach with further examples, which yield interesting, even counterintuitive and vexing results. Thus he recapitulates his “hegemonic preservation thesis” from his famous 2004 book *Towards Juristocracy*, according to which the worldwide judge-centered constitutionalization of the last decades can be explained as a strategy of those “who, faced with serious

19 *Bertram Russell*, *On the Notion of Cause*, Proceedings of the Aristotelian Society, London 1913, p. 1.

20 On new perspectives, potential and problems of empirical research in public law in the context of the German research landscape, see *Niels Petersen*, *Braucht die Rechtswissenschaft eine empirische Wende?*, *Der Staat* 49 (2010), p. 435.

21 Now available as a monograph, see *David Kosar*, *Perils of Judicial Self-Government in Transitional Societies. Holding the Least Accountable Branch to Account*, New York 2016.

threats, real or perceived, to their political and cultural hegemony within the polity, wish to protect their worldviews and policy preferences” (p. 264).

How can one causally prove such an earth-shaking thesis? The pertinent explanations in the book remain rather vague: concrete recommendations for how one should conceptually and methodologically frame such a study or control this result can hardly be found. Nor do most of the other suggested studies convince me in having achieved the identification of specific variables with causal force. Though it seems plausible to me that actors in constitutionalization have their power-interests in mind and want to shape society according to their preferences, for me, this does not appear to be adequate for a full understanding of the phenomena. Naturally the provocative statements of Hirschl are valuable when struggling for an appropriate understanding of contemporary constitutional adjudication. Without a doubt, this is an important aspect and Hirschl offers a welcome supplement to other studies with other instruments.<sup>22</sup> But only those who already assume an economic-rationalist model of human behavior will accept that striving for power is the central cause of contemporary constitutionalism.

This underlying economic model is a symptom of the book’s deep influence by North American law and its legal culture whose intellectual energy Hirschl never tires of championing (p. 13). The question is how much purchase Hirschl’s claims will have outside of the North American context. This North American bias also becomes clear in Hirschl’s description of what he sees as the basis for a new era of comparative law: globalization, the transnational era, and transnational legal environments (p. 204).

### *VIII. International Law as Foreign Law?*

Hirschl’s description fuses foreign public law and international law in a way which distorts how the phenomenon of transnational embeddedness appears in many regions of the world. The “constitutional law of others” and international law are both classified as “foreign law” (p. 6, 25). Hirschl further postulates the vague category of “general global law” as the heart of the new era (p. 85). An international court like the European Court of Human Rights is for him a “foreign court” similar to the supreme courts of other states (p. 8). From the perspective of the United States, Canada, and Israel this forced equivalency may function for political scientific understanding, because these states largely close themselves off from the jurisdiction of international courts. But for many others this de-differentiation leads to error.

22 See, e.g. *Édouard Lambert, Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis*, Paris 1921; *Ulrich R. Haltern, Verfassungsgerichtsbarkeit, Demokratie und Mißtrauen*, Berlin 1998; Matthias Jestaedt/Oliver Lepsius/Christoph Möllers/Christoph Schönberger (eds.), *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht*, Berlin 2011. The unusual form of a diary is used in the pioneer work of *Sabino Cassese, Dentro la Corte: Diario di un giudice costituzionale*, Bologna 2015.

Ratified international law is not “foreign” law, because it is legitimated by domestic parliaments. The European Court of Human Rights or the Inter-American Court of Human Rights are not “foreign courts” for those states that have recognized their jurisdiction. It also seems empirically incontestable that, at least in the European and Latin-American legal orders,<sup>23</sup> the reception of international legal sources and international judicial decisions has gained normality, and is far more pronounced and doctrinally elaborated than the reception of the laws of other states. This distinction between international law and foreign law corresponds to their respective legitimation structures and practical uses; the two should not be placed on the same level.

Here, one of the dangers of a political-scientific approach is realized, as it fails to grasp to essential legal differentiations. It is certain that the distance of such an approach from the law can enhance understanding and bring to light the unexpected. A metaphor adapted from Isaac Newton makes this clear: in a process of common research new insights do not require a higher position, a different position is enough.<sup>24</sup> But the more distant the standpoint, the more precarious and abstract the knowledge.<sup>25</sup>

### *IX. How Hirschl Helps to Understand the European Challenge*

Hirschl’s book can help to inform European comparative research which is currently blossoming with respect to public law. This is particularly true for inner-European comparisons.<sup>26</sup> In this field, the general grounds by which Hirschl, relying on Vicki Jackson, explains the move to comparative legal research are obviously present: necessity, academic curiosity, and concrete political intentions (p. 148). There is a need for comparative re-

- 23 On the role of the Inter-American Court of Human Rights, see *Christina Binder*, *Auf dem Weg zum lateinamerikanischen Verfassungsgericht? Die Rechtsprechung des IAGMR im Bereich der Amnestien*, *ZaöRV* 71 (2011), p.1. Also the contributions in Armin von Bogdandy/Mac-Gregor/Morales Antoniazzi (eds.), *La justicia constitucional y su Internacionalización. Hacia un Ius Constitutionale Commune en América Latina?*, 2 volumes, Mexico 2010.
- 24 Cf. *R. K. Merton*, *Auf den Schultern von Riesen: Ein Leitfaden durch das Labyrinth der Gelehrsamkeit*, Frankfurt 1983, p. 13 ff.
- 25 On this aspect, see also my work on Latin American Constitutional Law: *Armin von Bogdandy*, *Ius Constitutionale Commune en América Latina: Beobachtungen zu einem transformatorischen Ansatz demokratischer Verfassungsstaatlichkeit*, *ZaöRV* 75 (2015), p. 345.
- 26 See, e.g. *Christian Starck*, *Rechtsvergleichung im öffentlichen Recht*, *Juristenzeitung* 52 (1997), p. 1021; *Constance Grewe* and *Hélène Ruiz Fabri*, *Droits constitutionnels européens*, Paris 1995; *Michel Fromont*, *Droit administratif des États européens*, Paris 2006; *Giulio Napolitano* (ed.), *Diritto amministrativo comparato*, Milano 2007; *M. de Visser*, *Constitutional Review in Europe: A Comparative Analysis*, Oxford 2014; *Albrecht Weber*, *Europäische Verfassungsvergleichung*, München 2010; *Claus-Dieter Classen*, *Nationales Verfassungsrecht in der Europäischen Union*, Baden-Baden 2013. On theoretical foundations, see *Christoph Schönberger*, *Verfassungsvergleichung heute: Der schwierige Abschied vom ptolemäischen Weltbild*, *VRÜ* 43 (2010), p. 6; *Christoph Schönberger*, *Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte*, in: *Armin von Bogdandy/Cassese/Huber* (eds.), *Handbuch Ius Publicum Europaeum IV*, Heidelberg 2011, § 71, 493 ff.

search on constitutional law because the different constitutional systems are in an ever closer contact. This interaction requires constitutional comparison. Comparative constitutional law is a goldmine for insightful research and comparative constitutional law offers valuable arguments and mechanisms to influence social relationships.

Even though the general grounds are the same, the challenges confronting inner-European comparison are to be distinguished from those of the global comparative law at which Hirschl aims. This should be kept in mind in the reception of the book. Inner-European challenges are more urgent, as is revealed by the fact that the constitutional law in Europe consists of an unprecedented amalgam of E.U. primary law, the law of the European Convention on Human Rights and the state constitutions. One of the many features that make this amalgam unique is that the various orders, though closely linked, are adamant to remain *legally* autonomous, and thus not to coalesce into a *single* legal order.<sup>27</sup> This development is without any previous example world-wide, and leads to much confusion. In Hegelian terms, Europe is confronted with a deeply *alienating* form of objective spirit. This deep alienation, which is felt by many citizens, calls for the hermeneutic and constructive dimensions of legal and comparative legal research.<sup>28</sup> Comparative research is essential to deepen the normative and sociological legitimacy of the European legal order. Comparative law becomes a constitutive part of a comprehensive process of legal and political cultivation (*Bildung*), countering the critical alienation of citizens from a European public law that is diffuse, and from a public authority that is often perceived as relatively unaccountable. This is precisely the core theoretical program of what might be conceived as a Hegelian approach, which, of course, should not merely affirm the existing order, but provide ideas for its development.<sup>29</sup> Causal explanation can at best be a small part in this endeavor of theoretical and, later on, doctrinal construction.

With regards to global comparative law, Ran Hirschl's book encounters in the current German research landscape Uwe Kischel's *Comparative Law*,<sup>30</sup> an *opus magnum* that is comparable in its ambition. In contrast to Hirschl's proposed social-scientific transformation, Kischel defends the hermeneutic comparative law. One of the core contributions of his book is to develop the functional method in a promising way towards a contextual comparative method.<sup>31</sup> Hirschl's and Kischel's conceptions contrast usefully. Hirschl's book en-

27 *Rainer Wahl*, Die Rechtsbildung in Europa als Entwicklungslabor, JZ (2012), p. 862 ff. On the difficult question of what makes an ensemble of norms into a legal order, see *Dana Burchardt*, Die Rangfrage im europäischen Normenverbund, Tübingen 2015, p. 15 ff., 220 ff., 242 f.

28 This is formulated in the Hegelian tradition by *Benno Zabel*, Europa denken. Das Recht der Moderne zwischen staatlicher und entstaatlichter Freiheitsverwirklichung, in: Wilfried Griefßer (ed.), Die Philosophie und Europa. Zur Kategoriengeschichte der „europäischen Einigung“, Würzburg 2015, p. 19.

29 *Hans F. Fulda*, Zum Theorietypus der Hegelschen Rechtsphilosophie, in: Dieter Henrich/Rolf-Peter Horstmann (eds.), Hegels Philosophie des Rechts. Die Theorie der Rechtsformen und ihre Logik, München 1982, p. 412; *Charles Taylor*, Hegel, Frankfurt 1983, p. 13 ff., 447 f.

30 *Uwe Kischel*, Rechtsvergleichung, München 2015, with 1010 pages.

31 *Kischel*, *Ibid.*, p. 164 ff.

courages scholars to better clarify which research aims can be pursued with a “will to understand,” which concrete steps the “hermeneutic method” should consist of, and how it might engage with social-scientific knowledge. If this discourse takes up speed, much has been achieved. The path I see here for a confident and self-conscious comparative law enriched by other disciplines has been sketched out in administration law<sup>32</sup> and is politically supported by the relevant recommendations of the German Scientific Council.<sup>33</sup>

32 Above all, see Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts*, 2nd ed., 2 volumes, München 2012; With a similar orientation, see the many works of *Sabino Cassese*, e.g. *Istituzioni di diritto amministrativo*, 4th ed. Milano 2012.

33 *Wissenschaftsrat*, *Prospects of Legal Scholarship in Germany. Current Situation, Analyses, Recommendations*, Köln 2012.