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Comparative Matters: The Renaissance of Comparative Constitutional Law

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Comparative Matters: The Renaissance of Comparative Constitutional Law. By Ran Hirschl. Oxford: Oxford University Press, 2014. 320 pp. \$45.00 cloth.

Reviewed by Benjamin L. Berger, Osgoode Hall Law School, York University

As the epigraph to one chapter in his impressive volume, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Ran Hirschl offers the following exchange between the archaeologist Howard Carter and his patron, Lord Carnarvon, on Carter's entry into Tutankhamun's tomb: "Can you see anything?" "Yes, wonderful things!" The epigraph might aptly frame the volume as a whole. Hirschl's ambition is to seize a pivotal moment in the development of comparative constitutional scholarship and to help those engaged in the field to see more and better. There is a tone of excitement and affection in the pages, born of the recent and rapid global spread of constitutionalism and judicial review, which has been accompanied by a marked growth in scholarly - and juridical - interest in comparative constitutional study. Hirschl sees the scholarly possibilities attendant on such a moment and regards the comparative constitutional enterprise as poised to enrich our understanding of modern constitutional life.

And this enthusiastic tone is accompanied by one of concern because, as Hirschl sees it, the field of comparative constitutional study is currently afflicted by "a fuzzy and rather incoherent epistemological and methodological matrix" (5), a shortfall in self-understanding that prevents the scholarly enterprise from realizing its potential. In particular, the range and variety of approaches that are collected under the mantle of comparative constitutional study has deprived us of a clear view of what the character of the "comparative" project is and ought to be, and of a refined sense of what methods are well calibrated to its ends. In this volume, Hirschl seeks to address this weakness by drawing the reader through the contemporary quandaries and intellectual history of comparative constitutional inquiry and charting out a kind of methodological *desiderata* for the field.

Indeed, the heart of *Comparative Matters* is a plea for comparative constitutional study to be more energetically and resolutely interdisciplinary, engaging, in particular, with the social sciences and empirical methods. The latter half of Hirschl's book is dedicated to this methodological call, with Chapter 4 urging a shift from comparative constitutional "law" to comparative constitutional "studies," signalling an enterprise more closely tied to the contextual focus of the social sciences and less anchored to conventional forms of legal analysis. One need not wholly concur with Hirschl that the style of constitutional reflection in the legal academy is quite so thin on such social and political framing to nevertheless profit from his account of why deeper engagement with the social sciences and its methods would enrich the field of comparative constitutional study. In Chapter 5 and 6 Hirschl examines key methodological tensions that must be reckoned with for the field to continue to develop (the universal v. particular and critiques from the "global south") and offers a set of principles and methodological rules. In these latter pages, Hirschl sets out principles of case selection in small-N comparative studies and advocates for the greater use of large-N empirical studies. Hirschl is not sanguine about such studies, carefully noting the limits and risks involved. But he is insistent that research method must be calibrated to research aim and that *if* one aspires to meaningful causal claims or explanatory theories, such well-crafted studies are important arrows in the comparative constitutionalist's quiver.

The force of these methodological arguments rests, however, on the work that Hirschl does in the first half of the book. The first three chapters, each fascinating and erudite, appear vastly different in their focus and character. Chapter 1 addresses the currently salient issue of top courts citing the constitutional jurisprudence of foreign countries. Hirschl offers a helpful and extensive review of the practice, complete with an illuminating case study of Israel. Chapter 2 turns to "pre-modern religion law" and explores the ways in which religious communities managed engagement with the constitutive laws of societies in which they lived or came into contact, presenting these examples as early instances of comparative constitutional engagement. In Chapter 3, the reader is given an intellectual history of comparative constitutional inquiry, reaching back to the mid-16th century and Jean Bodin, and

galloping forward through thinkers like Selden, Montesquieu, Bolívar, arriving at a comparison between contemporary Canadian and US juridical practices.

What unites these apparently divergent chapters is their common insistence that a court's, community's, scholar's, or polity's practices of comparative constitutional inquiry are motivated and shaped by forces that lie outside of the purely legal. Patterns in the judicial citation of foreign law, Hirschl argues, are more about the politics of identity construction than divergences on legal principle. The deep history of comparative constitutional law revealed in the lives of religious communities shows that feelings of vulnerability or security, social and economic needs, political economy, and practical exigency are the chief determinants of adaptation to and borrowing from the constitutive law of others. And, in Hirschl's hands, the intellectual history yields the lesson that comparative constitutional reflection is driven by a trio of motivations: necessity, inquisitiveness, and politics. Although not cast in this manner, I read these chapters as jointly exposing and disrupting the pathologies of formalism, presentism, and parochialism that afflict too much comparative constitutional work. As he insistently pushes us into the theological, the social, the historical, and the political to understand the nature of constitutional comparison, Hirschl establishes his case that a genuinely interdisciplinary approach is not just appealing but imperative. Having been so pushed, where can we turn for richer understanding but to the social sciences (and, I would add, humanities)? Recall Hirschl's complaint about the current epistemological and methodological foundations for the field. By enriching the epistemological terrain for understanding comparative constitutional practices in the first part of the book, Hirschl establishes the case for his methodological ambitions.

Comparative Matters leaves us at the threshold of certain important issues of (appropriately) both an epistemological and methodological nature. In his desire to shine a light on the social, economic, and political factors that influence practices of comparative constitutionalism, Hirschl tends to narrow and ossify concepts that those working in socio-legal studies might prefer to expand and destabilize. For example, having explained the various political factors that influence judicial choices to

cite foreign constitutional law, Hirschl concludes that “[t]hese choices are sociopolitical, not juridical” (43). Similarly, the destination of his intellectual journey through comparative law is the statement that “ultimately attitudes toward the ‘laws of others’ reflect social processes, political ideologies, and national meta-narratives that are broader than the constitutional sphere itself” (13). Seeing the perduring influence of social, political, and identity-based factors on comparative constitutional practice, perhaps the more constructive move would be to expand our sense of the juridical task (as one always involving decisions about community identity) and of what is encompassed by the “constitutional sphere”. Methodologically, as *Comparative Matters* moves into its final chapters, the range of the imagined interdisciplinarity seems to narrow, focussing on empirical social sciences and leaving aside Hirschl’s own earlier and illuminating engagement with theology, philosophy, and literature evident and so fruitful in the early chapters of this book. The choice is understandable, given the less mature state of scholarship that takes seriously case selection and large-N research design principles; and yet one can hope that Hirschl’s book will inspire a similarly careful consideration of the methodological rules and approaches appropriate to the humanistic engagement with comparative constitutionalism.

Comparative Matters is an ambitious, learned, and provocative book that succeeds in contributing to a more sound and productive foundation for the field of comparative constitutional studies. With this volume, Hirschl again marshals his impressive range and vision as a scholar¹ to advance our understanding of constitutionalism and, this time, to help us to think more deeply about the character of the comparative constitutional enterprise. Otherwise put, as a comparative constitutionalist, this book will help you to see “wonderful things.”

¹ See, e.g., his earlier volumes, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard, 2004), and *Constitutional Theocracy* (Harvard, 2010).