

The Relevance of Constitutional Law

Konrad Lachmayer

Abstract

This paper questions the relevance of constitutional law in legal systems. Comparative constitutional law scholars have become used to the assumption that constitutional law is a universal point of reference which can be addressed in comparison. If comparative constitutional law is intended to refer to different constitutions, it will be necessary to check the relevance of the particular constitutional law first. Comparative constitutional studies have to develop criteria to address the relevance of constitutional law on the one hand and, on the other hand should be able to go beyond constitution and law to find the relevant comparative perspective.

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I. Constitution as Universal Point of Reference

1. The (Non-)Constitutional Dimension of Data Protection

This paper questions the relevance of constitutional law as a point of reference in comparative law to create a more realistic picture of constitutional law in legal comparison. The problem which will be addressed in this paper will first be exemplified by the diverse approaches towards data protection from different legal systems:

The Austrian legal system provides a fundamental right of data protection in Sec. 1 Austrian Data Protection Act.¹ This constitutionally guaranteed right enables individuals (in last instance) to file a complaint with the Austrian Constitutional Court when it comes to any violation of this right by the government or law enforcement authorities. The Austrian right to data protection not only applies to the government but also to private parties, especially companies. It is possible for an individual to file a complaint with the ordinary courts if a company violates his or her constitutionally guaranteed right of data protection. Thus, the Austrian legal system uses a broad constitutional concept to safeguard the data protection of individuals living in Austria.

An alternative approach can be seen in Germany. The German Constitution does not provide an explicit right to data protection. However, the German Constitutional Court has developed a world-famous approach towards data protection, which the Court calls

1 It is very difficult for a comparative constitutional lawyer to understand that Austria provides a fundamental right of data protection. First, the core constitutional document, the Federal-Constitutional Act, does not contain a certain right; indeed it almost provides no fundamental right at all. Second, the different fundamental rights catalogues which are in force in Austria also do not contain an explicit right to data protection (but a right to privacy). Third, Austrian constitution law can also be found in ordinary statutes, which is a rather unusual element of the Austrian constitutional system. See in this regard Manfred Stelzer, *The Constitution of the Republic of Austria* (Hart Publishing 2011) 208-15, 212. If you search for example in the research engine of the Constitute Project, you will be led to believe that Austrians do not have a right to privacy (see www.constituteproject.org). The reason for this erroneous result is simply the fact that the website does not reflect the three characteristics of the Austrian Constitution mentioned above.

the “right to information self-determination”.^{2,3} This right is a fundamental right and enables the individual to file a complaint against violations of this right by the government, administration and law enforcement with the German constitutional court. The German legal system thus also addresses data protection from a constitutional perspective, but it is limited to the interrelation of the state versus the individual and is not open to conflict between private persons (as is possible in the Austrian system).

The US Constitution – similarly to the German Constitution – does not provide an explicit right to data protection. However, like the German Constitutional Court, the US Supreme Court has developed elements of privacy with regard to governmental acts by applying the 4th amendment. The application, however, remains restricted, e.g. when it comes to persons not living in the US, or when personal data is available by third parties (e.g. a bank).⁴ The constitutional dimensions of data protection are therefore much more limited than in Austria or in Germany. However, there are still possibilities to claim damages under private law.

The Australian Constitution provides neither an explicit right to data protection nor a right to privacy. It actually does not contain a human rights catalogue at all!⁵ If one tries to address issues of data protection and privacy, it is necessary to refer to the Privacy Act 1988⁶. When it comes to data protection with regard to private companies, the application of the Privacy Act is very restrictive and only applicable in limited cases.⁷ Moreover, the Privacy Act is missing a tort claim. Thus, there is a lack of possibilities to get effective legal protection regarding the violation of personal data. The constitution is not effective and other alternatives in administrative or private law are more than limited.

In conclusion, these examples show the different approaches of different legal systems for dealing with questions of data protection, which can be seen as a major challenge

2 It is remarkable that the Constitute Project (see www.constituteproject.org) is also not able to find this fundamental right, because it is not part of the written constitution but a result of the case law of the German Constitutional Court.

3 See the famous judgment on the German Census Act from 1983, BVerfGE 65, 1 (*Volkszählungsurteil*).

4 See Thomas N McInnis, *The Evolution of the Fourth Amendment* (Lexington Books, 2009).

5 See Cheryl Saunders, *The Constitution of Australia* (Hart Publishing 2011) 257; it must, however, be mentioned that Australia as a federal state has partly established a bill of rights at state level (e.g. Victoria) and has signed up to international human rights treaties (e.g. ICCPR). Moreover, in an Australian constitutional understanding, it is up to the elected parliaments to protect human rights.

6 <http://www.oaic.gov.au/privacy/privacy-act/the-privacy-act>.

7 Normann Witzleb, ‘Halfway or Half-Hearted? An Overview of the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)’ (2013) 41 *Australian Business Law Review* 55.

in the 21st century. The role of constitutional law is very diverse in the different legal systems. From an explicit right in the constitution and over-constitutionalizing Austrian approach to a non-constitutional and under-regulating Australian approach, different perspectives are possible.

The important insight from this example regarding data protection is that a constitutional perspective on data protection falls short of grasping the relevant legal dimensions of data protection in every country. Constitutional law is not a universal point of reference when it comes to data protection. This quite clear and simple insight, however, can be related to the rise of comparative constitutional law from a general perspective and to how constitutional law can be approached properly in comparative constitutional law. Only if comparative constitutional law approaches took the (non-) relevance of constitutional law into consideration would it be possible to fulfil the tasks of legal comparison. The ignorance of the relevance of constitutional law can in contrast lead to a superficial comparison, which only compares constitutional texts or constitutional institutions. This kind of comparison will not achieve a sufficient methodological level of comparative law⁸, neither from a functionalist nor from a contextualist perspective.⁹

2. The Success of Constitutionalism

In the last 25 years, constitutionalism has spread around the world. After the fall of the Berlin Wall, the constitutionalization of Eastern Europe significantly changed the constitutional landscape in Europe. The South African Constitution 1995 is presumed to be a paradigm constitution and the new constitutional ideas in Latin America (“Nuevo constitucionalismo”) led to new debates on the concepts of constitutional law. International constitutional experiments like in East Timor, Bosnia-Herzegovina or Iraq¹⁰ only had mixed success, but still established constitutional law as relevant paradigm. Other countries like Nepal are still struggling to develop their constitution.¹¹

The success of constitutionalism is not only related to constitution-making, but to the establishment of constitutional courts and their increasing importance all around the

8 See Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014).

9 See Vicki C. Jackson, Jackson, ‘Comparative Constitutional Law: Methodologies’, in Michel Rosenfeld & András Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 54.

10 See Daniel Thürer, *Kosmopolitisches Staatsrecht* (Schulthess Verlag 2005)

11 See Surendra Bhandari, *Self-Determination & Constitution Making in Nepal* (Springer 2014).

world. Moreover, constitutional court and supreme court¹² judgments are much more easily accessible and networks of judges¹³ have led to intensified cross-references between courts.¹⁴ The transnational dialogue and the rising importance of international courts, especially in the European context, have even accelerated the success of constitutionalism.

The picture of constitutionalism can, however, not be drawn too enthusiastically as the migration of anti-constitutional ideas¹⁵ does not only refer to counter-terrorism but also to new forms of illiberal and authoritarian forms of constitutional law.¹⁶ Constitutional law could often not fulfil the promise of a more equal and just society and the crisis of human rights in the context of the Islamic State and other regimes by militant groups has cast a shadow over constitutionalism.

3. The Rise of Comparative Constitutional Law

The success of constitutionalism, however, has led to the rise of comparative constitutional law in academia as well as in practice. Scholarship in comparative constitutional law in the last 10 years has increased significantly. New journals, like the *International Journal of Constitutional Law* or *Global Constitutionalism*, are covering recent developments; new handbooks, like the *Oxford Handbook on Comparative Constitutional Law*,¹⁷ the *Routledge Handbook on Constitutional Law*¹⁸ or the *Research Handbook on Comparative Constitutional Law* by Edward Elgar¹⁹, summarizes the main debates in the scientific community; huge research projects like

12 Supreme Courts often fulfil a constitutional court function, most prominently the US Supreme Court since its famous *Marbury vs Madison* decision. However, other Supreme Courts have also developed their competences further to review statutes, like the Norwegian Supreme Court did back in the 19th century.

13 See Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005) 65-102

14 See Tania Groppi and Marie-Claire Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013).

15 See Kim Lane Scheppele, 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency' in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 347.

16 See Tom Ginsburg and Alberto Simpser (eds.), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014).

17 Michel Rosenfeld & András Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

18 Mark Tushnet, Thomas Fleiner, Cheryl Saunders (eds.), *Routledge Handbook of Constitutional Law* (Routledge 2013).

19 Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law. Research Handbooks in Comparative Law series* (Edward Elgar 2011).

the Constitute Project,²⁰ the CONREASON project²¹ or the ERC project on “The Role and Future of National Constitutions in European and Global Governance”²² show the potential of this research field in legal scholarship.

Besides the academic dimension, comparative constitutional law fulfils an important function for international and private organisations supporting governments in constitution-making or support strategies of constitutional and supreme courts to develop their case law. Comparative constitutional law serves as a benchmark for international indices on legal systems, gives NGOs the possibility to support their concerns and helps lawyers to strengthen their lines of argumentation. These manifold possibilities to apply comparative constitutional law in practice also creates new scholarship opportunities in the field.

This interrelation between academics and practitioners in comparative constitutional law has also created the interest and need for adequate education in comparative constitutional law, which has led to a rise in courses on comparative constitutional law, especially in (post-)graduate programs of law. The internationalization of legal education creates even more scope for relevant courses on the topic.²³

In conclusion, the rise of comparative constitutional law has created an academic debate, practical application and educatory measures which focus on the constitutional perspectives of legal and social questions. This article aims to bring the constitutional element in comparative constitutional law into perspective. It questions the relevance of constitutional law and opens up the perspective of comparative constitutional law beyond the constitutional and legal perspective. Above all, the paper aims to contribute to a deeper understanding of the subject.

20 See || <https://www.constituteproject.org/>.

21 See || <http://www.conreasonproject.com/>.

22 See the ERC Project by Anneli Albi – further information available: || <http://www.kent.ac.uk/roleofconstitutions/>.

23 See Konrad Lachmayer, ‘Teaching Constitutional Comparison. Changing the Culture of Legal Education’, in Busch et al (eds.), *International Constitutional Law in Legal Education* (Facultas Verlag 2014) 13–39.

II. Comparative Constitutional Law beyond Constitutional Law – Insights from Functionalism

1. Functionalism as a Starting Point

The starting point of this analysis is the functionalist theory of comparative law, which was developed in the context of private law²⁴, but which also became influential in comparative constitutional law.²⁵ As Mathias Siems points out, the core element of the functionalistic approach towards comparative law is “that a socio-economic problem should be the starting point of comparative analysis”.²⁶ The comparativist does not compare similar rules in the different legal systems following a positivistic approach, but analyses the comparative legal rules and institutions with regard to a common denominator (*tertium comparationis*), which relates to the chosen socio-economic problem. Functionalism involves looking for the functional equivalent and not for certain legal institutions or legal concepts.

Applying the functionalist method in comparative constitutional law means accepting constitutional law as the frame of the legal comparison. However, the method of functionalism does not approach law from a certain subject area, like constitutional law, but demands certain functions which the legal systems provide with regard to certain socio-economic problems. Based on the success of constitutionalism, more or less every country in the world can address part of its legal system as constitutional law.²⁷

From a functionalist perspective, however, the functional equivalent to resolve a social problem does not necessarily relate to constitutional law in each country. On the contrary, as the introductory example showed, the legal response of different legal systems to certain social challenges will differ. This can include private, corporate, procedural or criminal law, for instance, and – at the same time – exclude constitutional

24 See, regarding the complexity of the functionalist method of comparative law, Ralf Michaels, ‘The Functional Method of Comparative Law’, in Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 339-82.

25 Mark Tushnet, ‘Some reflections on method in comparative constitutional law’, in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 67 (72-6).

26 Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 24.

27 See, regarding the understanding of constitutional law, the next section.

law. Constitutional law might play a big role, a small one or no role at all if one looks at social problems from a functionalist perspective.

This functionalist dimension of legal comparison has to be addressed in comparative constitutional law. Comparative constitutional law has to integrate into its analysis a reality check if constitutional law in the specific country is to be relevant at all and if it is relevant in the particular topic chosen by the comparativist. Moreover, constitutional comparativists might already consider the question of constitutional relevance in their case study selection.²⁸ It is, however, important to stress that comparative constitutional lawyers shall not exclude countries from their selection only because these countries follow a different, non-constitutional approach to address certain social challenges. It is not the task of constitutional comparison to create a perfect “constitutional world”, which excludes countries because they approach social problems differently.

It is finally necessary to stress that the functionalist/contextualist divide²⁹ in the comparative methodology does not apply in the question on constitutional relevance. The contextualist criticism on functionalism, that there are no universal problems to be solved and that it is necessary to look deeper into the history, politics and cultural context of a society and its legal order³⁰, actually emphasises a perspective which evaluates the relevance of constitutional law. The functionalist insight, which opposes superficial comparisons on a solely textual or institutional level, applies even more from a contextualist perspective.

2. The Plural Understanding of Constitutional Law

If one wants to argue that comparative constitutional law has to go beyond constitutional law, it is necessary to clarify the understanding of constitutional law in place. The meaning of constitutional law seems to create the conceptual framework for comparative constitutional law. However, there is no exact or exclusive understanding of constitutional law. On the contrary, there are many different

28 See, with regard to the possibilities of case study selection, Ran Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 224, 244-67.

29 See Vicki C. Jackson, Jackson, ‘Comparative Constitutional Law: Methodologies’, in Michel Rosenfeld & András Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 54.

30 See Mark Tushnet, ‘Some reflections on method in comparative constitutional law’, in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 67.

understandings of constitutional law and these scholarly constructs already shape the discussion. It is not possible to go into the details of this particular debate in this paper, but it is necessary to make some general statements: first, for the purposes of this paper it is sufficient to focus on a domestic perspective³¹ of constitutional law; second, the applied terminology refers to the constitution as law and not to political ideas and concepts of constitutions.

Constitutional law can be identified by different criteria.³² Dieter Grimm proposes the following functional characteristics of constitutionalism:³³

- Constitution as a set of legal norms, not as a philosophical construct
- Purpose of these norms is to regulate the establishment and exercise (and limitation) of public power
- Comprehensive regulation (no pre- or extra constitutional bearers of public power)
- Constitutional law is higher law (including primacy and invalidation of other acts)
- Constitutional law finds its origin with the people as the only legitimate source of power.

Grimm's definition of constitutional law is problematic insofar as it excludes constitutional law concepts like the British concept, which does not guarantee primacy of constitutional law because of its concept of sovereignty of parliament. Moreover, the link between constitutional law and its origin with the people excludes different versions of international constitution-making procedures. However, this criteria can prevail if one accepts that the constitutional document merely claims that the people are the source of the constitution.³⁴

Within such a general understanding of constitutional law (as provided by Dieter Grimm), the difference between constitutional laws all around the world is

31 See, with regard to International Constitutional Law, Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009).

32 In contrast to a state-based version of constitutional law, Gunther Teubner's constitutional fragments can be understood as a watered-down version of constitutional law; see Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

33 See Dieter Grimm, Types of Constitutions, in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 98, 104.

34 If one looks at the constitution-making procedure, a lot of constitutions lack the legitimizing expression of the will of the people, e.g. the German Constitution. See e.g. András Jakab, 'On the Legitimacy of a New Constitution. Remarks on the Occasion of the New Hungarian Basic Law of 2011', Miodrag A. Jovanović / Đorđe Pavićević (eds.), *Crisis and Quality of Democracy in Eastern Europe* (Eleven 2012) 61-76.

tremendous. Constitutional law can differ from a formal perspective, including written or unwritten constitutions, invisible constitutions, flexibilities of constitutional law³⁵, incorporation clauses in constitutional law or fragmented constitutions, or from a substantive perspective, including the concept of democracy (e.g. direct or representative, liberal and illiberal democracies), the understanding of the rule of law (e.g. civil/common law divide) or the role of human rights (liberal and/or social rights, human rights vs civil liberties, exclusion of human rights from constitutional law), the integration of federalism, etc.³⁶

Moreover, it is important to clarify that constitutional law cannot only be linked to constitutional documents but is mainly shaped by constitutional interpretation by the parliaments and the courts. Constitutional conventions have to be considered as well as the legal system in which the constitutions are embedded. Finally, constitutional law is also shaped by society, which accepts the constitution as part of its fundamental social order.

In conclusion, comparative constitutional law can only work with a plural understanding of constitutional law, which tries to integrate the great plurality of constitutions all around the world. Moreover, comparative constitutional law requires a permanent process of reflection on its own subject matter. Beyond the manifold understandings and impacts of constitutional law, a legal order also contains various other fields of law, which can be distinguished from constitutional law and which are – at least to a certain extent – excluded from a comparative constitutional law perspective. It is, however, necessary to find a solution to consider other areas of law in comparative constitutional law to fulfil the methodological standards of legal comparison.

3. Comparing Constitutions beyond (Constitutional) Law

If one looks back in history, constitutional law was not the first layer of law, not even of codified law. The development of legal systems is a complex process, in which constitutional law is one (important?) layer, but definitely not the only one. Nowadays, newly established constitutions also usually have to deal with existing laws. The constitutional layer is sometimes added artificially on top of an existing legal system

35 Xenophon Contiades (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge 2012).

36 Michel Rosenfeld & András Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

and legal culture, which only refer to a certain extent to areas of ordinary law in that country.

If one goes beyond a textual comparison of constitutional documents and an institutional comparison of constitutional features, like the role of constitutional courts, one has to consider the legal order in which constitutional law is embedded. The introductory example showed that in a functionalist approach it is not guaranteed to find the answers raised within comparative questions in the same layer of a particular domestic legal system. The constitutional solution to a general social problem in one country does not prohibit a private law solution to the same problem in another country.

If comparative constitutional law looks beyond constitutional law, it tends to analyse the influences of constitutional law in other fields of law,³⁷ especially topics with regard to the constitutionalization of ordinary law, e.g. private law, corporate law, etc. In legal systems with a high relevance of constitutional law, it is not unusual for constitutional ideas to spread via different concepts, like *Drittwirkung*, in other areas of law.³⁸ The focus of this article however refers to the opposite perspective: Comparative constitutional law also has to keep in mind that, in a legal comparison, it is necessary to realise the limits of the relevance of constitutional law in different legal systems. This relativizing approach towards comparative constitutional law does not only refer to the relevance of constitutional law in general but also to the relevance of constitutional law with regard to the particular topic or social problem which is addressed by the comparative research.

If comparative constitutional law has to accept that, in a comparative approach, the answers to the constitutional questions in one country might be found in private, corporate, criminal law etc.³⁹ in another country, the next important consequence is to go a step further and to understand that answers might not be found within the legal system at all. Certain constitutional questions in one country might be solved politically or culturally in another country. Questions of social rights, for example, might be addressed constitutionally in one country (e.g. South Africa or India), but are

37 See e.g. Stephen Gardbaum, 'The Place of Constitutional Law in the Legal System', in Michel Rosenfeld & András Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 169-185.

38 See András Sajó and Renáta Uitz (eds.), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven 2005).

39 See, regarding the interrelation between constitutional and private law, Frank I. Michelman, 'Constitutions and the Public/Private Divide', in Michel Rosenfeld & András Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 298-317.

addressed by ordinary law in another country (e.g. in Austria) or are not regulated by law at all. How a society deals with these questions can also depend on cultural strategies in the society. If one comes back to the introductory example of data protection, in Australia, for example, it is still a political struggle to create a certain awareness of the necessity of effective regulation of data protection at all. Thus the comparison cannot only focus on legal approaches to understand the way the Australian society deals with privacy in general and data protection in particular, but also has to consider the non-legal approaches, especially political and cultural ones, towards the topic.

The approach of comparative constitutional law to look beyond law is a crucial part of a contextualist approach towards constitutional comparisons. Contextualists argue that it is necessary to understand the history, politics, economics and culture of a society to understand the constitutional law of this country.⁴⁰ The approach of this paper not only follows this perspective of comparative constitutional law, but further suggests that comparative constitutional law might have to leave a constitutional law, even a legal perspective, to find the relevant (not legal but maybe political or cultural) approaches in the other country for the comparison (thus, to identify differences or similarities).

III. The Relevance of Constitutional Law as an Element of Comparative Constitutional Studies

1. Comparative Constitutional Studies

Ran Hirschl has intensified his claim for a changing perspective on comparative constitutional law in different ways in recent years. Starting from a critique of the “blurred methodology of comparative constitutional law”⁴¹, with a specific focus on questions of case study selection, *Hirschl* has developed a broader concept of

40 Vicki C. Jackson, Jackson, ‘Comparative Constitutional Law: Methodologies’, in Michel Rosenfeld & András Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 54, 66-7.

41 Ran Hirschl, ‘On the Blurred Methodological Matrix of Comparative Constitutional Law’, in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 39-66.

comparative constitutional studies. In the *International Journal of Constitutional Law*, *Hirschl* made his position clear in the following statement:

“In summary, comparative constitutional law professors will continue to hold a professional advantage in their ability to identify, dissect, and scrutinize the work of courts, or critically assess the persuasive power of a given judge’s opinion. No one is better positioned than comparative constitutional law professors to evaluate constitutional texts, trace patterns of convergence alongside persisting divergence in constitutional jurisprudence across polities, or to advance the research on how constitutional courts interact with the broader, trans-national legal environment within which an increasing number of them operate. But theorizing about the constitutional domain as part of the outer world requires more than that. Many of the tools necessary to engage in the systematic study of constitutionalism across polities can be found in the social sciences. In fact, I would argue that there cannot be a coherent positivist (as in “is,” not “ought”) study of comparative constitutional law without the social sciences in general, and political science in particular. Maintaining the disciplinary divide between comparative constitutional law and other closely-related disciplines that study the same set of phenomena does not make sense. [...]

Such a shift entails greater emphasis on explanatory modes of inquiry and inference-oriented research design, as well as a transition, already underway even if in a somewhat slow motion, from doctrinalism and formalism within legal academia towards more frequent engagement with the insights and methods of disciplines such as political science, sociology, and economics. The time has come to go beyond selective accounts of specific provisions or of court rulings (comparative constitutional law) towards a more holistic approach to the study of constitutions across polities (comparative constitutional studies that appreciates the tremendous descriptive depth and explanatory potential of the social sciences in analyzing various aspects of the constitutional universe).”⁴²

The concept of comparative constitutional studies goes beyond a legal perspective of comparative constitutional law. It even challenges the belief that a legal perspective is at the heart of research. *Hirschl* argues that it is necessary to complement comparative legal research on constitution law with “pertinent insights and methods from the human sciences, qualitative and quantitative”.⁴³

The approach towards comparative constitutional studies links the legal and political as well as social dimension of constitutions. Constitutional law cannot be separated from the constitutional reality and the way constitutional law contributes to the social problems in society. In that regard, the relevance of constitutional law is a question which also can and shall be raised from the perspective of comparative constitutional studies.

42 Ran Hirschl, ‘From comparative constitutional law to comparative constitutional studies’ (2013) 11 *International Journal of Constitutional Law* 1–12.

43 Ran Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 283

Comparative constitutional studies also focus – like comparative constitutional law – on constitutions. If one brings constitutions (and thus constitutional law) into perspective, it is important to see the role which a constitution plays in a certain society. Comparative constitutional studies, however, have the right tools to evaluate the relevance of constitutional law. However, finally, comparative constitutional studies also have to take into consideration the possibility that a constitution or constitutional law does not have significant relevance either with regard to a certain topic or at all. From this perspective, it is necessary to open up the comparative study to other elements of a political, legal or social process which might not be related to constitutional law at all.

2. The Relevance of Constitutional Law

If one is interested in the relevance of constitutional law, it is necessary to ask how this relevance of constitutional law can be evaluated. Obviously, there are many different possible approaches to clarify the relevance of constitutional law in a particular country or legal order. The starting point might be the constitutional claim itself. Is the constitution giving itself much space for development? An indicator for a bigger constitutional relevance in this regard is for example the establishment of a constitutional court by the constitution or the explicit empowerment of a supreme court with constitutional functions. If a constitution sets out constitutional rights, it is more likely that the constitution will become relevant if individuals have the possibility to claim such rights. The legal dimension of constitutional relevance goes beyond constitutional law and involves the legal status of a constitution in an entire legal system. Is constitutional law understood primarily as supreme law, which can be enforced, or as a political program, which does not affect ordinary law, or as a social contract, which mainly has a symbolic function?⁴⁴

Besides the legal dimension of the relevance of constitutional law, constitutional relevance is, politically speaking, especially shaped by certain actors, e.g. relating to:

- the state:
 - Parliament: The relevance of constitutional law is linked to the importance constitutional law gains in the process of the enactment of statutes. Does

⁴⁴ Günter Frankenberg, 'Comparing Constitutions – Toward a Layered Narrative' (2006) 4 *International Journal of Comparative Constitutional Law* 439-59.

- the parliament understand itself as the protector and/or implementing authority of the constitution?
- Courts: What weight does constitutional argumentation have before the courts? Again, the relevance of the constitution depends on the extent to which courts are willing to apply and enforce the constitution.
 - Government: Governmental actions are crucial for the relevance of a constitution in a country. The level of compliance to constitutional requirements tells a lot about the constitutional culture in a country and thus about the relevance of constitutional law.
- civil society:
- NGOs: In some countries, the relevance of constitutional law is closely interrelated with civil society, especially certain groups of society, which play an important role as constitutional watchdogs to ensure that constitutional law remains relevant in the state. This task is primarily fulfilled by NGOs, but can also include other actors, like academia
 - Media: How much do the media tackle constitutional topics in public debates? Can you read about constitutional issues regularly in the newspapers? The media mainly shape constitutional relevance in the public debate and can thus create a significant impact on the relevance of constitutional law in a society.
 - Individuals: Finally, it is up to the whole population of a country to contribute to the relevance of constitutional law. It starts with the constitutional knowledge and constitutional awareness of the people and it leads to the willingness of individuals to file a complaint in court if their constitutional rights are violated.

The measuring of constitutional relevance is a challenge which has to consider the complex elements of the interrelation between constitutional law, its application and implementation by state actors as well as constitutional recognition and awareness on the part of society. The development of a constitutional relevance barometer seems to be a challenging task, but is – as pointed out – a necessary precondition for constitutional comparison. The challenge gets even bigger as the relevance of constitutional law is not an absolute term but is changing permanently over time. Moreover, it makes a difference if one looks at the relevance of constitutional law as a whole or if one is only interested in a specific feature of constitutional law.

IV. The Spectrum – Case Studies

1. The Plurality of Constitutional Relevance

The relevance of constitutional law is very different in the various states. In this paper, it is not possible to focus on the relevance of certain constitutional topics, social challenges or cultural particularities, only on the overall characteristics of constitutions. The relevance of constitutional law does not necessarily need to have the same reasons in different countries. On the contrary, completely different dimensions of relevance (e.g. legal importance, role in public debates etc) can contribute to the overall relevance of constitutional law.

The following case studies exemplify the general approach towards relevance research in constitutional comparison. A spectrum of constitutional relevance will be developed starting from constitutions which are very important in the respective legal, political and social system to constitutions in which constitutional law only plays a minor role. However, it is also interesting to identify constitutional fragments, which are still relevant, although the overall importance of the constitution is very minor. In between, there are various constitutions in which constitutional law is of changing importance.

2. The Omnipresence of Constitutional Law

The first category of constitutional relevance refers to countries in which constitutional law is of great relevance for the legal, political and cultural aspects of society. The German and the US system can serve as examples of this category, where it might even be possible to speak of the omnipresence of constitutional law.

— The role of the constitution in the legal system

In both countries, the constitution is established as a supreme constitutional layer within the legal system. The constitution is legally conceptualized – especially in Germany, by the establishment of the Constitutional Court – so that the constitution is applied to review Acts of Parliaments, administrative action and court judgments. The US Constitution in comparison did not provide a specialized constitutional court as in Germany. However, the case law of the US Supreme Court developed its own constitutional approach, which gives the Supreme Court the possibility to review statutory acts in last instance. The priority of constitutional law is nowadays legally established and enforced by different constitutional actors.

- The political relevance for the constitution in parliament, administration and the courts

In both countries the political relevance of the constitution is very high. All three branches (parliament, administration and courts) consider constitutional law within their scope of action. The constitution is applied as a framework of legislative and administrative power and as an argument in judicial reasoning. The debates on the constitutionality of certain actions cannot be understood as a limitation of constitutional relevance but as part of a vivid debate, which reflects the political relevance of constitutional law. The US approach towards counter-terrorism, however, shows certain struggles with the relevance of constitutional law. While the administration is reducing its compliance with constitutional requirements, it is – in a checks and balances perspective – up to the parliament (revealing and controlling the activities of government) and to the courts (reviewing the activities of government) to guarantee the constitutional relevance in the legal system.

- The role of the constitution in the public debate

If one looks at the media in Germany and the US, one can observe that in both countries the constitution plays an important role not only when it comes to media presence of the constitution in general but also in terms of the relevance of the constitutional framework for social issues discussed in the public. With regard to the US, one can observe a broad debate on constitutional questions, like the death penalty or the right to carry guns. In Germany, the topic of state surveillance is among those that are very important. In both countries you will find different groups in society which are dealing with constitutional issues. While in the US civil society groups are of particular importance, academia plays a crucial part in the German public debate on constitutional issues.

In conclusion, it is possible to argue that constitutional law is highly relevant in an overall perspective. It is no coincidence that these two countries are very influential in comparative constitutional law, because of their long-standing culture of dealing with legal questions from a constitutional perspective.

3. The Changing Importance of Constitutional Law

The second category focuses on a broad field of countries in which the relevance of constitutional law is changing over time. The constitution might not be as dominant

as in the US or the German legal system, but constitutional law is on the rise or in decline. On the one hand, an example for strengthening constitutional law might be provided by Nordic countries in Europe, which have intensified their constitutional approaches in the last 20 years, especially in the context of the EU and/or the ECHR. On the other hand, an example for the declining importance of constitutional law in the last 20 years could be the legal system of Hong Kong.

— The role of the constitution in the legal system

The Constitution in Norway has already celebrated its 200th birthday. However, the relevance of constitutional law has never been higher than today. The European influence (although Norway is not part of the European Union) and the changing, more active approach of the Norwegian Supreme Court significantly increases the legal relevance of the constitution. An opposite example can be found in developments in Hong Kong. Although the Chinese government follows the concept of one country, two systems in Hong Kong, the increasing influence of the Chinese legal system is legally relativizing the Hong Kong constitutional law step by step.

— The political relevance for the constitution in parliament, administration and courts

As the Norwegian Supreme Court strengthens its constitutional approach, the political relevance of constitutional law is increasing in parliament and is becoming more relevant in Norwegian administration. As the court system in Norway follows a unitary, common law model, the influence of the Supreme Court on other courts is great. The constitutionalisation of the Norwegian system thus follows a top-down approach. However, the Norwegian rise of importance of constitutional law is not yet close to achieving the relevance constitutional law in Germany, for example.

The influence of the Hong Kong Constitution as part of the British Commonwealth was significant. Although the Hong Kong Basic Law is still in force, the relevance of constitutional arguments is in decline in the court system and the importance in the parliamentary decision-making is increasingly limited. Finally, the administration does not feel bound by constitutional law in the same manner any more.

— The role of the constitution in the public debate

The rise of constitutional law in Norway follows a top-down approach. Thus, the public debate does not focus on constitutional issues in particular. Although the 200 year celebrations created some awareness in the public debate last year, it is still not a dominant issue in the media. Constitutional knowledge within the society and the role

of the Supreme Court are still modest. Again, the situation in Hong Kong is quite the opposite. Although the relevance of constitutional law is in decline from a legal and political perspective within state authorities, constitutional law plays an important role within the public debate. The restriction of constitutional rights is hotly debated and has led to extended protests by the population. As shown, the changing role of constitutional law creates different impacts on society.

In conclusion, dynamics in law, politics and society shape the relevance of constitutional law. Certain developments, like total constitutional revisions of constitutions might have completely different impacts on the relevance of constitutional law in a country. The strengthening of constitutional law by constitutional revision could be observed in the constitutional revision in Switzerland; the attempts to form a new constitution in Turkey seem to create the opposite: a limitation of constitutional law by a constitutional revision.

4. Constitutional Law as a Facade

The third category refers to countries in which constitutional law plays only a minor part in the legal, political and social system. The constitution, however, remains a part of a legal system, but many constitutional provisions only formally cover an underlying political agreement, which ignores constitutional law (at least to a certain extent). Constitutional law becomes a façade in the legal and political order of the country. Examples in this context are the Russian and the new Egyptian constitutional law approach.

— The role of the constitution in the legal system

The Russian constitution is a post-Cold War constitution from the beginning of the 1990s, which has been very important both legally and politically as a transitory step towards a liberal democracy. The establishment of the constitution creates legal relevance of constitutional law in Russia, which still exists to a certain degree today. For 15 years, however, the constitution has been increasingly confronted with a dual legal and political structure that creates – besides the constitutional concept of the state - a second legal layer (e.g. in the context of federal state), which undermines the legal concept of the constitution. The Egyptian legal system is in transition and tries to give the country stability and the current government the necessary legitimation. The trial proceedings against the Muslim Brotherhood, however, clearly showed that the willingness to consider the constitutional framework is very limited.

- The political relevance for the constitution in parliament, administration and the courts

The Russian constitution is still a relevant element of the Russian legal system and is thus a point of reference for the parliament and part of judicial reasoning. However, the political relevance of the constitution is still in decline and not so much political relevance remains. The presidential system in Russia has taken over and significantly reduced the political relevance of constitutional law. Although opposition parties are claiming their constitutional rights, democratic possibilities to engage against the current government are more and more limited. The extension of Putin's presidency is one example of the limited relevance of constitutional law in Russia, which shows how constitutional provisions are interpreted to keep power. While the president holds the governmental power in Russia, it is the military that is the political actor shaping constitutional relevance in Egypt. This approach limits the relevance of constitutional law, especially in consideration of the application of human rights and the rule of law.

- The role of the constitution in the public debate

In the Russian public debate, the relevance of constitutional law is not very great. It is up to certain groups of opposition and critical media to keep constitutional law alive in public debate. People believe much less in the legal power of constitutional law than in the political power of the current government. The anti-democratic influence of the government on the media further contributes to the irrelevance of constitutional law. While in Russia parliamentary opposition is difficult but possible, the biggest opposition party in Egypt, namely the Muslim Brotherhood, is already forbidden, with members in jail and some party leaders sentenced to death. The public debate played an enormous role in the Arabic Spring and the subsequent years, but the possibilities for public debates on constitutional law are significantly on the decline.

In conclusion, the relevance of constitutional law can also become mere rhetoric, a political game, with constitutional arguments only considered in the cases, in which it helps to legitimize the government's interests. When it comes to critical voices of individuals in the public, the support of the constitutionally established democratic framework or the establishment of effective legal protection of rights, there is not much relevance of constitutional law left.

5. Conclusions

The three categories should have given a short but structured overview on the broad variety of the relevance of constitutional law all around the world. Obviously, most constitutions are in the middle of this spectrum. In certain countries, like Nepal, it is not even possible to find a consensus on a constitution remaining permanent transitions.⁴⁵ In so-called failed states, like Somalia, it is even more difficult to create relevance for constitutional law.

I have chosen a broad perspective on constitutional law as a whole and have not focussed on particular elements of constitutional law. When it comes to constitutional comparison, however, it is not only necessary to look at the relevance of constitutional law in general, but also the relevance of constitutional law regarding the certain topic, which is of particular interest to the constitutional comparativist. Within specific questions, the evaluation of the relevance of constitutional law can be the complete opposite of the overall picture. If one looks at the overall importance of constitutional law in Austria, for example, one would agree that constitutional law is very relevant, but when it comes to social rights, Austrian constitutional law can merely contribute to the topic (although Austria has one of the best social welfare systems in the world).⁴⁶ In contrast to this setting (high relevance overall, no relevance in the specific topic) the Japanese constitution does not have a very high relevance overall, but when it comes to the specific topic of military activities and peaceful approaches towards international law, the Japanese constitution is of great domestic relevance.⁴⁷

V. Measuring Constitutional Relevance

1. Criteria of Constitutional Relevance

This paper shall only be understood as a starting point for academic research to focus on the question of the relevance of constitutional law. In this paper, only certain criteria, like the legal, political and public impact of constitutional law, have been applied to figure out the relevance of constitutional law. The criteria to evaluate the

45 See Surendra Bhandari, *Self-Determination & Constitution Making in Nepal* (Springer 2014).

46 See Manfred Stelzer, *The Constitution of the Republic of Austria* (Hart Publishing 2011).

47 See Shigenori Matsui, *The Constitution of Japan. A Contextual Analysis* (Hart Publishing 2010).

relevance of constitutional law are of specific importance. It is necessary to do further, especially empirical, studies to analyse if constitutional law is relevant in a specific country. It is necessary to combine legal, political and social science approaches in comparative constitutional studies to develop a plausible set of criteria.

The set of criteria applied in this paper distinguished between:

- the role of the constitution in the legal system;
- the political relevance for the constitution in parliament, administration and the courts;
- the role of the constitution in the public debate.

These criteria have been applied only in a very brief and general manner for reasons of exemplification in this paper. Several other criteria might serve the evaluation of the relevance of constitutional law, like concrete court judgments, media analysis of the public debate, evaluation of the concrete knowledge and awareness of constitutional law by the population in general and lawyers in particular or individuals' willingness to file a complaint to protect their fundamental rights by.

2. Consequences for Comparative Constitutional Studies

Different consequences can be drawn from the consideration of constitutional relevance in comparative constitutional studies:

First, constitutional relevance demands a constitutional reality check in comparative constitutionalism. Within the case study selection and the framing of the constitutional topic, it would be necessary to consider the overall relevance of constitutional law in that particular country. Moreover, it would be important to question if and to what extent constitutional law can contribute to the very specific research topic and research question which one is focussing on in one's comparative research.

Second, the consequences of this approach is – from the functionalist view – that it is necessary to find answers to social problems beyond constitutional law and – from the contextualist view – to go even further and to analyse the social and political background, which provides the relevant answers to the research questions, which might be constitutional in one country, but political and thus non-legal in another country.

Third, this approach relativizes the constitutional dimension and also the legal dimension of comparative constitutional studies. However, it is also a purpose of comparative constitutional studies to reflect on the relevance of constitutional law as such and thus question its own foundations. Particularly from a perspective of comparative constitutional studies, the legal dimension is only a secondary part of the scholarly research. Applying such an approach means that implicit comparative constitutional law⁴⁸ will be implied, which is even more dependent on the evaluation of the relevance of constitutional law.

Fourth, it is important to stress that the relevance of constitutional law might not affect all topics of comparative constitutional law to the same extent. If the focus lies on constitutional courts, the constitutional dimension might be paramount. However, even if comparative research focuses on constitutional courts, it would be necessary to figure out to what extent the constitutional court in a certain country has an impact on the social reality of the people, and thus how far constitutional relevance affects the concept of the constitutional court.

Finally, if one agrees that it is important to evaluate the relevance of constitutional law in comparative constitutional studies, it opens up huge research tasks to develop certain standard criteria for this kind of analysis and requires even more effort to apply these criteria with an adequate method on a regular basis to constitutional legal systems around the world. Only if it is possible to provide such a Constitutional Relevance Barometer to comparative research will it be possible to take the relevance of constitutional law fully into consideration.

48 See regarding implicit comparative law, Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 287-312.