

Comparing Constitutional Networks

Konrad Lachmayer

In a traditional understanding constitutional law is a more or less static (in some cases nearly unamendable) legal structure of a nation-state. The function of comparative constitutional law is to compare different institutions, functions or contexts of these constitution. The following paper argues that this approach towards comparative constitutional law is not useful anymore because the core element of the comparison is not the same anymore. Constitutional law changed significantly in the last 25 years and makes it necessary to discuss the function of comparative constitutional law.

The understanding of a constitution (below and beyond the state) is changing, which affects comparative law in general and comparative constitutional law in particular. The paper analyses the question what we can or shall compare if we are comparing constitutions. The change from constitution as permanent object of analysis towards a process, which is dislocating permanently, challenges comparative law and demands a re-configuration of its focus.

Sub-national constitutions in the context of federalism (e.g. Scotland, Catalonia and others), supra-national constitution in the European context or international constitutions (WTO, etc) are shifting the understanding of constitutional law constantly away from a strict understanding of constitutional law, which is bound to the national state. A neo-federal perspective (*Robert Schütze*) broadens the view of analysis to take the interrelations of the different layers of constitutional law into consideration

The concept of “constitutional fragments” (*Gunther Teubner*) goes even a step further. As the point of reference is permanently changing, constitutional law can only be identified as constitutional fragments anymore. The old ideal of a full constitution is changing towards residual elements of constitutional law, which spreading out in the political spectrum from global to local levels and can be related to multiple actors in the political sphere.

These fragmented constitutions, however, are not isolated elements within different legal orders, but are linked to each other, which can be described and analysed as constitutional networks. The interrelations and transactions of constitutional fragments characterise the new constitutional landscape.

In conclusion, the function of comparative constitutional law has to adapt its analysis to address the dynamic processes of constitutional networks. First, comparative law has to focus on constitutional networks (including sub- and international constitutions) when comparing constitutional law. Comparing international law as a result of the fragmentation of international law becomes as relevant in comparative constitutional law as the comparison of subnational structures. Second, constitutional networks are dynamic, volatile and incoherent. It is not possible to address fixed or permanent structure, but only dynamic interrelation of constitution fragments.