Comparative Public Law for European Society

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A. Claim and Program

Comparative law is about transcending the focus on just one legal order. This contribution presents European comparative public law as a special way of doing so. Outlining its special nature allows us to better understand European comparative public law as well as other comparative efforts.

European comparative public law is special because it belongs to a specific body of law, namely European law. It is special because it serves a specific social entity, namely European society. It helps to create commonalities as well as to understand, assess and protect social and legal diversity. Last but not least, European comparative law is special because it can rely on a specific legal foundation, namely Article 2 TEU.

This contribution theorizes European comparative public law by exploring its special nature. It does so by reconstructing European law as its legal frame (B.1) and European society as its social reference (B.2). This is followed by a discussion of the specific role of comparative arguments (B.3), the legal and methodological bases (B.4) as well as a comparison between the new and the old *Jus Publicum Europaeum* (B.5). A comparative reconstruction of constitutional adjudication illustrates this theorization (C.). It exemplifies European society's commonalities as well as its diversity,

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i.e. its multiple modernities (C.1). While constitutional courts have become important actors throughout European society, their agency differs according to their respective authority (C.2). Of the many mechanisms for dealing with diversity, the courts' common responsibility for European society will be presented as it illustrates the necessity of a comparative mindset (C.3). Finally, I show how the European comparative setting impacts on academic identities (D.).

But first, a preliminary note on *publicness* that distinguishes the research object from comparative private law: I read that distinction as responding to a fundamental differentiation in modern societies. Private action and public action belong to different social spheres with different operational logics and justificatory requirements. Public law mostly operates in relationships not justified by direct consent, unlike what is usually the case under private law. At the same time, private law mostly allows subjects to act solely in pursuit of self-interest whereas action under public law is bound by higher standards such as those of Article 2 TEU. Of course, the border runs differently in different legal orders, the two spheres relate to each other in different ways, the practical distinction between the two spheres is sometimes difficult. But all that does not affect the private-public distinction as such.

B. Theorizing European Comparative Public Law

1. European Law

European comparative public law is part of the vibrant field of studies that look beyond one legal order.[1] After having spent decades in an academic niche existence in many countries,[2] barely noticed by mainstream scholars, comparative efforts have by now gone mainstream. Though the statement that 'we are all comparativists now'[3] remains a bit of a hyperbole for public-law scholarship, it captures a true spirit and a real thrust.

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1 For a discussion of possible understandings Lucio Pegoraro, *Diritto costituzionale comparato. La scienza e il metodo* (2014), 19-42; Uwe Kischel, *Comparative Law* (2019), 3-10, 27-31.

2 Italy being one important exception with a chair of comparative constitutional law in many law and political-science departments.

3 Charles Lees, 'We Are All Comparativists Now. Why and How Single-Country Scholarship Must Adapt and Incorporate the Comparative Politics Approach', Comparative

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This success comes with a process of differentiation. Global or cross-regional comparison stand next to comparisons focussing on a specific region.[4] The global discourse has flourished ever since the Iron Curtain came down and many states introduced an entrenched liberal constitution.[5] Associations such as the 'International Association of Constitutional Law' or the 'World Conference on Constitutional Justice' are thriving. Comparative administrative law too has acquired a new significance. GAL, the acronym for 'Global Administrative Law', is public-law scholarship's first global brand in the twenty-first century.[6] The founding of the 'International Society of Public Law' in 2014 represents a milestone, as it joins the administrative and the constitutional strand in an overarching public-law discourse that includes transnational phenomena and interdisciplinary perspectives.[7]

Comparisons within regions differ from global comparisons as they can often build on political agendas and wider affinities. Latin America provides a vivid example: here, much of comparative constitutional scholarship is part of a regional political push for democratic constitutionalism and trustworthy public institutions. Moreover, the region has common institutions, most importantly the Inter-American Court of Human Rights. It helps that the region's legal orders show significant affinities: the shared legacy of Iberian conquest, the *Corpus Iuris Civilis,* the *Corpus Iuris Canonici*, the United States Constitution and U.S. scholarship, the Constitution of Cádiz and of French public law. They also exhibit, no less important, common problems: the exclusion of large segments of the population, the legacy of authoritarian regimes, the shadow cast by U.S. interests, *presidencialismo,*

Political Studies (2006), 1084; Ran Hirschl, 'On the blurred methodological matrix of comparative constitutional law' in: Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (2007), 39 (63).

4 Michel Rosenfeld and András Sajó, 'Introduction' in: Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012), 1 (10-11).

5 Bruce Ackerman, 'The Rise of World Constitutionalism', Virginia Law Review 83 (1997), 771; Sabino Cassese, 'Fine della solitudine delle corti costituzionali, ovvero il dilemma del porcospino' in: Accademia delle Scienze di Torino (ed.), *Inaugurazione del 232° anno accademico dell'Accademia delle Scienze di Torino* (2014), 20.

6 Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law', Law and Contemporary Problems 68 (2005), 15. See also several contributions to the 'Symposium: Through the Lens of Time: Global Administrative Law After 10 years', International Journal of Constitutional Law 13 (2015), 463.

7 Joseph H. H. Weiler, 'The International Society for Public Law – Call for Papers and Panels', International Journal of Constitutional Law 12 (2014), 1; Sabino Cassese, 'An International Society of Public Law', ICON.S Working Paper 1(2015), 1.

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and the weakness of many public institutions. On that basis, a comparative argument holds greater sway in practical legal discourses, which is key for legal scholarship as a mostly practice-oriented endeavour.

No surprise then that Latin-America shows a rich regional discourse on public law, in particular constitutional law. The *Instituto Iberoamericano de Derecho Constitucional* provides a pivot of comparison in the service of constitutional democracy.[8] The idea of a regional discourse informs journals such as the *Revista Latinoamericana de Derechos Humanos*, the *Anuario de Derecho Constitucional Latinoamericano*, the *Revista Latinoamericana de Derecho*, and the *Revista Latinoamericana de Derecho Social*. Some reconstruct a common Latin American law of human rights.[9] However, these legal phenomena do not rely on political decisions and institutions like those that underpin European law, and thus allow for a specific European comparative public law.[10]

To understand European comparative public law as part of European law requires theorizing European law, i.e. a fitting concept must be developed. If the words *European law* are to embody a concept, they must identify (or distinguish) something and tie various phenomena, experiences, theoretical insights, or data into a connection providing insights that transcend the mere designation of issues.[11]

I suggest a concept of European law that includes EU public law, the European Convention as well as the domestic public laws that respond to European integration. Hermann Mosler was the first to articulate such a concept. As a legal architect of Germany's *Westbindung*, Mosler was important in terms of both scholarship and practice. The Frankfurt law

8 See https://iidc.juridicas.unam.mx/ (last accessed 25 October 2023).

9 Alexandra Huneeus, 'The Inter-American Court of Human Rights: How Constitutional Lawyers Shape Court Authority' in: Karen J. Alter, Laurence R. Helfer and Mikael R. Madsen (eds), *International Court Authority* (2018), 196, 216; Armin von Bogdandy et al. (eds), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune* (2017).

10 This also applies to European comparative private law, Reinhard Zimmermann, 'Comparative Law and the Europeanization of Private Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2019), 557 (559); Andreas Schwartze, 'Comparative Law' in: Karl Riesenhuber (ed.), *European Legal Methodology* (2017), 61 (63).

11 This is, of course, but one of many ways to conceptualize concepts; this understanding relies on Reinhart Koselleck, 'Einleitung' in: Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland. Bd. 1* (1972), XIII (XXIII).

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professor served as legal advisor to Adenauer and Hallstein and later as the director of the Max Planck Institute for Comparative Public Law and International Law. In recognition of his achievements, he became the first German judge at the ECtHR in 1959 and the first German judge at the International Court of Justice in 1976.[12] His international career symbolizes the Federal Republic's successful integration into the West.

Mosler developed his concept in the context of European integration, more particularly within the major conflict personified by the sovereigntist Charles de Gaulle and the federalist Walter Hallstein. Hallstein's early successes led defenders of national sovereignty to oppose him. The French *chaise vide* policy from 30 May 1965 to 30 January 1966, which the French government used to block the transition to majority voting in the Council, is the most famous example of this opposition.[13]

The conflict between Hallstein's and de Gaulle's vision has many aspects. Here, I focus on Mosler's mediating concept of European law that encompasses Community law (now Union law), the European Convention on Human Rights as well as domestic law, namely all domestic acts of implementation as well as autonomous Member State acts 'issued with a view to the objectives of European integration'.[14] His concept thus posits a body of law that spans different legal orders.

Mosler admitted that his concept was radical, writing that '[i]t breaks down the boundaries between international and domestic law'. His concept is similarly radical as it also 'breaks down' the boundaries between different domestic legal orders, e.g. between French law and Italian law. The concept is radical because those distinctions are foundational for most modern understandings of law.[15] Of course, there were holistic theories before Mosler, such as Kelsen's monism and Schmitt's *Jus Publicum Europaeum* (D.).[16] But

12 On Hermann Mosler, see Felix Lange, 'Between Systematization and Expertise for Foreign Policy: The Practice-Oriented Approach in Germany's International Legal Scholarship (1920–1980)', European Journal of International Law 28 (2017), 535.

13 In detail Luuk van Middelaar, *The Passage to Europe. How a Continent Became a Union* (2014), 54 ff.

14 Hermann Mosler, 'Begriff und Gegenstand des Europarechts', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 28 (1968), 481; Hermann Mosler, 'European Law – Does it Exist?', Current Legal Problems 19 (1966), 168.

15 Heinrich Triepel, *Völkerrecht und Landesrecht* (1899), 12-22; Pierre-Marie Dupuy, 'International Law and Domestic (Municipal) Law' in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law (online)* (2011).

16 Hans Kelsen, *Pure Theory of Law (1934)* (1967), 320 ff.; Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum (1950)* (2006).

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it is Mosler's holistic understanding that is tailored to the European law of the post-war order.

How does this relate to the aforementioned political conflict? Hallstein's vision of federal European institutions stood against de Gaulle's *Europe des patries*. Mosler's concept mediates between these two because it stresses that both levels are important and serve a common purpose. In other words, Mosler anticipated what would happen in the coming decades. In 1992, the framers of the Maastricht Treaty would proclaim the European Union a 'union of the peoples of Europe' (Article 1 para. 2 TEU). This includes a union of their legal orders.

In 1996, Ingolf Pernice's concept of constitutional union (*Verfassungsverbund*) further developed Mosler's notion and turned it into a cornerstone of the European constitutional debate of the 1990s and 2000s.[17] His 'multilevel constitutionalism' seeks to articulate the manifold experiences of deep interaction between the various legal orders. Most strands of European legal pluralism, European network theories, or European federalism have similar objectives.[18] Though these theories differ, all see the national and European legal orders so deeply entangled that their entanglement forms part of their very identity. Along these lines, one of the CJEU's most important doctrines considers every Member State court as an '"ordinary" [court] within the European Union legal order'.[19]

European law encompasses a body of law that transcends the individual legal orders. It articulates what today occurs in countless legal operations throughout European society. Union law depends on national law for a myriad of reasons, not least in order to become effective in millions of legal

17 Ingolf Pernice, 'Die Dritte Gewalt im europäischen Verfassungsverbund', Europarecht 31 (1996), 27; Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?', Common Market Law Review (1999), 703.

18 For a reconstruction of these debates, see Ferdinand Weber, 'Formen Europas. Rechtsdeutung, Sinnfrage und Narrativ im Rechtsdiskurs um die Gestalt der Europäischen Union', Der Staat 55 (2016), 151. For multilevel constitutionalism, see Antonio D'Atena, *Costituzionalismo multilivello e dinamiche istituzionali* (2007).

19 CJEU, Opinion 1/09, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets* (EU:C:2011:123), para. 80; see also Case C-106/77, *Amministrazione delle finanze dello Stato v. Simmenthal* (EU:C:1978:49); Allan Rosas, 'The National Judge as EU Judge: Opinion 1/09' in: Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System. Essays in Honour of Pernilla Lindh* (2012), 105.

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relationships. At the same time, many legal operations under the Member States' legal orders depend on European law's transnational components.

For a long time, scholars observed this phenomenon primarily between the individual Member States and the European Union, i.e., in the vertical dimension. Yet by now, it has become clear that the horizontal interweaving of Member States' legal orders is also important and indeed transformative.[20] Even apex courts, once lonely by definition, have integrated into horizontal European networks that constitute one facet of European society (see B.3, C.3).

Approaching legal phenomena with the concept of European law differs from traditional legal thinking in that the concept brings together norms that are conventionally attributed to different legal orders.[21] At the same time, this concept of European law addresses its constituent parts as legal orders (which is a presupposition for comparative law). Indeed, any decision on the validity, legality, legal effects, and legitimacy of an act requires attributing this act to a specific legal order. European law does not fuse its parts but rather stands for adequate complexity. The concept suggests a relational, dynamic structure, a thick and continuous legal communication between public institutions under different legal orders, be they of various countries, the EU, or the Council of Europe. All this is European law, but not one legal order.

This adds to the distinguishing force of the concept. European public law stands, on the one hand, against the traditional approach to public law according to which 'everything can be explained through sovereignty'[22] and that strives to keep the national legal order supreme.[23] On the other hand, it is distinct from understandings that read the European developments as an instance of global governance, as similar to legal phenomena under

20 Ingolf Pernice, 'La Rete Europea di Costituzionalità. Der Europäische Verfassungsverbund und die Netzwerktheorie', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 70 (2010), 51.

21 On this concept, see Dana Burchardt, *Die Rangfrage im europäischen Normenverbund. Theoretische Grundlagen und dogmatische Grundzüge des Verhältnisses von Unionsrecht und nationalem Recht* (2015), 15 ff., 220 ff., 242 f.

22 Georg Jellinek, *Die Lehre von den Staatenverbindungen (1882). Herausgegeben und eingeleitet von Walter Pauly* (1996), 16 ff., 36.

23 Compare Christian Hillgruber, 'Souveränität – Verteidigung eines Rechtsbegriffs', JuristenZeitung 57 (2002), 1072, 1077-1079; Agostino Carrino, *Il problema della sovranità nell'età della globalizzazione: da Kelsen allo Stato-mercato* (2014).

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the WTO, the United Nations, NAFTA, the Mercosur.[24] Put succinctly, European law refers neither to a national society, nor to world society, but to European society.

2. European Society

European society is not a scholarly fantasy, but a legal concept. According to Article 2 TEU, all individuals living in the European Union are today part of *one* society.[25] European integration may not have produced a European state or people, but it has led to a European society. This society is intimately interwoven with European public law, for the Treaty legislator – that is, the 27 Member States' political systems in cooperation with EU institutions – avails itself of constitutional principles to characterize it. Thus, Article 2 TEU states that European society is one 'in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail' and in which the values of 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' apply. Notwithstanding the autonomy of EU law, developing these principles requires insights from the domestic legal orders.

There are many European societies. Consider the 3000 European public limited companies in the legal form of *Societas Europaea* and thousands of civil society organizations, ranging from the European Society of International Law to the European Society of Cardiology to the European Society for Spiritual Regression. The term *society* in Article 2 TEU encompasses all of these, but it refers to much more – namely, the social whole constituted

24 For sophisticated elaborations, see Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, 2015), 14 f.; Bruno de Witte, 'The European Union as an International Legal Experiment' in: Gráinne de Búrca and Joseph H. H. Weiler (eds), *The Worlds of European Constitutionalism* (2012), 19.

25 The term has received little attention from legal scholars, cf. Christian Calliess, 'Art. 2 EUV' in: Christian Calliess and Mathias Ruffert (eds), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar* (2016), para. 30; Marcus Klamert and Dimitry Kochenov, 'Article 2 TEU' in: Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (2019), para. 5; Luigi Fumagalli, 'Commento Art. 2 TUE' in: Antonio Tizzano (ed.), *Trattati dell'Unione europea* (2014), 11 (14); but see Stelio Mangiameli, 'Article 2' in: Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (2013), paras 35-41.

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by the EU Treaty, including all public institutions (supranational as well as domestic) with their staff, procedures, instruments, and practices. It is the meaning of society used by the European Convention on Human Rights. Many of its provisions feature the words ‘a democratic society’ (e.g., Article 6 para. 1, Article 8 para. 2, Article 9 para. 2, Article 10 para. 2, Article 11 para. 2 ECHR). In doing so, they mainly refer to the Convention states’ public institutions. Of course, the question remains whether European society – a society that does not form a state – can develop and sustain democratic public institutions.

While Article 2 TEU envisions a European society without a European state, it does not picture a stateless society. Instead, it posits the Member States, including all their public institutions, as essential parts of European society. The *society* of Article 2 TEU is not limited to the sphere that Hegel calls *civil* (*bürgerliche*) society, that is, to the web of economic relations. Article 3 para. 3 TEU uses the term ‘internal market’ to designate this web.[26] Indeed, the term *civil society* usually refers today to the sphere of social engagement or non-profit organizations, as does the term in Article 11 para. 2 of the EU Treaty.[27] Article 2 TEU’s *society*, by contrast, denotes the social whole, which encompasses all the institutions of the Union and its Member States as well as all their citizens and other residents. Under Article 2 TEU, society thus represents the ultimate social reference of European law.

Article 2 refers to *European* society[28] – and not to the societies of the Member States[29] – because it uses the singular ‘society’. It does not allude to the global (or world) society because it refers to the EU Member States and to democratic values.[30] The reference to values also underscores that Article 2 does not understand society as only transactional as opposed to a normatively thick *community*. The European Treaties’ path and terminology exhibit an almost opposite logic. In 1957, the Treaty makers started

26 Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right (1821)* (1991), para. 182.

27 Joana Mendes, ‘Participation and the Role of Law after Lisbon. A Legal View on Article 11 TEU’, Common Market Law Review 48 (2011), 1849.

28 CJEU, Case C-574/12, *Centro Hospitalar de Setúbal and SUCH*, Opinion of AG Mancini (EU:C:2014:120), para. 40; path breaking Mangiameli (n. 25).

29 Thus Pierre-Yves Monjal, ‘Le projet de traité établissant une Constitution pour l'Europe. Quels fondements théoriques pour le droit constitutionnel de l'Union européenne?’, Revue trimestrielle de droit européen 40 (2004), 443 (453 f).

30 On the scarcity of values in world society, Niklas Luhmann, ‘Die Weltgesellschaft’, Archiv für Rechts- und Sozialphilosophie 57 (1971), 1.

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with the *Community* of the EEC Treaty; in 2007, after half a century of integration, they postulated a society based on values.

The Treaty legislator addresses today's quantity and quality of interaction and communication between the 27 national societies as one European society. This use of the word is sociologically robust.[31] Of course, numerous questions remain as to how to theorize European society and how to observe it. As a basic concept of European thought, society has been theorized in many different ways, and the relevant data can be reconstructed in similarly various forms. But all rely on social interaction or communicative practice.[32] Legal scholars observe such interaction or practice mainly through the study of certain texts: constitutions, treaties, laws, decrees, directives, judgments, and scholarly publications. European comparative law has much to offer in that respect, not least because Article 2 TEU characterizes European society via its pluralism. To grasp this pluralism, comparative law is essential.

Lawyers concentrate on juridical disputes, which are an especially intense form of social interaction and communicative practice. Accordingly, European society is realized in the many conflicts involving the terms of Article 2 TEU, conflicts in which *European* rights, *European* justice, *European* solidarity, *European* democracy, or the *European* rule of law become contentious. Indeed, European society creates itself in these disputes.[33] European law plays a constitutive role inasmuch as it conceptualizes the conflicts as European conflicts, cabins them, and renders their legal outcomes valid, effective, and legitimate. For European law to do this adequately, it takes comparative law as most European legal operations involve various legal orders.

European comparative public law, in supporting such operations, not only serves European law. Comparative arguments provide a way for different parts of European society to meet and to deepen mutual knowledge. Thus,

31 See, e.g., William Outhwaite, *European Society* (2008); Hartmut Kaelble, *Eine europäische Gesellschaft? Beiträge zur Sozialgeschichte Europas vom 19. bis ins 21. Jahrhundert* (2020).

32 Hans-Peter Müller, 'Auf dem Weg in eine europäische Gesellschaft? Begriffsproblematik und theoretische Perspektiven', Berliner Journal für Soziologie 17 (2007), 7 (24).

33 Jiri Přibáň, 'Introduction: on Europe's crises and self-constitutions' in: Jiri Přibáň (ed.), *Self-Constitution of European Society. Beyond EU politics, law and governance* (2016), 1 (3).

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European comparative law contributes to the development of European society, however small its contribution.

3. The Role of Comparison

The consideration of domestic laws of various countries is anything but alien to transnational law. Comparison has had a legal footing in international law ever since Édouard Descamps penned what is now Article 38 para 1 lit c ICJ Statute.[34] Yet, comparative public law is not terribly important to international law. Moreover, domestic law remains a 'fact' under international law; it is not considered part of it.

European law scholarship, while building on international law, has been more comprehensive from the beginning, incorporating those parts of domestic law that implement and respond to the transnational parts of European law. Hence, expositions of European law should go beyond EU law (and the European Convention on Human Rights) and extend to domestic law. Of course, scholars often only look at the domestic order they know best. It is self-evident that European law calls for a broader reach.

In Mosler's understanding, the comparison of domestic laws serves to generate common principles that (a) help interpret transnational law, (b) help institutions make law, and (c) help identify a common *ordre public* that centres on individual rights, the rule of law, and democratic government.[35] Compared with the traditional private-law orientation of international law,[36] European law started out with a strong orientation towards public law.

Along Mosler's lines, comparative law is far more important to the European courts than to the International Court of Justice or the International Tribunal for the Law of the Sea. Both institutions – the CJEU and the ECtHR – have special research units on comparative law. Comparison is used, for example, to determine a so-called European consensus, a weighty

34 Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (2001), 161.

35 Mosler (n. 14).

36 The comparison with Mosler's thought on international law is revealing; see Hermann Mosler, 'General Principles of Law' in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law. vol. II* (1995), 511, 518 ff.; for a seminal analysis, see Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (1927).

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argumentative tool that the ECtHR uses to develop convention law.[37] Similarly, the CJEU uses 'evaluative comparison' to support critical statements.[38] If there are doubts, they concern the soundness of the comparisons (see B.3), but not that comparison is taking place. This is why academic research has flourished.[39]

In the 50 years since Mosler's theorization, European law has transformed public law in Europe. A transnational public law emerged, in a process conceptualized as the 'constitutionalization' of Community law and the formation of European administrative law. Both concepts suggest academic theorizing that involves comparing deep layers of domestic legal thought. Moreover, the domestic impact of Community law is conceived as the 'Europeanization' of domestic public law. Though this concept also remains fuzzy, it clearly calls for a comparative study of domestic phenomena beyond the original comparative agenda, as the systemic dimension is at stake. In a similar move, political science has moved beyond studying integration solely through the disciplinary approach of international relations, using interests, theories and methods of comparative politics.[40]

It may seem paradoxical, but the very success of integration implies a much more prominent role for domestic public laws and their comparison. Today, the study of domestic laws and their comparison has outgrown the role that Mosler assigned it in the 1960s, when he qualified it as a

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37 Kanstantsin Dzethsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015); for a view from inside the ECtHR, see Luzius Wildhaber, Alrnaldur Hjartarson and Stephen M. Donnelly, 'No Consensus on Consensus?', HRLJ (2013), 248.

38 E.g. CJEU, Case C-144/04, *Mangold* (ECLI:EU:C:2005:709).

39 Important contributions include Jürgen Schwarze, *Europäisches Verwaltungsrecht* (1988); Constance Grewe and Hélène Ruiz Fabri, *Droits constitutionnels européens* (1995); Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds), *The European Court and National Courts. Doctrine and Jurisprudence. Legal Change in its Social Context. Legal Change in its Social Context* (1998); Peter Häberle, *Europäische Verfassungslehre* (2002); Michel Fromont, *Droit administratif des États européens* (2006); Paolo Ridola, *Diritto comparato e diritto costituzionale europeo* (2010); Albrecht Weber, *European constitutions compared* (2019); Claus D. Classen, *Nationales Verfassungsrecht in der Europäischen Union. Eine integrierte Darstellung von 27 Verfassungsordnungen* (2021); Enzo Di Salvatore (ed.), *Sistemi costituzionali europei* (2021).

40 Wilhelm Knelangen, 'Ist die Europäische Union ein Fall für die Vergleichende Regierungslehre?' in: Johannes Varwick and Wilhelm Knelangen (eds), *Neues Europa, alte EU? Fragen an den europäischen Integrationsprozess* (2004), 113.

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mere *Hilfswissenschaft* (ancillary science) evocative of a *Hilfsarbeiter*, i.e., a subordinate helper.[41]

A recapitulation of the European transformation helps to see better this additional, and indeed far more important role. A first dynamic began in the early 1960s, establishing the primary elements of European public law: Community institutions gained authority and Community law became ingrained in large-scale institutional practices and a normal part of domestic legal discourses.[42] These elements were weaved together in the progressive narrative of Europe forming a European community of law.[43] In more theoretical terms, Community black-letter law evolved into Hegel's 'concrete freedom', Hauriou's or Santi Romano's 'institutions', Schmitt's 'concrete order', Marx' 'class relations', or Bourdieu's 'legal field'.

The pluralism of European society stresses the need for comparison. Just consider the constitutional diversity among Member States. There are republics and monarchies, parliamentary and semi-presidential systems, strong and weak parliaments, strong and weak party structures, unitary, regionalized and federal orders, strong, weak as well as non-existent constitutional courts, significant divergences in institutional guarantees of judicial independence, fundamental rights, and electoral systems, and, last but not least, Catholic, Protestant, secular, socialist, statist, anarcho-syndicalist, civic, Ottoman, and post-colonial constitutional traditions. European society surely does not feed on every aspect of these traditions, but it values its diversity. European public law cannot aim for unifying modernization.[44] Rather, it has to reflect the multiple modernities of EU Member States (see C.1).[45] Any reconstruction of European law that does not account for this is pipe dream. European diversity is not folklore.

At the same time, there are legal limits to diversity. All domestic legal orders are committed to the values of Article 2 TEU. These limits have

41 Mosler (n. 14), 489.

42 For a seminal text, see Joseph H. H. Weiler, *Il sistema comunitario europeo. Struttura giuridica e processo politico* (1985); Joseph H. H. Weiler, 'The Transformation of Europe', The Yale Law Journal 100 (1991), 2403; for other important accounts, see Anna Katharina Mangold, *Gemeinschaftsrecht und deutsches Recht. Die Europäisierung der deutschen Rechtsordnung in historisch-empirischer Sicht* (2011); van Middelaar (n. 13).

43 Walter Hallstein, *Der unvollendete Bundesstaat. Europäische Erfahrungen und Erkenntnisse* (1969), 33 ff. This is now thoroughly historicized; see Antoine Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (2015).

44 Wolfgang Zapf, 'Die Modernisierungstheorie und unterschiedliche Pfade gesellschaftlicher Entwicklung', Leviathan 24 (1996), 63.

45 Shmuel N. Eisenstadt, 'Multiple Modernities', Daedalus 129 (2000), 1.

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become important as the liberal character of all Member States is under strain, in particular for the developments in Hungary since 2010 and in Poland since 2015 (see C.4). Mosler already saw a role of comparative public law for the *ordre public européen*. Today, there is sharp dispute in European society on what falls under the common constitutional traditions that feed the principles of Article 2 TEU. In that dispute, comparative arguments are playing a role.[46]

Comparative reasoning has further gained importance for the networking among domestic institutions. Once, domestic public law created a self-contained sphere of legal communication; contacts with public institutions of other countries went mostly through the foreign ministry. Today, things are starkly different: it is normal that members of government and of parliament, public officials, administrators, and judges engage with their European peers when preparing to exercise their powers, and they do so often within institutionalized networks. Even institutions such as supreme and constitutional courts – usually at the lone peak of their branch of government – have formed institutionalized networks that inform their jurisprudence.[47] Though sometimes required by EU law, much of this activity between domestic institutions is autonomous.

This horizontal opening of national legal spaces transcends the original understanding of European law and stresses its comparative dimension. To compare one's own domestic setting with that of another legal order has become a routine experience for many practitioners in Europe. Accordingly, knowledge of other legal systems and comparative reasoning helps lawyers, civil servants, or judges interacting in European society to understand their colleagues and adjust their line of argument accordingly.

Domestic courts, in particular apex courts, provide a well-studied example. They increasingly have comparative law research groups,[48] as important domestic court rulings are often of interest across Europe. Many courts want to be heard abroad and thus publish decisions in English. It seems

46 Compare Opinion no. 833/2015 of the Venice Commission of 11 March 2016, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29001-e (last accessed 25 October 2023), in particular 16, 17, 21, and 22.

47 Christoph Grabenwarter, 'Summary of the results for the previous sessions' in: Verfassungsgerichtshof der Republik Österreich (ed.), *The Cooperation of Constitutional Courts in Europe: Current Situation and Perspectives. Vol 1* (2014), 169, 170 f.

48 A comparative-law research unit at the Italian Constitutional Court has so far published several dossiers on questions submitted to the court; the dossiers are available at http://www.cortecostituzionale.it/ActionPagina_1123.do (last accessed 25 October 2023).

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normal by now that verdicts of foreign colleagues inform the judges' work, even if that source is not always cited. Domestic courts use the comparative argument in particular to justify far-reaching decisions (see further C.3). As a sound use requires some systemic knowledge to avoid misreading, this calls for academic texts that provide *structural* knowledge, illuminate critical issues as well as, last but not least, monitor practice.

The horizontal networking is important for the thickening of European society. This does not imply that it always supports European institutions. That networking also operates to constrain them, as the reciprocal citing of constitutional courts in rulings that control European institutions show.[49] This leads to a further aspect: early European comparative law seemed partisan to advancing integration, but its success also led to the emphasis of constraints. Today, comparative European public law is not only about advancing but also about resisting top-down Europeanization.

In particular the 'identity' protection has a strong comparative element. Indeed, domestic public law has developed a new function, that of expressing national identity. More than ever, it appears politically, legally, and normatively unfeasible that EU law dominates European public law in the way that federal law takes precedence in federal states: most Europeans feel too diverse for that. Studying other legal orders helps understand valued differences, while such studies, in a dialectical twist, increase mutual understanding.

For all these developments, comparative arguments pervade European law. Some focus on operational logics, be they common or divergent, others on how specific issues are tackled under the various legal systems of European society. Often the interest in other domestic legal orders involves the objective to develop or adjust one's own system. The embedding of various legal orders in a common European society requires reconstructing them in light of the new larger context. European integration has led many historians to reconsider national histories in a common frame and to reconstruct them accordingly;[50] the studies of literature have undertaken similar

49 Mattias Wendel, 'Die Europa-Entscheidungen der Verfassungsgerichte' in: Christoph Grabenwarter and Erich Vranes (eds), *Kooperation der Gerichte im europäischen Verfassungsverbund – Grundfragen und neueste Entwicklungen* (2013), 134.

50 For a masterpiece, see Tony Judt, *Postwar. A History of Europe Since 1945* (2005); Judt gets some details of European integration wrong, however. Similar comparative studies can be found in the journal *Comparative Studies in Society and History*.

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work.[51] Likewise, legal scholars review and reconstruct domestic theories and doctrines for which European comparative public law is an important, indeed crucial tool.[52]

Along these lines, comparative arguments have become an established and ever more expected element of legal scholarship in European society. This helps a common European legal culture. By common culture, I mean that legal actors from multiple and diverse legal systems operate within a shared framework of knowledge, arguments, practices, values, and understanding.[53] Importantly, that emerging European culture does not seem to fuse legal minds into one mindset, as does uniform legal education in many Member States. The development of European legal culture feeds the development of a European society that remains pluralist.

4. The Bases for Comparison

Fortunately then, European comparative arguments can rely on a sound legal foundation and rather simple methods. I start with the first element, the legal foundation, as it is the key to the specificity of European comparative law compared to comparative law in general. The second step will then discuss what I consider the most important methodological standards.

Comparativists have forever pleaded to give comparative law a key role. The Paris *Congrès international de droit comparé* of 1900 advocated that it should harmonize the law of peoples *de même civilisation*.[54] In 1949, Konrad Zweigert, the founder of the functional method of comparative law, presented it as a 'universal method'.[55] Manuel García Pelayo, later the first President of the Spanish Constitutional Court, drafted a universal

51 Compare Piero Boitani and Massimo Fusillo (eds), *Letteratura europea* (2014); Cesar Domíngez, *Literatura europea* (2013).

52 For a fine example Christoph Schönberger, *Der 'German Approach'. Die deutsche Staatsrechtslehre im Wissenschaftsvergleich* (2015), though I do not share his dismissal of doctrine.

53 Susana de la Sierra, *Una metodología para el Derecho comparado europeo: Derecho público comparado y Derecho administrativo europeo* (2004), 67 ff.; Peter Häberle and Markus Kotzur, *Europäische Verfassungslehre* (2016), 104-111.

54 See Édouard Lambert, 'Théorie générale et méthode' in: Congrès International de Droit Comparé (ed.), *Procès-verbaux des séances et documents, tome 1* (1905), 26 (38 ff.).

55 Konrad Zweigert, 'Rechtsvergleichung als universale Interpretationsmethode', Zeitschrift für ausländisches und internationales Privatrecht 15 (1949), 5.

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constitutional law based on comparison in 1951.[56] In 1989, Peter Häberle declared comparison the 'fifth' method of interpretation.[57] In 2016, Jürgen Basedow considered it 'obligatory'.[58]

Yet, general comparative arguments have not become pervasive, and I think for good reason.[59] Its normative foundations are too sparse, so that democratic doubts remain. Eduard Gans, perhaps Germany's first true legal comparativist, believed that universal reason is the foundation for comparative law.[60] Today's equivalent might be a global constitutionalism that posits the United Nations Charter of 1945 and the two Covenants of 1966 as the constitutional law of humankind. In my opinion, such constitutionalism lacks a legal, political, and societal basis.[61] World society, if that is a meaningful concept, is certainly not framed by the principles of the UN Charter and the Covenants. The world's heterogeneity impedes a global comparative law that can support doctrinal claims.

Accordingly, I agree with those contemporary public-law comparativists who do not consider that global comparisons are embedded in or leading to a general law that rules the various legal orders. Vicki Jackson sums it up well. This leading advocate of global comparison suggests 'engagements' between legal orders to argue for the relevance of global comparisons.[62] However, she does not assert a layer of common legal normativity, not even among democratic countries such as Denmark, Israel, and the United States of America. This fits well with the general understanding of the Article 38

56 Manuel García-Pelayo, *Derecho constitucional comparado* (1951).

57 Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als „fünfter" Auslegungsmethode', JuristenZeitung 44 (1989), 913 (916 ff.).

58 Jürgen Basedow, 'Hundert Jahre Rechtsvergleichung. Von wissenschaftlicher Erkenntnisquelle zur obligatorischen Methode der Rechtsanwendung', JuristenZeitung 71 (2016), 269.

59 Karl Riesenhuber, 'Rechtsvergleichung als Methode der Rechtsfindung?', Archiv für die civilistische Praxis 218 (2018), 693.

60 See Heinz Mohnhaupt, 'Universalrechtsgeschichte und Vergleichung bei Eduard Gans' in: Reinhard Blänkner, Gerhard Göhler and Norbert Waszek (eds), *Eduard Gans (1797-1839). Politischer Professor zwischen Restauration und Vormärz* (2001), 339; Stefan Vogenauer, 'Rechtsgeschichte und Rechtsvergleichung um 1900: Die Geschichte einer anderen "Emanzipation durch Auseinanderdenken"', Rabels Zeitschrift für ausländisches und internationales Privatrecht 76 (2012), 1122 (1127).

61 Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law. Translating World Public Opinion into International Public Authority', European Journal of International Law 28 (2017), 115 (126 f.).

62 Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (2010).

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para 1 lit c ICJ Statute that links global comparative law with international law: there are only few public-law principles in universal international law. As most concepts of law require some effectiveness, there is at best a very thin layer of a common public law for world society.

The situation is very different in European society. It displays conditions that can accommodate Zweigert's, Pelayo's, Häberle's and Basedow's pleas. EU Member States have formed a union and one society, Article 1 para 2 TEU and Article 2 sentence 2 TEU. That union includes the domestic legal orders. Article 2 TEU subjects these legal orders to a common set of constitutional standards. Any legal act of any public authority in European society is bound by these standards.[63] Thus, European legal comparison operates within one society and one constitutional frame, contrary to comparisons even with other democracies, such as Israel, the United Kingdom, or the United States of America.

Any comparative exercise has to answer the question whether the laws it compares are comparable. Article 2 TEU answers that question for the legal orders that the Treaty on European Union unites, not least because it posits that these legal orders are part of one society. Under Article 2 TEU, a legal solution under one legal order can be presumed to be acceptable throughout European society (which is why fighting authoritarian tendencies is so important, see C.4).[64] For Article 2 TEU, legal comparisons in European society compare apples with apples.[65]

Of course, the question remains what methodological standards a comparative argument should follow.[66] One issue is whether it must consider all 27 Member States, as the principle of equality (Article 4 para 2 TEU) seems to suggest. Indeed, the procedures for all EU law-making involves all Member States, and the European courts employ considerable staff for comparative studies (B.3). However, such research requires library, financial, human, and time resources that only the European institutions can

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63 In detail on Article 2 TEU Armin von Bogdandy, 'Founding Principles' in: Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2009), 11.

64 Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine. How to Protect Checks and Balances in the Member States', Common Market Law Review 57 (2020), 705.

65 On comparability Giuseppe De Vergottini, *Diritto costituzionale comparato* (1999).

66 On the general debate, Pegoraro (n. 1).

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usually provide.[67] Scholarly practice is generally selective, and that is fine. I have never heard that any academic comparative study is flawed simply because it did not involve all 27 domestic legal orders.

However, a selection requires justification. Considering the importance of comparative law for European society, but also the difficulties it involves, I find it convincing that the justificatory requirements are modest. Many grounds are accepted as justifying selective choices, not least that of limited language proficiency and limited time resources.

At the same time, there is one strict rule. It is unacceptable to select only what confirms the desired result and to deliberately avoid contradictory findings. Antonio Scalia put it in what is arguably the most famous statement on the comparative method: 'To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry'.[68] European scholars must, to the extent they are capable of doing so, search for typical patterns as well as divergences.[69]

There is also an expectation that, in most cases, research should go beyond abstract rules and doctrines. Indeed, most academics discuss social functions, historic trajectories, the legal, but also the cultural, economic, political and social context.[70] Such approaches are often referred to as 'contextualized functionalism'.[71] This concept, though, does not entail any

67 On the CJEU's comparative approach, Koen Lenaerts, 'Discovering the Law of the EU: The European Court of Justice and the Comparative Law Method' in: Tamara Perišin and Siniša Rodin (eds), *The Transformation or Reconstitution of Europe. The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (2018), 61. On the ECtHR's comparative approach, Monika Ambrus, 'Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law', *Erasmus Law Review* 2 (2009) 353.

68 USSC, *Roper v. Simmons,* 543 U.S. 551, 627 (2005) (Scalia, J, dissenting). For criticism of the CJEU along these lines, see M. Bardin, 'Depuis l'arrêt Algera, retour sur une utilisation "discrète" du droit comparé par la Cour de justice de l'Union européenne' in: Thierry Di Manno (ed.), *Le recours au droit comparé par le juge* (2014), 97 (97 ff., esp. 101).

69 Attila Vincze, 'Europäisierung des nationalen Verwaltungsrechts. Eine rechtsvergleichende Annäherung', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 77 (2017), 235 (246 ff.).

70 On this need, see Jan Muszyński, 'Comparative legal argument in the Polish discussion on changes in the judiciary', Jahrbuch des öffentlichen Rechts 68 (2020), 705.

71 Kischel (n. 1), 87 ff.; see also Ralf Michaels, 'The Functional Method of Comparative Law' in: Reimann and Zimmermann (n. 10), 345. On contextualization Günter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law', Harvard International Law Journal 26 (1985), 411; Vicki C. Jackson, 'Comparative Constitutional Law: Methodologies' in: Rosenfeld and Sajó (n. 4), 66; Ran Hirschl, 'Comparative

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precise protocol for successful research. To present a successful study, all depends on a well-argued answer to a good research question. In that respect, comparative research shows little difference to other scholarly endeavours.

There are many good uses of comparative arguments. After all, comparison is a standard method of human insight and normative argumentation.[72] Comparative law may even play a role similar to that of experimentation in other disciplines.[73] As in general comparative law, three uses appear dominant: to confirm a statement, to highlight a contrast, and to develop a broader conceptual framework.[74]

But there are also objectionable uses. The most important one is suggesting commonality where it does not exist, as did the CJEU's *Mangold* judgment on age discrimination[75] or the German Federal Constitutional Court's PSPP judgment when it claimed to be representative of the European mainstream.[76] Particularly crass is the Hungarian Constitutional Court with the way it uses comparative law to support authoritarian tendencies.[77]

Methodologies, in: Roger Masterman and Robert Schütze (eds.), *Cambridge Companion to Comparative Constitutional Law* (2019), 11, 35 f.; Peter Häberle and Markus Kotzur, *Europäische Verfassungslehre* (2016), para. 254.

72 Matthias Ruffert, 'The Transformation of Administrative Law as a Transnational Methodological Project' in: Matthias Ruffert (ed.), *The Transformation of Administrative Law in Europe* (2007), 3 (5).

73 Martin Shapiro, *Courts. A Comparative and Political Analysis* (1981), viii.

74 Mattias Wendel, 'Richterliche Rechtsvergleichung als Dialogform: Die Integrationsrechtsprechung nationaler Verfassungsgerichte in gemeineuropäischer Perspektive', Der Staat 52 (2013), 339 (344 ff.); Tania Groppi and Marie-Claire Ponthoreau, 'The Use of Foreign Precedents by Constitutional Judges. A Limited Practice, An Uncertain Future' in: Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (2013), 411 (424 ff.); Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', The American Journal of International Law 102 (2008), 241 (241 ff.).

75 CJEU, Case C-144/04, *Mangold* (EU:C:2005:709), para. 74; see Basedow (n. 58), 275; Ulrich Preis, 'Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht. Der Fall "Mangold" und die Folgen', Neue Zeitschrift für Arbeitsrecht (2006), 401 (406).

76 BVerfGE 154, 17, *Public Sector Purchase Programme – PSPP,* paras 124 ff.; Diana-Urania Galetta, 'Karlsruhe über alles? The reasoning on the principle of proportionality in the judgment of 5 May 2020 of the German BVerfG and its consequences', federalismi.it. 14 (2020), 173.

77 Beata Bakó, 'The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review in Hungary', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 78 (2018), 863.

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As a means of legal argumentation, European comparative law involves assessing the externalities of domestic decisions, i.e., their impact on other legal orders. Given the interdependence of legal orders within European society, a legislative, administrative, or judicial decision may well have significant repercussions or consequences outside the legal order in which it was taken. To consider such externalities is part of the common responsibility for European society (C.3).

The consideration of consequences is today accepted as part of legal reasoning, albeit usually only within the framework of the national legal order.[78] In European society, the common responsibility implies that this framework extends to all associated legal orders. Thus, a national court must consider whether a possible interpretation could lead to the insolvency of the Greek state or encourage authoritarian tendencies in other Member States. Blanking out such consequences fails European responsibility and amounts to epistemic nationalism (Michael Zürn, Anne Peters). Looking beyond one's national borders is essential to ensuring reasonable outcomes in European society.

For all these reasons, comparative reasoning is part of European law. But what is its normative reach? Can the comparative method yield a best answer to a legal question? Zweigert seemed to suggest as much. He claimed that after thorough comparison, one solution will emerge that is 'clearly superior' in terms of 'justice', 'expediency', and 'an elite's sense of quality'.[79]

I cannot see how that might work. Indeed, comparative *public* law has forever understood that almost no legal prescription is just a best technical solution, but somehow always political.[80] For that reason, comparative public law usually presents not a best solution, but rather thoughts for understanding, reflection, critique, and construction.[81] Such usage is often

78 Gertrude Lübbe-Wolff, *Rechtsfolgen und Realfolgen. Welche Rolle können Folgenerwägungen in der juristischen Regel- und Begriffsbildung spielen?* (1981), 156 f.; Andreas Voßkuhle, 'Neue Verwaltungsrechtswissenschaft' in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts. Vol. 1* (2006), § 1, paras 32 ff.

79 Konrad Zweigert and Hein Kötz, *Introduction to comparative law* (2011), 46 f.; Zweigert (n. 55), 14.

80 Rudolf Bernhardt, 'Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 431, 432 f.

81 Philipp Dann, 'Thoughts on a Methodology of European Constitutional Law', German Law Journal 6 (2005), 1453, esp. 1427 ff.; Eberhard Schmidt-Aßmann, 'Zum

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considered as 'evaluative comparison' method-wise, while its constructions are what the Treaties call 'common' or 'generally recognised principles' or 'traditions common to the Member States'.[82] While neither these (nor other) concepts answer all epistemic questions, they do provide a viable frame, as the flourishing of the field shows.

5. European Public Law, Old and New

Finally, a historical comparison helps theorize the special nature of European comparative public law. There is an old European public law and the new European public law informed by Article 2 TEU. Both have a strong comparative law component, but differ greatly in many other respects. The old European comparative public law emerged after the Peace of Westphalia of 1648 put an end to the idea of Christian political unity.[83] Joachim Hagemeier's *Juris Publici Europaei* is probably the first European comparativist monograph to document what that meant. It consists of eight volumes, published between 1677 and 1680. They contain reports on the 'statu' of Denmark, Norway and Sweden, France, England, Scotland and Ireland, Belgium and the Netherlands, Hungary and Bohemia as well as Poland, the Principality of Moscow, Italy, and, last but not least, the Holy Roman Empire of the German Nation.[84] The work provided an extensive overview

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Standort der Rechtsvergleichung im Verwaltungsrecht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 78 (2018), 807, esp. 836 ff., 850 ff.

82 See Article para 3 TEU, Article 340 para 2 TFEU, Article 83 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version); Sabino Cassese, 'The "Constitutional Traditions Common to the Member States" of the European Union', Rivista trimestrale di diritto pubblico 67 (2017), 939; see also Peter M. Huber, 'Die gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten – Identifizierung und Konkretisierung', Europarecht 57 (2022), 145.

83 Derek Croxton, *Westphalia. The Last Christian Peace* (2013). The following section is based on Armin von Bogdandy and Stephan Hinghofer-Szalkay, 'European Public Law - Lessons from the Concept's Past' in: Armin von Bogdandy, Peter M. Huber and Sabino Cassese (eds), *The Max Planck Handbooks in European Public Law. Vol. I: The Administrative State* (2017), 30.

84 On the methodology used, see Heinz Mohnhaupt, '"Europa" und "ius publicum" im 17. und 18. Jahrhundert', in: Christoph Bergfeld et al. (eds), *Aspekte europäischer Rechtsgeschichte. Festgabe für Helmut Coing zum 70. Geburtstag* (1982), 207 (esp. 219-224); for a deep reconstruction, Heinz Mohnhaupt, *Rechtsvergleichung als Erkenntnisquelle. Historische Perspektiven vom Spätmittelalter bis ins 19. Jahrhundert* (2022).

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of public laws in Europe.[85] European comparative public law began as a chronicler of sovereign states.

Later, European public law gained a deeply conservative meaning. After the French Revolution, Charles Maurice de Talleyrand-Périgord, one of the deftest statesmen of his time, used the concept of a *droit public européen*, with an even restorative note. After the Holy Alliance had defeated the French revolutionary transformation of Europe, Talleyrand advocated monarchical legitimacy as the guiding principle of a *droit public européen.*[86] Talleyrand argued that the *droit public européen* protected monarchical sovereignty just as the domestic *droit public* protected private property.

After the Second World War, the public-law scholar Ernst Rudolf Huber elaborated this legitimistic notion. His ground-breaking *Deutsche Verfassungsgeschichte seit 1789* (*German Constitutional Law After 1789*) assigned the *Jus Publicum Europaeum* a function for both domestic *and* international law under the *Ancien Régime*. In Huber's view, the *Jus Publicum Europaeum* of that time consisted of the law of interstate relations as well as of 'inviolable' elements of a common European constitutional law.[87] He considered the European monarchies' intervention in revolutionary France justified, for the revolutionary overthrow and execution of Louis XVI had violated the European constitutional principle of monarchical legitimacy.

Of all the books on the European public law, none is as famous as Schmitt's *Nomos of the Earth in the International Law of the Jus Publicum*

85 The title reads *Juris Publici Europaei*, and not *Jus Publicum Europaeum,* because it is the genitive to *Epistola*, Joachim Hagemeier, *Juris Publici Europaei de Trium Regnorum Septentrionalium Daniae, Norvvegiae & Sveciae Statu, Epistola Prima* (1677); Joachim Hagemeier, *Juris Publici Europaei de Statu Galliae, Epistola II* (1678); Joachim Hagemeier, *Juris Publici Europaei de Statu Angliae, Scotiae Et Hiberniae, Epistola III* (1678); Joachim Hagemeier, *Juris Publici Europaei de Statu Imperii Germanici, Epistola IV* (1678); Joachim Hagemeier, *Juris Publici Europaei de Statu Provinciarum Belgicarum, Epistola V* (1679); Joachim Hagemeier, *Juris Publici Europaei de Statu Italiae, Epistola VI* (1679); Joachim Hagemeier, *Juris Publici Europaei de Statu Regnorum Hungariae et Bohemiae, Epistola VII* (1680); Joachim Hagemeier, *Juris Publici Europaei de Statu Regni Poloniae et Imperii Moscovitici, Epistola VIII* (1680).

86 Paul-Louis Couchoud and Jean-Paul Couchoud (eds), *Mémoires de Talleyrand. Tome II* (1957), 436 ff.; William Grewe, *The epochs of international law* (2000), 430 f.; Duff Cooper, *Talleyrand* (1955), 232 f.

87 Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789. Bd. 1. Reform und Restauration. 1789 bis 1830* (1957), 16 ff.

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Europaeum, published in 1950.[88] Schmitt's concept, like Talleyrand's and Huber's, encompasses international law as well as the constitutional orders of the European states.[89] Schmitt doubles down on Talleyrand and Huber as he uses it to justify the German war of aggression.[90] In summary, the normative thrust of comparison within the old European public law was almost the complete opposite to that of the new one that is informed by Article 2 TEU.

In 1954, Paul Guggenheim, a Swiss scholar of international law, articulated the fallacies of Schmitt's concept and heralds the new European public law.[91] 'Concerning its substantive content', he denounced the *Jus Publicum Europaeum* as 'an ideological interpretation of numerous rules of general international law'. At the same time, he projected that the European Coal and Steel Community of 1952 could lead to a true *Jus Publicum Europaeum* that stands between universal international law and the domestic legal systems of Europe. Guggenheim's concluding sentence is prophetic. 'It would be no small irony in world history if the sovereign state [...] were to undergo a structural transformation due to the blossoming of the Jus publicum europaeum.'[92] This is what occurred (B.1), providing for the special character of European comparative public law, as shown by the development of constitutional adjudication.

C. A Test with Constitutional Adjudication

1. Common Developments and Multiple Modernities

How useful is this theorization of European comparative public law? As a test case, I use it to theorize constitutional adjudication in European society. The test case seems fit as judicial decisions have become a crucial feature of European law. Today, the function of the judiciary (in particular of

88 Jochen Hoock, 'Jus Publicum Europaeum. Zur Praxis des europäischen Völkerrechts im 17. und 18. Jahrhundert', Der Staat 50 (2011), 422.

89 Carl Schmitt, *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969* (1995), 592 ff.

90 Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Bd. 1. Reichspublizistik und Policeywissenschaft 1600-1800* (2012), 204.

91 Paul Guggenheim, 'Das Jus publicum europaeum und Europa', Jahrbuch des öffentlichen Rechts 3 (1954), 1.

92 Ibid., 14.

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constitutional courts) is by no means to settle only individual disputes. Nor do constitutional courts act exclusively as Kelsen's 'negative legislator'.[93] Almost everywhere, constitutional adjudication shapes, even has the function to shape important issues. No one can understand European public law without understanding constitutional adjudication.

Such judicial power evinces a common European development. In the European public law of old, courts played a small role at best. Carl Schmitt's *Jus Publicum Europaeum* (B.5) cites a single judgment, his *Constitutional Theory* a mere handful. The iconic public-law court of the nineteenth century, the French *Conseil d'État*, served to control the subordinate administration but not the government. The German administrative courts, established in the nineeteenth century, were also tame.[94] The most famous judgment of the most famous administrative court, the *Kreuzberg* judgment of the Prussian Higher Administrative Court, declared unlawful a police order that impeded a construction project.[95]

That narrow role in constitutional law constituted the European standard until well into the twentieth century.[96] Judicial review of legislation against standards such as those entrenched in Art. 2 TEU was at best an *optional* component of democratic constitutions. Rather, many considered it a democratic imperative to immunize legislation, i.e., parliamentary statutes, against judicial review.[97] The Conference of European Constitutional Courts was founded in 1972 with only four members – the German

93 Pedro Cruz Villalón, 'The Evolution of Constitutional Adjudication in Europe' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume IV: Constitutional Adjudication: Common Themes and Challenges* (2023); Carl Schmitt, *Der Hüter der Verfassung* (1932), partially translated in Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (2015).

94 Bert Schaffarzik and Karl-Peter Sommermann (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (2019).

95 Decision of the Prussian Higher Administrative Court of 14 June 1882, PrOVGE 9, 353.

96 On the paradigmatic function of German, English, and French public law, Sabino Cassese, 'The Administrative State in Europe' in: von Bogdandy, Huber and Cassese (n. 83), 57 (57, 60 ff.); Michel Fromont, 'A Typology of Administrative Law in Europe' in: von Bogdandy, Huber and Cassese (n. 83), 579 (585 ff.).

97 Exerting great influence, Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis. L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (1921).

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Federal Constitutional Court and the Austrian, Italian, and Yugoslavian Constitutional Courts.[98]

Then, a grand transformation began.[99] Today, the Conference of European Constitutional Courts has forty members, many of which decide important controversies and shape society. This transformation has proved popular: In rankings of public confidence, constitutional courts generally perform very well and far ahead of political actors.[100] Everywhere, courts have assumed the function of entrenching, but also of developing constitutional law.

Yet, the ways these functions are exercised is anything but uniform. The many institutions of constitutional adjudication in European society exhibit manifold differences, and it requires contextualization to understand them. Their diversity explains why I study the phenomenon of *constitutional adjudication* rather than simply constitutional courts. Only nineteen EU Member States have a specific constitutional court, if we consider the *Conseil constitutionnel* as such,[101] but eight EU Member States, namely Denmark, Estonia, Finland, Greece, Ireland, the Netherlands, Sweden and Cyprus, do not.[102] The diversity of constitutional adjudication validates the theorem of multiple modernities even for the small group of countries that form European society. The idea of one modernity exemplarily realized in one society is obsolete. The many paths of European constitutional adjudication do not follow any one model, especially not the so-called European (i.e., Kelsenian) model of constitutional adjudication.[103]

98 www.confeuconstco.org (last accessed 29 July 2022).

99 This is a global phenomenon: see Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in: David Trubek and Alvaro Santos (eds), *The New Law and Economic Development – A Critical Appraisal* (2006), 19 (63).

100 Christine Landfried, 'Constitutional Review in the European Legal Space: A Political Science Perspective' in: von Bogdandy, Huber and Grabenwarter (n. 93).

101 Olivier Jouanjan, 'Constitutional Justice in France' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law. Volume III: Constitutional Adjudication: Institutions* (2020), 223 (235-237).

102 On the reasons, Kaarlo Tuori, 'Constitutional Review in Finland' in: von Bogdandy, Huber and Grabenwarter (n. 101), 183 (204, 207-209, 219); Leonard Besselink, 'Constitutional Adjudication in the Netherlands' in: von Bogdandy, Huber and Grabenwarter (n. 101), 565 (578 ff.).

103 On this model, Victor Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective* (2009), 111 ff.; Luca Mezzetti, 'Sistemi e modelli di giustizia costituzionale' in: Luca Mezzetti (ed.), *Sistemi e modelli di giustizia costituzionale* (2009), 1 (1, 5 ff.).

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The diversity in constitutional adjudication has many reasons. One is that the relevant institutions were established at different times in different contexts and then developed accordingly, as historical institutionalism explains with the concepts of critical junctures and path dependency.[104] The spectrum ranges from the Dutch *Hoge Raad*, established after the Napoleonic wars by the Constitution of 1815, to the Austrian Constitutional Court of 1920, to the post-socialist constitutional courts of the Central and Eastern European Member States of the 1990s.[105]

We may identify three contexts to which national constitutional adjudication primarily owes its existence. In some states, in particular in Austria, Cyprus, and Belgium, but also in Switzerland, it reflected a federal settlement. In many other states, experiences with authoritarianism and the concern to protect democracy led to the creation of a constitutional court, for instance in Italy, Germany, Portugal, Spain and many post-socialist states. In a third group, such as France, the Netherlands, or the Nordic states, constitutional adjudication owes a lot to the general strengthening of individual rights from the 1970s onwards, a strengthening institutionally embedded in the ECtHR.

The courts' powers differ accordingly.[106] In some legal orders, judicial review of legislation is limited to the disapplication of a law in the individual

104 Giovanni Capoccia, 'Critical Junctures' in: Orfeo Fioretos, Tulia G. Falleti and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (2016), 89; Nils Grosche and Eva Wagner, 'Einführung in das Tagungsthema. Pfadabhängigkeit hoheitlicher Ordnungsmodelle' in: Mainzer Assistententagung Öffentliches Recht e.V. (ed.), *Pfadabhängigkeit hoheitlicher Ordnungsmodelle: 56. Assistententagung Öffentliches Recht* (2016), 11.

105 Jochen A. Frowein and Thilo Marauhn (eds), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa* (1998); Otto Luchterhandt, Christian Starck and Albrecht Weber, *Verfassungsgerichtsbarkeit in Mittel- und Osteuropa* (2007); Constance Grewe, 'Constitutional Jurisdiction in Ex-Yugoslavia in the Perspective of the European Legal Space' in: von Bogdandy, Huber and Grabenwarter (n. 93).

106 Cruz Villalón (n. 93); in detail on the individual states (in alphabetical order), Maria Lúcia Amaral and Ravi Afonso Pereira, 'The Portuguese Constitutional Court' in: von Bogdandy, Huber and Grabenwarter (n. 101), 673; Christian Behrendt, 'The Belgian Constitutional Court' in: von Bogdandy, Huber and Grabenwarter (n. 101), 71; Besselink (n. 102); Giovanni Biaggini, 'Constitutional Adjudication in Switzerland' in: von Bogdandy, Huber and Grabenwarter (n. 101), 779; Raffaele Bifulco and Davide Paris, 'The Italian Constitutional Court' in: von Bogdandy, Huber and Grabenwarter (n. 101), 447; Anuscheh Farahat, 'The German Federal Constitutional Court' in: von Bogdandy, Huber and Grabenwarter (n. 101), 279; Christoph Grabenwarter, 'The Austrian Constitutional Court' in: von Bogdandy, Huber and Grabenwarter (n. 101), 19; Jouanjan (n. 101); Jo E. K. Murkens,

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case. In others, the courts have the power, akin to a 'negative legislator', to invalidate the statute under review. Some courts have the additional power to pass substitute legislation. The protection of individual rights can take the shape of mere interlocutory proceedings, in which the concerned individual plays almost no role (such as in Italy or before the CJEU), or that of separate proceedings instituted by the concerned person (such as the constitutional complaint in Germany and Poland or the individual complaint before the ECtHR). Even greater diversity reigns with respect to proceedings for disputes between political bodies.

Given this spectrum, we may ask whether any particular court embodies a model for all. Proposals include the *Conseil constitutionnel*[107] as well as the German Constitutional Court, given the power the latter enjoys.[108] A model, however, is something that can be reproduced, which means that the Karlsruhe Court cannot serve as such. The German Court's role originated in a unique combination of circumstances: the lost war, the experience with totalitarianism, the German trust in authority, clever judicial politics and many decades of stable government majorities.[109] That it is of little use as a model also becomes evident from the fact that some constitutional courts that followed the example of Karlsruhe have encountered enormous difficulties.[110] All things considered, conceptions of a 'European model' remain unpersuasive.[111]

'Verfassungsgerichtsbarkeit im Vereinigten Königreich. § 108' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *Handbuch Ius Publicum Europaeum. vol. VI: Verfassungsgerichtsbarkeit in Europa: Institutionen* (2016), 795; Juan L. Requejo Pagés, 'The Spanish Constitutional Tribunal' in: von Bogdandy, Huber and Grabenwarter (n. 101), 719; Laszlo Sólyom, 'The Constitutional Court of Hungary' in: von Bogdandy, Huber and Grabenwarter (n. 101), 357; Piotr Tuleja, 'The Polish Constitutional Tribunal' in: von Bogdandy, Huber and Grabenwarter (n. 101), 619; Tuori (n. 102).

107 Élisabeth Zoller, *Introduction au droit public* (2nd edn, 2013), esp. 197 ff.

108 Samuel Issacharoff, *Fragile Democracies. Contested Power in the Era of Constitutional Courts* (2015), 138 ff.

109 Christoph Schönberger, 'Karlsruhe: Notes on a Court' in: Matthias Jestaedt et al. (eds), *The German Federal Constitutional Court: The Court Without Limits* (2020), 1 (7 ff.).

110 On the crises in Spain and Hungary, Requejo Pagés (n. 106), and Sólyom (n. 106).

111 Andreas Voßkuhle, 'Die Zukunft der Verfassungsgerichtsbarkeit in Deutschland und Europa', Europäische Grundrechte-Zeitschrift 47 (2020), 165.

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2. On Judicial Power

To exercise their functions, courts need authority, judicial power. A comparative analysis helps to comprehend how it can be acquired and used. Two aspects are of particular interest for European law: the expansion of a constitutional court's competences and its relationship to other institutions. The *Bundesverfassungsgericht*, the *Corte costituzionale* and the *Conseil constitutionnel* will serve as examples.

They do so because they are the constitutional courts of the three most populous Member States. Perhaps as a result, they have influenced the creation and jurisprudence of constitutional courts established later (in Portugal, Spain, or former socialist states). Moreover, the German and the Italian court symbolize the potential judicial contribution to a society's democratic transformation.[112] As this was the great theme of European constitutionalism in the second half of the twentieth century, the two post-authoritarian courts gained much visibility. France, on the other hand, has the most influential tradition of public law defined by democratic continuity.

Neither the German nor the French or Italian constitutional framers wanted to endow these three courts with the power they have today. In Italy, the establishment of the constitutional court was controversial until the very end. In Germany, the establishment was not disputed (as the Allies required it), but the framers certainly did not envision today's powerful institution either. In the case of the *Conseil constitutionnel,* it is even clearer that the framers of the Constitution of the Fifth Republic did not envision a law-making institution. Indeed, they called this body a Council rather than a Court because they did not want a constitutional court such as the ones in Austria, Germany or Italy.[113]

The *Conseil constitutionnel* was not conceived as the institution of a post-authoritarian society. Instead, the framers of 1958 intended for the court to protect the separation of powers, above all by protecting the executive power against legislative encroachments. This was a reaction to the parliamentary centralism of the Third and Fourth Republics that the Constitution of the Fifth Republic was meant to overcome. For that reason, the *Conseil*'s *raison d'être* in 1958 was not to develop fundamental rights or

112 Cruz Villalón (n. 93).
113 Jouanjan (n. 101), 235.

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a democratic society.[114] Accordingly, the subsequent transformation of the *Conseil constitutionnel* into a court that also protects fundamental rights was considered nothing less than a 'constitutional miracle'.[115]

It is almost as miraculous how the *Bundesverfassungsgericht* and the *Corte* extended their powers, establishing themselves as engines of democratic society. The fundamental judgments of all three courts are remembered today as transformative steps towards social democratization:[116] the German *Lüth* judgment, the Italian judgment 1/1956,[117] and the French *Liberté d'association* decision.[118] Their common denominator is that they all tremendously expanded the scope of constitutional provisions, and thus of judicial powers. The *Lüth* judgment includes what is perhaps the most important and most frequently cited sentence of the *Bundesverfassungsgericht*, with the Court holding that 'the Basic Law ... has also established an objective system of values in its section on fundamental rights' and that this system of fundamental values must 'apply to all areas of law as a fundamental constitutional decision'.[119] Consequently, the Court can ultimately adjudicate controversies in all areas of society. The *Corte*'s judgment 1/1956 ascribed a legal character to fundamental rights, thereby contradicting the supreme court, the *Corte di Cassazione*, which had held that fundamental rights have a purely programmatic function.[120] In doing so, the *Corte* too extended its reach tremendously.

The *Conseil constitutionnel*, in its 1971 decision *Liberté d'association*, took an even greater step in expanding its jurisdiction to individual rights. That is because the Constitution of the Fifth Republic of 1958 is almost devoid of fundamental rights. Only its preamble hints at the protection of rights

114 Dominique Rousseau, Pierre-Yves Gahdoun and Julien Bonnet, *Droit du contentieux constitutionnel* (12th edn, 2020), 29 ff.

115 Jouanjan (n. 101), 235.

116 Of course, there are also other voices, see Otto Depenheuer, 'Grenzenlos gefährlich. Selbstermächtigung des Bundesverfassungsgerichts' in: Christian Hillgruber (ed.), *Gouvernement des juges. Fluch oder Segen* (2014), 79.

117 Vittoria Barsotti et al., *Italian Constitutional Justice in Global Context* (2016), 30.

118 Conseil constitutionnel, Decision No. 71-44 DC of 16 July 1971, *Law completing the provisions of Articles 5 and 7 of the Law of 1 July 1901 on association agreements*; George D. Haimbaugh, Jr., 'Was it France's Marbury v. Madison?', Ohio State Law Journal 35 (1974), 910.

119 BVerfGE, 7, 198, *Lüth*, 205; on this, Matthias Jestaedt, 'The Karlsruhe Phenomenon: What Makes the Court What It Is' in: Matthias Jestaedt et al. (eds), *The German Federal Constitutional Court: The Court Without Limits* (2020), 32 (48 ff.).

120 Bifulco and Paris (n. 106), 454.

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by proclaiming the 'attachment' of the French people to the 'Rights of Man' as defined by the Declaration of 1789 and as 'confirmed and complemented by the Preamble to the Constitution of 1946'.[121] This minimalism was obviously insufficient thirteen years later, for the Rights Revolution had begun in the meantime.[122] Therefore, the *Conseil* simply postulated that the rights mentioned in the preamble were legally binding. The legal argument was weak, given that preambles do not establish binding law, but that did not diminish the transformation of an institution intended to protect the executive power into an – initially embryonic – fundamental rights court.

Why did these three courts engage in such transformations? Hardly any legal scholar will claim that legal texts, legal doctrine, or interpretive theories guided the court's decision-making.[123] Consequently, the courts' true reasons are the object of much speculation. Some claim to have isolated a chief motivating factor. Ran Hirschl argues that judges act like 'any other economic actor: as self-interested individuals'.[124] Accordingly, the judges' concern for their power is sometimes perceived as motivating some constitutional courts to resist transnational courts' case law, such as the Second Senate of the *Bundesverfassungsgericht* in its PSPP judgment.[125] However, this theory's explanatory power is limited, as it is also used to explain the

121 In detail, Olivier Jouanjan, 'Frankreich. § 2' in: Armin von Bogdandy, Pedro Cruz Villalón and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum. Vol I: Grundlagen und Grundzüge staatlichen Verfassungsrechts* (2007), 87.

122 Charles R. Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective* (1998); Mitchel de S.-O.-l'E. Lasser, *Judicial Transformations. The Rights Revolution in the Courts of Europe* (2009).

123 Kelsen (n. 16), 236 ff.; Ulfrid Neumann, 'Theorie der juristischen Argumentation' in: Winfried Brugger, Ulfrid Neumann and Stephan Kirste (eds), *Rechtsphilosophie im 21. Jahrhundert* (2008), 233 (241).

124 Ran Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (2014), 168.

125 Martin Wolf, 'German court decides to take back control with ECB ruling', Financial Times (13 May 2020), 17, https://www.ft.com/content/37825304-9428-11ea-af4b-499244625ac4 (last accessed 21 July 2022); Noel Dorr, 'Why is a German court undermining the European Union?' *The Irish Times* (28.05.2020), https://www.irishtimes.com/opinion/why-is-a-german-court-undermining-the-european-union-1.4263978 (last accessed 21 July 2022); Julien Dubarry, 'Prendre la Constitution au sérieux. Regard franco-allemand sur l'enchevêtrement des discours juridique et politique au prisme de la proportionnalité', Recueil Dalloz 27 (2020), 1525.

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antithetical orientation of the First Senate's 'Right to be Forgotten I and II' decisions.[126]

Many more possible reasons come to mind: ideologies and world views, cultural patterns, character, the constraints of collective decision-making, but also the call for justice, established protocols of legal argumentation, the established meaning of the law, and, not least, the ethos of fidelity to the law. All these factors seem relevant to me and are deeply interwoven, making it impossible to isolate individual factors and thereby explain judicial decision-making. The best we can aim for is understanding, rather than explanation.

While all three courts have become powerful, they play fundamentally different roles within their national legal order.[127] The *Bundesverfassungsgericht* accomplished what no other constitutional court has yet achieved: It established itself as the apex court of the German legal system. Through its *Lüth* judgment, it supplanted the Federal Supreme Court (the *Bundesgerichtshof*) which, as successor to the *Reichsgericht*, considered itself the highest German court. The judgment, which overturned a decision by the *Bundesgerichtshof*, made clear that the *Bundesverfassungsgericht* does not cooperate with the specialized courts but rather corrects them.[128] Accordingly, the *Bundesverfassungsgericht* sets very high standards for the admissibility of concrete judicial review. Under the Italian constitution, by contrast, concrete judicial review represents almost the only way for the Italian Constitutional Court to interpret and apply rights.[129]

Thus, the *Bundesverfassungsgericht*, unlike *la Corte,* has the power to make the final decision at the apex of the judicial system. Since almost any controversy can be brought before a court in Germany (Article 19 para. 4 of the Basic Law), the constitutional complaint is first and foremost a legal remedy against a court judgment. Not least for this reason, the *Bundesverfassungsgericht* represents an exception rather than the rule: Very few other

126 BVerfGE 152, 152, *Right to be forgotten I* and BVerfGE 152, 216, *Right to be forgotten II*, para. 60; on this, Mattias Wendel, 'Das Bundesverfassungsgericht als Garant der Unionsgrundrechte', JuristenZeitung 75 (2020), 157.

127 This section is based on Armin von Bogdandy and Davide Paris, 'Power is Perfected in Weakness. On the Authority of the Italian Constitutional Court' in: Vittoria Barsotti et al. (eds), *Dialogues on Italian Constitutional Justice. A Comparative Perspective* (2021), 263.

128 BVerfG *Lüth* (n. 119).

129 Jörg Luther, *Die italienische Verfassungsgerichtsbarkeit* (1990), 82 ff.

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legal orders allow for a constitutional complaint against judgments.[130] In the vast majority of cases, the *Bundesverfassungsgericht* reviews whether another German court has violated the individual rights enshrined in the Constitution.[131] While it overturns only a tiny percentage of the courts' decisions,[132] this does not detract from its august role.

Furthermore, the two courts have different addressees and audiences in mind. The Italian Constitutional Court, similar to the CJEU, mainly addresses the other courts on which it depends, whereas the German Constitutional Court, much like the ECtHR, primarily addresses the citizenry. The proverbial expression of 'going to Karlsruhe'[133] articulates the citizens' expectation of finding justice before the *Bundesverfassungsgericht* at the end of a long judicial process.

The *Corte* never gained such a role vis-à-vis the other courts. In its Judgment 1/1956, it initially scored a win against the *Cassazione*. In this case, which concerned the freedom of expression, it declared a law unconstitutional that the *Cassazione* had previously considered constitutional. In doing so, the *Corte* sided with the lower court that had referred the case, rebelling against the *Cassazione*'s interpretation and, worse, its authority.

Ten years after the Constitutional Court's decision, the so-called first 'war of the Courts' forced the *Corte* to relinquish a lot of ground. The dispute revolved around its attempt to impose its interpretation of a law on the *Cassazione*, which would have served to constitutionalize the legal order, as exemplified by the *Lüth* judgment of the *Bundesverfassungsgericht*.

Yet the *Corte*'s attempt failed, revealing an important structural element of Italian constitutional adjudication: The *Corte* can only bring its authority to bear in conjunction with another court. Hardly conceivable from a German point of view, it is a constitutional court without a constitutional complaint or any other form of direct access for citizens.[134] Instead, the

130 Markus Vašek, 'Constitutional Jurisdiction and Protection of Fundamental Rights in Europe' in: von Bogdandy, Huber and Grabenwarter (n. 93). The Orbán constitution introduced this remedy to control the ordinary courts through the captured constitutional court.

131 See Bundesverfassungsgericht, *Annual Statistics 2020*, https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/Gesamtstatistik%202020.pdf?__blob=publicationFile&v=2, at 23 (last accessed 15 October 2023).

132 See ibid., 24.

133 Uwe Wesel, *Der Gang nach Karlsruhe. Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik* (2004).

134 From a comparative perspective, this is also an exception: most legal order provide for some access, Vašek (n. 130).

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Corte's most important power, that of concrete judicial review, depends on other courts' willingness to refer questions of constitutionality. Unlike the *Bundesverfassungsgericht*, the *Corte* does not impose individual rights on recalcitrant courts; instead, it protects rights by acting together with them. Cooperation, not correction, is its tenet.

The *Corte* digested its defeat with the new doctrine of *diritto vivente*.[135] According to this doctrine, it no longer inquires whether the *Cassazione* could have developed a better – that is, a constitutional – interpretation of the law. In doing so, it defuses the conflict between the two courts. The *Corte* considers the *Cassazione*'s interpretation mandated by the law in question and limits itself to reviewing statutes for constitutionality following the *Cassazione*'s interpretation. Thus, the *Corte's* normative authority is much more limited than that of the *Bundesverfassungsgericht*. After all, imposing a certain understanding of a statute by means of an 'interpretation that conforms with the constitution' is an important tool of judicial law-making.[136]

This weakness prompted the *Corte* to closely cooperate with the other courts. It developed an 'interjudicial relationality' that has become paradigmatic of Italian constitutional adjudication.[137] Thus, the concept of judicial dialogue, which in Germany is used to describe the interaction of the *Bundesverfassungsgericht* with the European courts, grasps the relationship of the Italian Constitutional Court with all other courts.

The *Conseil constitutionnel* found it even more difficult than the *Corte* to establish an authoritative role beside the highest civil court, the *Cour de Cassation,* and the highest administrative court, the *Conseil d'État.* For many decades, it simply was not a court that protected citizens. This remained true even after the 1971 constitutional revolution, which brought rights protection into its remit. The constitutional reform of 1974 expanded standing rights, but this only benefitted the parliamentary opposition (*saisine parlementaire*). What remained unchanged was that the *Conseil constitutionnel* could only review a statute before it entered into force, and only at the request of political institutions. Litigation involving citizens had

135 Corte costituzionale, sentenza n. 11/1965 and sentenza n. 52/1965 as well as sentenza n. 127/1966 and sentenza n. 49/1970; Bifulco and Paris (n. 106), 478.

136 Anuscheh Farahat, 'Constitutional Jurisdiction and the Separation of Powers in the European Legal Space: A Comparative Analysis' in: von Bogdandy, Huber and Grabenwarter (n. 93).

137 Barsotti et al. (n. 117), 236.

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to wait for the constitutional reform of 2008 to find its way to the *Conseil constitutionnel.* But the new proceeding, a preliminary ruling procedure (*question prioritaire de constitutionnalité)*, is even more circumscribed than Italian concrete review, for only the *Cour de Cassation* and the *Conseil d'État* can initiate it. Accordingly, the *Conseil constitutionnel* can do little to alter their powerful position.[138] Unlike the *Corte* in Italy or the CJEU, the Constitutional Council thus cannot become the ally of rebellious lower courts.[139] Nevertheless, concrete judicial review is beginning to play a role in the French legal system. Ten years after its introduction, the *Conseil constitutionnel* noted that 80 per cent of its decisions result from these proceedings.[140]

The three constitutional courts also wield different forms of authority over political institutions. The tremendous authority that the *Bundesverfassungsgericht* quickly claimed is summed up by a famous phrase attributed to Konrad Adenauer: 'That is not how we thought it would be' (*Dat ham wir uns so nich vorjestellt*).[141] These words go to the heart of how the *Bundesverfassungsgericht* has evolved: It has built its authority by confronting political power, establishing itself as a visible counterweight to the government majority.

The Court's founding decade is remembered as a decade of epic victories. One need only recall its 'status struggle', in which it overcame its dependence on the Ministry of Justice, still pervaded by a National Socialist presence. Through that struggle, it established itself as one of the five constitutional institutions alongside the Federal President, the *Bundesrat*,

138 Laurence Gay, 'Le double filtrage des QPC : une spécificité française en question ? Modalités et incidences de la sélection des questions de constitutionnalité en France, Allemagne, Italie et Espagne' in: Laurence Gay (ed.), *La question prioritaire de constitutionnalité. Approche de droit comparé* (2014), 51 (53, 72 ff.).

139 Thierry Santolini, 'La question prioritaire de constitutionnalité au regard du droit comparé', Revue française de droit constitutionnel 93 (2013), 83 (94).

140 Laurent Fabius, 'QPC 2020 - Les 10 ans de la question citoyenne', Titre VII, Les cahiers du Conseil constitutionell (Octobre 2020), https://www.conseil-constitutionnel.fr/publications/titre-vii/avant-propos-du-president-laurent-fabius (last accessed 8 July 2022).

141 Quoted from Schönberger (n. 109), 10. The German quote is from Christoph Schönberger, 'Anmerkungen zu Karlsruhe' in: Matthias Jestaedt et al. (eds), *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (2011), 9 (26).

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the *Bundestag*, and the federal government.[142] In the First Broadcasting Judgment (the so-called ZDF Judgment), the *Bundesverfassungsgericht*, responding to a complaint by SPD-led *Länder*, prevented the establishment of a pro-government television channel,[143] an important project of the federal government led by the *Christian Democratic Union*.

Things went differently in Italy in this respect, too. There is no public memory of anything akin to Adenauer's remark. Considering how controversial the *Corte costituzionale* was in the Constituent Assembly, it is hardly surprising that it approached and continues approaching its work far more cautiously than the German court. Its landmark decision 1/1956 concerned not the democratic legislature but a statute from Fascist times that restricted the freedom of expression. While the executive branch of democratic Italy continued to use this and similar repressive statutes, it did not actually wish to defend them. By declaring the statute unconstitutional, the Constitutional Court attested to its democratic anti-fascism. In its review of such statutes, the *Corte* discovered a field in which it could develop its case law and authority while avoiding major conflicts with the political sphere.[144] The self-confident Karlsruhe Court, which did not need to proceed with such caution, left such statutes to the ordinary courts.[145] The *Conseil constitutionnel* acts even more restrained when reviewing legislation in substantive terms.[146] However, in the spirit of its original role as guardian of the separation of powers, its scrutiny of the legislature's compliance with parliamentary procedure is stricter than that of the other two courts.[147]

The abortion issue illustrates how differently the three courts relate to the legislature. These decisions date back to 1975 and thus to the time when individual-rights protection was gaining strength in many societies. In its long, innovative, and doctrinally elaborate first decision on abortion rights, the *Bundesverfassungsgericht* rejected the full decriminalization of abortion, a key legislative project of the social-liberal coalition. Here, a powerful

142 In detail, Wesel (n. 133), 54-82; Christian Walter, 'Art. 93 GG' in: Theodor Maunz and Günter Dürig (eds), *Grundgesetz Kommentar I* (2018), paras 93 ff.

143 BVerfGE 12, 205, *Rundfunk*.

144 Elena Malfatti, Saulle Panizza and Roberto Romboli, *Giustizia costituzionale* (6th edn, 2018), 357.

145 BVerfGE 2, 124, *Normenkontrolle II*.

146 Georges Bergougnous, 'Le Conseil constitutionnel et le législateur', Les Nouveaux Cahiers du Conseil constitutionnel 38 (2013), 5 (18).

147 Julie Benetti, 'La procédure parlementaire en question dans les saisines parlementaires', Les Nouveaux Cahiers du Conseil constitutionnel 49 (2015), 87.

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court confronted a powerful government (with its parliamentary majority). It established when human life begins and how it must be protected.[148]

In the same year, the *Corte* was confronted with the question of whether the general criminalization of abortion without exceptions violates the constitution.[149] Parliamentary attempts at liberalization had failed because of the Christian Democrats' resistance. In this context, a criminal court asked the *Corte* whether punishing a woman for terminating her pregnancy was constitutional if the pregnancy endangered her health. The *Corte*'s very brief decision refrained from determining when life begins and deciding on the nature of unborn life. Its terse decision states that unborn life is constitutionally protected in principle but that a criminal court cannot punish a woman for an abortion if her health was in danger.

The *Conseil constitutionnel* also faced the issue in 1975. The context resembled the German one, for decriminalizing abortion constituted an important project of Valéry Giscard d'Estaing's liberal presidency and majority. Opposing MPs brought it before the *Conseil constitutionnel* by means of a *saisine parlementaire*. The *Conseil* pursued a third way. Its brief decision clarified that it does not question such decisions of the parliamentary majority.[150] It also developed the formula it would henceforth use in dealing with such cases. According to this formula, the Constitution 'does not confer on the Constitutional Council a general or particular discretion identical with that of Parliament, but simply empowers it to rule on the constitutionality of statutes referred to it'. In other words, the *Conseil* avoided the matter altogether.

Important differences between the three courts also become apparent in their style of reasoning. The *Bundesverfassungsgericht* often dedicates a separate section to constitutional interpretation, the famous 'C.I.' section,[151] which is neatly separated from the subsequent application of the interpretation to the concrete case. This separation helps the Court develop extensive interpretations that transcend the case in question. Indeed, most commentators focus on the C.I. section's peculiar mix of sermon, political theory,

148 BVerfGE 39, 1, *Schwangerschaftsabbruch I*.

149 Corte costituzionale, sentenza n. 27/1975.

150 Conseil constitutionnel, Decision No. 74-54 DC of 15 January 1975, *Law on Abortion I*; the following quote is from § 1 of the decision, in the English version on the website of the Conseil constitutionnel, https://www.conseil-constitutionnel.fr/en/decision/1975/7454DC.htm (last accessed 12 September 2022).

151 Oliver Lepsius, 'The Standard-Setting Power' in: Matthias Jestaedt et al. (eds), *The German Federal Constitutional Court: The Court Without Limits* (2020), 70.

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and elaborate doctrine. To ensure that nobody overlooks the directives developed in that part, the Court prefixes them to the decision in so-called *Leitsätze*, which often read like statutory provisions.

The Italian Constitutional Court employs a far more minimalist style of reasoning. The *Corte* does not formulate general directives resembling those of the *Bundesverfassungsgericht*. Moreover, it employs the so-called absorption technique. Thus, the lower courts often include multiple possible grounds for unconstitutionality of a statute they refer to the *Corte*. If the latter holds that one of these grounds is sufficient to render the law unconstitutional, it declares the other grounds 'absorbed' without reviewing them.[152] The *Corte* is usually adamant in avoiding pronouncements that are not strictly necessary. The *Bundesverfassungsgericht*, by contrast, often indulges in *obiter dicta,* namely, in general statements that are not required to decide the case but are meant to have great impact nevertheless.[153] This might surprise a reader from a common-law country, where *dicta* do not form part of a precedent. German lawyers and courts do not make this distinction, thereby enormously expanding the *Bundesverfassungsgericht's* law-making powers. Because of its minimalist approach, the *Corte* exercises much less of a directive function vis-à-vis the legislature and society.

This is even more true of the *Conseil constitutionnel*, whose particularly apodictic and cryptic style of reasoning has traditionally been hostile to generalization.[154] However, things are changing. In 2016, the *Conseil* abandoned its practice of formulating its decision as a single sentence.[155] Its reasoning, however, remains very brief. The *Conseil* provides more orientation, though indirectly, as its Secretary General usually publishes

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152 Andrea Bonomi, *L'assorbimento dei vizi nel giudizio di costituzionalità in via incidentale* (2013).

153 For a recent example: BVerfG, Decision of 18 November 2020, 2 BvR 477/17, *State Liability for Foreign Deployments of the Bundeswehr*: the statements on liability are obiter, but they stand at the heart of the Court's reasoning.

154 Arthur Dyèvre, 'The French Constitutional Council' in: Andras Jakab, Arthur Dyèvre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (2017), 323.

155 Conseil constitutionnel, Decision No. 2016-540 QPC of 10 May 2016, *Société civile Groupement foncier rural Namin et Co* and Conseil constitutionnel, Decision No. 2016-539 QPC, *Mme Ève G.*; Nicole Belloubet, 'La motivation des décisions du Conseil constitutionnel : justifier et réformer', Les Nouveaux Cahiers du Conseil constitutionnel 55-56 (2017), 5.

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a commentary that serves the function of the *Bundesverfassungsgericht's* C.I.[156]

The *Bundesverfassungsgericht* on the one hand and the *Corte* and the *Conseil* on the other hand embody two different forms of logic – *maximalist* or *minimalist* – that determine how a constitutional court shapes a democratic society's structures. The terms 'maximalist' and 'minimalist' are not contradictory but comparative, for they describe a difference of degree, not of kind. They are meant analytically rather than evaluatively. Maximalist does not mean activist or *ultra vires*, and minimalist does not mean lethargic or captured.

Both orientations are propagated by renowned scholars.[157] The *Bundesverfassungsgericht* is extolled as the heart of the Republic.[158] The *Corte* is considered one of the most stable institutions in Italy besides the president,[159] and the *Conseil constitutionnel* is even praised as a new incarnation of the European model of constitutional adjudication.[160] These three courts are incommensurable with each other. This helps understand why neither French nor Italian mainstream scholars advocate introducing a constitutional complaint that many German academics regard as the procedural core of democratic constitutionalism.

The transformation of all three courts can be traced back to farsighted judges, but also to a general understanding that democratic societies do better with constitutional adjudication. This also holds true for European society. Indeed, it depends on judicial law-making, as on judicial cooperation.

156 Ruth K. Weber, *Der Begründungsstil von Conseil constitutionnel und Bundesverfassungsgericht. Eine vergleichende Analyse der Spruchpraxis* (2019), 120-127.

157 On the one hand, Cass R. Sunstein, *One Case at a Time. Judicial Minimalism on the Supreme Court* (1999), 3-72, 259-263; on the other hand, Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', German Law Journal 7 (2006), 341.

158 See Michael Stolleis (ed.), *Herzkammern der Republik. Die Deutschen und das Bundesverfassungsgericht* (2011).

159 Cruz Villalón (n. 93).

160 Zoller (n. 107).

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3. The European Role of National Courts

The rise of constitutional adjudication is not specific to Europe. It is a global development that occurred, above all, in the two decades around the turn of the millennium.[161] Most states now feature some form of constitutional adjudication, exercised either by an apex court or by a specific constitutional court.[162] The judicial guarantee and development of constitutional legality has been a central component of the democratic rule of law since the fall of the Iron Curtain in 1989.[163]

Constitutional jurisdiction in European society is part of a global phenomenon. But at the same time, it is special.[164] One distinctive feature is that European constitutional adjudication is not governed by a single apex court (as in most societies) but is instead exercised by many institutions: the CJEU, the ECtHR, the Member States' apex courts, and, frequently, lower courts entrusted with this task by European law. European society's pluralism is reflected in the pluralism of its institutions of constitutional adjudication.

The European embedding of national courts affects their doctrines, practices, outlooks, authority, and image.[165] Five main levers have effectuated that embedding: the duty under EU law to provide for judicial review, the constitutional role of EU law and the ECHR, the duty to refer cases to the CJEU, the jurisdiction of the ECtHR and the multi-level cooperation of courts that responds to their common responsibility for European law and society, which I now explore.

The legal foundation for the European responsibility of national judges are contained in Article 4 para. 3 TEU, the mandate of the Member State courts under European law, and the 'Europe clauses' of the Member State

161 Doreen Lustig and Joseph H. H. Weiler, 'Judicial Review in the Contemporary World. Retrospective and Prospective', International Journal of Constitutional Law 16 (2018), 315; Lucio Pegoraro, *Giustizia costituzionale comparata. Dai modelli ai sistemi* (2nd edn, 2015); Michel Fromont, *Justice constitutionnelle comparée* (2013).

162 Cassese (n. 5).

163 Ackerman (n. 5).

164 The following section draws on Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter, 'Constitutional Adjudication in the European Legal Space' in: von Bogdandy, Huber and Grabenwarter (n. 101), 1.

165 Aida Torres Pérez, 'The Challenges for Constitutional Courts as Guardians of Fundamental Rights in the European Union' in: Patricia Popelier, Armen Mazmanyan and Wouter Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (2013), 49 (53).

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constitutions.[166] It also follows from the rule of law (principle): Often, a decision by the Luxembourg or Strasbourg Court requires a further decision by a national court if it is to be realized within society, given that the CJEU and ECtHR cannot void national decisions.[167] Common responsibility also results from a court's responsibility for its own legal order since the latter is closely interwoven with the other legal orders.

The constitutional courts are of particular interest in this regard because the CJEU and ECtHR's case law has affected their role more than that of all other courts. While the powers and importance of most Member State courts has increased as a result of their Europeanization, the monopoly of the constitutional courts is under threat. Scholars of European law have put a lot of effort into researching the resulting conflict.[168] Ideal-typically, the constitutional courts have two options: to resist[169] or to cooperate.[170]

Many have accepted and even supported the CJEU and ECtHR's transformative case law, not least by recognizing, in principle, their precedential effect. Specifically with regard to the CJEU, many constitutional courts moderate their review and sanction violations of the duty to refer cases to the CJEU. The apotheosis of this support is when a constitutional court itself refers a critical case to the CJEU and abides by the latter's decision.[171]

At the same time, some constitutional courts have positioned themselves as review bodies vis-à-vis the ECtHR and the CJEU, usually by invoking

166 Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht. Verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich* (2011); Burchardt (n. 21), 199 ff.

167 There is an exception for Central Banks. CJEU, Joined Cases C-202/18 and C-238/18, *Rimšēvičs* (EU:C:2019:139), paras 69 ff.; Alicia Hinarejos, 'The Court of Justice Annuls a National Measure Directly to Protect ECB Independence: Rimšēvičs', Common Market Law Review 56 (2019), 1649.

168 Monica Claes and Bruno de Witte, 'The Roles of Constitutional Courts in the European Legal Space' in: von Bogdandy, Huber and Grabenwarter (n. 93).

169 Paradigmatically, Jan Komárek, 'Why National Constitutional Courts Should not Embrace EU Fundamental Rights' in: Sybe A. de Vries, Ulf Bernitz and Stephan Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument. Five Years Old and Growing* (2015), 75.

170 Paradigmatically, Davide Paris, 'Constitutional Courts as European Union Courts. The Current and Potential use of EU Law as a Yardstick for Constitutional Review', Maastricht Journal of European and Comparative Law 24 (2017) 792; Francisco Balaguer Callejón et al., 'Encuesta sobre el TJUE como actor de constitucionalidad', Teoría y Realidad Constitucional 39 (2017), 13.

171 Monica Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure', German Law Journal 16 (2015), 1331.

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the democratic principle. The dispute about the scope of EU law's primacy is well known. The CJEU's doctrine assumes Union law's unconditional primacy over all constitutional law of the Member States.[172] While the Member State constitutional courts recognize primacy in principle, some impose provisos that enable them to check the CJEU.[173]

Following Christoph Grabenwarter, the general functions of constitutional courts (entrenchment and development of constitutional law) are supplemented with three specific functions.[174] The additional *function of connection* expresses that the constitutional courts form a specific link between the domestic and the European courts. The requirement that all domestic remedies must have been exhausted before a complaint can be brought before the ECtHR even entails that often a case has been decided by a competent constitutional court. Frequently, constitutional courts are also the first courts to engage with new, constitutionally relevant case law from the CJEU and ECtHR and thus introduce it into domestic legal discourse. In other words, there are many channels of communication.

Furthermore, constitutional courts have a legitimizing *function* for European decisions. By processing and citing them affirmatively, they provide additional legitimation, which supports domestic reception. The *function of review* is closely related to that of legitimation. Thus, constitutional courts review CJEU and ECtHR decisions and claim the power to prohibit their effects within the domestic legal order. This function can serve the European checks and balances but can also facilitate constitutional protectionism. In both respects, the arguments mostly revolve around constitutional identity.

Consequently, conflicts are bound to occur, but they can serve the European constitutional core. It is important, however, that they do not escalate. Any conflict must be managed in the light of the courts' common responsi-

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172 Koen Lenaerts, José A. Gutiérrez Fons and Stanislas Adam, 'Exploring the Autonomy of the European Legal Order', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 81 (2021), 47.

173 On the state of the discussion, Stephan Schill and Christoph Krenn, 'Art. 4 EUV. Prinzipien der föderativen Grundstruktur' in: Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (2020), paras 14-38.

174 Christoph Grabenwarter, 'Zusammenfassung der Ergebnisse der vorangegangenen Sitzungen für den XVI. Kongress der Konferenz der Europäischen Verfassungsgerichte' in: Verfassungsgerichtshof der Republik Österreich (ed.), *Die Kooperation der Verfassungsgerichte in Europa. Aktuelle Rahmenbedingungen und Perspektiven* (2014), 174.

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bility. For that reason, the interaction between them is very flexible,[175] and so are the relevant doctrines (*controlimiti*, *ultra vires*, etc.).[176] At the same time, most agree that Union law should remain unapplied only as a means of last resort. A constitutional court has to justify such a move by pointing to a grave threat to constitutional principles; moreover, it should first give the CJEU the opportunity to address and manage the conflict.[177]

Voicing dissent comes in different ways. Ideal-typically, we can distinguish between a maximalist style and a minimalist one, as, once again, exemplified by the German Constitutional Court and the Italian Constitutional Court. When the German Constitutional Court perceives a conflict between EU and German constitutional law, it tends to instruct the European Court of Justice about the limits of EU primacy in pithy terms. The reaction of the Karlsruhe Court to the broad interpretation of the Charter's scope in *Åkerberg Fransson* provides a telling example.[178] Two months after the CJEU's judgment, it stated – and did so, moreover, in an *obiter dictum,* that is, without cause – that the *Åkerberg Fransson* decision 'must not be read in a way that would view it as an apparent ultra vires act (...). The decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR.'[179] As a rule, the German Constitutional Court leaves little room for interpretation, as is the case here: The CJEU must interpret the precedent of *Åkerberg Fransson* narrowly if it wishes to avoid serious

175 Claes and de Witte (n. 168); Juan L. Requejo Pagés, 'The Decline of the Traditional Model of European Constitutional Jurisdiction' in: von Bogdandy, Huber and Grabenwarter (n. 93).

176 CJEU, Case C-62/14, *Gauweiler et al.*, Opinion of AG Cruz Villalón (EU:C:2015:7), para. 59.

177 In detail, Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter, 'Constitutional Adjudication in the European Legal Space' in: von Bogdandy, Huber and Grabenwarter (n. 93).

178 CJEU, Case C-617/10, *Åkerberg Fransson* (EU:C:2013:105).

179 BVerfGE 133, 277, *Counter-Terrorism Database.*

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conflict.[180] Its formulation in the OMT case is similarly categorical.[181] The German Constitutional Court assumes common responsibility by clearly articulating its position.

In *Taricco,* the Italian Constitutional Court chose virtually the opposite approach. The case concerns the punishment of tax fraud to the detriment of the EU budget. Since the Italian judiciary often works slowly, such offences frequently become statute-barred. The ensuing impunity harms European financial interests considerably. Therefore, the CJEU held that the Italian criminal court had to disapply the statute of limitations in order not to impede the effectiveness of Union law.[182] Said court then asked the *Corte* whether to comply with this CJEU judgment. The *Corte*, in turn, again referred the question to the CJEU, pointing out that sentencing the defendant would violate the constitutional prohibition of retroactivity.

The order for reference 24/2017 to the European Court of Justice undoubtedly contained a threat. The *Corte* made it clear that it would likely use its strongest weapon, the *controlimiti* doctrine, if the CJEU were to uphold its *Taricco* judgment. Unlike the *Bundesverfassungsgericht*, however, it did not outline the decision it expected the CJEU to make. Rather, in a minimalistic move, it limited itself to declaring a conflict between a CJEU judgment and one of the Italian Constitution's highest principles. And unlike the *Bundesverfassungsgericht*, it also did not elaborate on the principle's scope in the order for reference, leaving open what it would ultimately consider acceptable. Thus, it did not shy away from a conflict that would affect its constitutional authoritativeness significantly. However, it also kept practically all its options open.

Both the German and the Italian approach allow for conflicts to be managed constructively.[183] The CJEU has adjusted its standards pursuant to the preliminary reference of the Italian Constitutional Court.[184] The same applies to the CJEU's *Åkerberg-Fransson* doctrine, which has taken into

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180 Daniel Thym, 'Die Reichweite der EU-Grundrechte-Charta. Zu viel Grundrechtsschutz?', Neue Zeitschrift für Verwaltungsrecht (2013), 889; Filippo Fontanelli, '*Hic Sunt Nationes*. The Elusive Limits of the EU Charter and the German Constitutional Watchdog. Court of Justice of the European Union: Judgment of 26 February 2013, Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*', European Constitutional Law Review 9 (2013), 315 (327 ff.)

181 BVerfGE 134, 366, *OMT Decision*.

182 CJEU, Case C-105/14, *Taricco* (EU:C:2015:555), paras 35-44.

183 von Bogdandy and Paris (n. 127).

184 CJEU, Case C-42/17, *M.A.S. and M.B.* (EU:C:2017:936).

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account the German Court's criticism.[185] However, I hold that the relational Italian style better suits the courts' common responsibility because it is more dialogic.

The courts' common responsibility brings considerable costs for legal certainty and the length of judicial proceedings.[186] But they seem an acceptable price to pay. No one should overlook the civilizational gain that inheres in the way the pluralistic European society manages, cabins, and often resolves its conflicts by judicial means, thereby processing its own unfolding (B.2). This civilizational achievement shows that most judges have a shared conception of their functions, rely on common principles and are aware of their common responsibility in a legal setting composed of multiple and diverse legal orders.[187] To all this, comparing, i.e. comparative public law, is key.

D. Outlook: The Comparative Setting and Academic Identities

The comparative setting of European law has made comparative law of all sorts mainstream among European public-law scholars. Indeed, there is a new mindset. Nowadays, scholars who only work on *their* national law without considering anything *outside* seem almost anachronistic.[188] This implicates the actors' self-understanding as it loosens scholars' ties to the legal order in which they, as individuals, were primarily socialized. Traditionally, legal scholars conceive of their identity within national boundaries: They think of their own law versus foreign law, or versus international law. They often research along lines that could be described as *epistemic*

185 See CJEU, Case, C-206-13, *Siragusa* (EU:C:2014:126); Case C-265/13, *Torralbo Marcos* (EU:C:2014:187); Case C-198/13, *Julian Hernández* (EU:C:2014:2055).

186 Dana Burchardt, 'Kehrtwende in der Grundrechts- und Vorrangrechtsprechung des EuGH? Anmerkung zum Urteil des EuGH vom 5.12.2017 in der Rechtssache M.A.S. und M.B. (C-42/17, "Taricco II")', Europarecht 53 (2018), 248; Anneli Albi, 'An Essay on How the Discourse on Sovereignty and on the Cooperativeness of National Courts Has Diverted Attention From the Erosion of Classical Constitutional Rights in the EU' in: Monica Claes et al. (eds), *Constitutional Conversations in Europe* (2012), 41.

187 See Marta Cartabia, 'Courts' Relations', International Journal of Constitutional Law 18 (2020), 3.

188 Thomas Ackermann, 'Eine "ungeheure Jurisprudenz"? Die Europarechtswissenschaft und die Europäisierung des Rechts', Jahrbuch des öffentlichen Rechts 68 (2020), 471.

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nationalism as to topics, theories, doctrines, cases, methods, forms of argumentation.

The dynamics of the comparative setting of European law impact on how scholars select and address topics, theories, doctrines, cases, methods, forms of argumentation as well as cultures of attention. Its dynamics affect how authority and scholarship are organized as well as the media, career paths, academic loyalties, structures of equality, and the question of how to gain (and lose) one's reputation. Research is a fully-fledged EU policy field under Article 179 para. 1 TFEU.[189] One outcome is the European Research Council (ERC)[190] and its associated executive agency, the ERCEA.[191] Their grants have established a European reputational hierarchy, thus Europeanizing a driving force for academic work.[192] Not least because research at elite U.S. law schools often serves as the beacon for frontier research in European society, ever more European researchers transcend their jurisdictions.[193]

Many further factors operate in favour of overcoming the focus on just one legal order and culture. Since many up-and-coming scholars seek high European visibility by publishing in international journals that feature anonymous peer review from various legal cultures, they need to adapt. Moreover, quite a few researchers have more than one career path in mind. Today, there are new options abroad, particularly those offered by English, Dutch, Irish, Norwegian, Scottish, and Swiss faculties. Given their multinational composition, comparative thinking is built into their fabric.

189 Álvaro De Elera, 'The European Research Area. On the Way Towards a European Scientific Community?', European Law Journal 12 (2006), 559.

190 Commission Decision 2013/C 373/09 of 12 December 2013 establishing the European Research Council, OJ 2013 C 373/23.

191 Commission Implementing Decision 2013/779/EU of 17 December 2013 establishing the European Research Council Executive Agency and repealing Decision 2008/37/EC, OJ 2013 L 346/58.

192 On the role of reputation, Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (1990), 245-251; Helmut Goerlich, 'Die Rolle von Reputation in der Rechtswissenschaft' in: Eric Hilgendorf and Helmuth Schulze-Fielitz (eds), *Selbstreflexion der Rechtswissenschaft* (2021), 207.

193 Anthony Arnull, 'The Americanization of EU Law Scholarship' in: Anthony Arnull, Piet Eeckhout and Takis Tridimas (eds), *Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs* (2008), 415; Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (2018), 193; Christian Tomuschat, 'The (Hegemonic?) Role of the English Language', Nordic Journal of International Law 86 (2017), 196; Marta Cartabia, 'La lingua inglese e lo studio del diritto pubblico', Rivista trimestrale di diritto pubblico (2018), 907.

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It is striking that many of the voices we hear throughout Europe are those of migrant workers speaking from such institutions. We can assume that this group of migrant workers takes on a vital role in a genuinely European scholarly community. This brings us to the most important point.

There is a developed European public law, but a European academic legal community is still in its beginnings. Most legal scholars still articulate their self-understanding primarily in terms of the national community in which their professional future unfolds. This is hardly convincing: If national systems of legal scholarship want to accompany the course of European society, they must find and reflect their place in this society.

To Europeanize legal scholarship is a difficult undertaking, given the plurality of languages, the complexity of the research and publication landscape, and the cultural diversity that legal research often reflects. But if multilingualism, a comparative mindset, transnational cooperation, and a European publication profile open doors to attractive positions, many scholars will make the effort.[194]

Such developments are perhaps easier to detect outside Germany. In 2012, I presented my ideas on European legal scholarship in Leiden at the *Staatsrechtconferentie,* the annual conference of the *Staatsrechtkring*, the Dutch Association of Constitutional Law.[195] Unlike the Association of German Professors of Public Law, the Dutch Association admits scholars who, in the German system, are called – strangely enough – *Nachwuchs*, offspring. The latter categorically opposed my assertion that national identities continue to dominate academic identities. For many, the fact they belong to the Dutch or Belgian, or even Flemish, community constituted only one of several identities. While that identity remains important, it is not paramount, being embedded instead in the wider European as well as international context. I saw them as self-confident citizens of European society with a sharp comparative mindset.

194 For proposals, see Gernot Sydow, 'Die Europarechtswissenschaft europäisieren? Überlegungen zur Strukturentwicklung der juristischen Fakultäten und zur Lehre des Europarechts', Jahrbuch des öffentlichen Rechts 68 (2020), 545; Christophe Jamin, *La cuisine du droit. L´École de Droit de Sciences Po: une expérimentation française* (2012), 171 ff.

195 The conference proceedings are published in Michal Diamant et al. (eds), *The Powers that Be. Op zoek naar nieuwe checks and balances in de verhouding tussen wetgever, bestuur, rechter en media in de veellagige rechtsorde* (2013).

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