Constitutional Comparison by Constitutional Courts – Observations from Twelve Years of Constitutional Practice

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A. Introduction

There have been a large number of publications and discussions on the topic of comparative constitutional law in recent years. In my lecture, I would like to focus on a small section of this topic, namely the practice of comparative constitutional law[1] at the Federal Constitutional Court of Germany. This practice is difficult to grasp. Even if the international trend towards more constitutional comparison is indisputable, analysing constitutional comparative practice remains challenging. In most cases, the considerations behind the judgement are only partially reflected in the court's decision.[2] Genesis and presentation of a decision are each subject to

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1 In Germany, this practice is commonly referred to as 'constitutional comparison' ('Verfassungsvergleichung') instead of 'comparative constitutional law' ('Verfassungsrechtsvergleichung'), for a specific insight into the German and international terminology see Karl-Peter Sommermann, 'Funktionen und Methoden der Grundrechtsvergleichung' in: Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte* (C.F. Müller 2004), vol I § 16, para. 5 with further references.

2 This view is shared by the former constitutional judges Brun-Otto Bryde, 'The constitutional Judge and the International Constitutionalist Dialogue' in: Basil Markesini and Jörg Fedke (eds), *Judicial Recourse to Foreign Law. A New Source of Inspiration?* (Routledge 2006), 295 (297); Wolfgang Hoffmann-Riem, 'Constitutional Court Judges Roundtable', International Journal of Constitutional Law 3 (2005), 556, 559; Peter M. Huber and Andreas L. Paulus, 'Cooperation of Courts in Europe' in: Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press

their own requirements.[3] This makes it essential for courts to try different solutions and sometimes pursue half-baked thoughts without being subjected to continuous scrutiny. The repeatedly suggested publication of the court's internal votes and comparative working principles[4] is no solution but would instead prove to be dysfunctional.

Moreover, the Federal Constitutional Court judges' willingness to engage in constitutional comparison seems to differ. This certainly has something to do with the personal preferences,[5] language skills, and respective professional backgrounds of the single judges. International lawyers are more inclined to comparative law than, for example, former judges of the Federal Supreme Court. However, there is also a link to the still too parochial training of German lawyers, placing too little emphasis on the comparative perspective. The model of the 'European lawyer' has not yet been sufficiently internalised.[6] What we generally observe then is only the tip of the

2015), 281, 293; Anna-Bettina Kaiser, 'Verfassungsvergleichung durch das Bundesverfassungsgericht', Journal für Rechtspolitik 18 (2010), 203, 204, who descriptively refers to this practice as 'implicit constitutional comparison'.

3 In the present context cf. Stefan Martini, *Vergleichende Verfassungsrechtsprechung* (Duncker & Humblot 2018), 48-50 with further references. The inner life of the highest courts continues to be a black box to outsiders. However, an insight into the Federal Constitutional Court's consultation culture is provided by Gertrude Lübbe-Wolff, 'Die Beratungskultur des Bundesverfassungsgerichts', Europäische Grundrechte-Zeitschrift 41 (2014), 509 ff.; Gertrude Lübbe-Wolff, *Wie funktioniert das Bundesverfassungsgericht?* (Universitätsverlag Osnabrück, V & R unipress 2015), and Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses* (VS Verlag für Sozialwissenschaften 2010). Cf. also Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court*, (Doubleday 2007); Dominique Schapper, *Une sociologue au Conseil Constitutionnel* (Gallimard 2010); Laszlo Sólyom and Georg Brunner, *A Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court* (University of Michigan Press 2010); Sabino Cassese, *Dentro la corte: Diario di un giudice costituzionale* (il Mulino 2015).

4 Cf. for example Peter Häberle, 'Gemeineuropäisches Verfassungsrecht', Europäische Grundrechte-Zeitschrift 18 (1991), 261, 271; Armin von Bogdandy, 'European Law Beyond "Ever Closer Union" Repositioning the Concept, its Thrust and the EJCs Comparative Methodology', European Law Journal 22 (2016), 519, 537-538, with a reference to the existing practice of the Italian *Corte Costituzionale*.

5 On the significance of the acting person's individual experiences, see Claus-Dieter Classen, 'Das Grundgesetz in der internationalen Verfassungsvergleichung' in: Wolfgang Kahl, Christian Waldhoff and Christian Walter (eds), *Bonner Kommentar zum Grundgesetz* (C.F. Müller 2019), paras 12-13.

6 For further details see Andreas Voßkuhle, 'Das Leitbild des „europäischen Juristen"' in: Andreas Voßkuhle (ed.), *Europa, Demokratie, Verfassungsgerichte* (Suhrkamp 2021), 19 ff. with further references.

'comparative iceberg'.[7] In what follows, I will share some observations from my twelve years of judicial practice at the Federal Constitutional Court.

B. Comparative Constitutional Law and the Court

I. The Scope of Comparative Constitutional Law

To examine the practice of constitutional comparison precisely, it is helpful to distinguish comparative law in a narrow sense from those constellations in which domestic law expressly refers to a foreign legal system. Examples of the second case are the primacy of EU law or the duty to take into account the European Convention on Human Rights while interpreting domestic law.[8] The latter cases raise their own problems of legal harmonisation in multi-level governance. Also, the simple application of foreign law, for example, in the context of private international law, is not a case of comparative legal analysis in a narrow sense.[9] In these instances, judges decide autonomously whether to make use of the possibility of comparative law.[10] I follow the understanding that comparative constitutional law only takes place

- if **firstly,** a reference is made to aspects of another legal system for argumentative purposes,
- if, **secondly,** that system is comparable in at least one respect,
- if, **thirdly,** it is not normatively binding for one's own legal system, and

7 Mattias Wendel, 'Richterliche Rechtsvergleichung als Dialogform', Der Staat 52 (2013), 339, 342 who refers to the metaphorical image from Jaakko Husa, 'Methodology of Comparative Law Today: From Paradoxes to Flexibility', Revue Internationale de Droit Comparé 58 (2006), 1095.

8 Likewise Kaiser (n. 2), 203, 204; Stefan Martini (n. 3), 42; Susanne Baer, 'Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus', Jahrbuch des öffentlichen Rechts der Gegenwart neue Folge 63 (2015), 389, 390. Otherwise, see Susanne Baer, *Renaissance der Verfassungsvergleichung?* (2022), 3.

9 For further information on the Federal Constitutional Court's jurisprudence regarding cases with a foreign element see Baer (n. 8), 391-392 with further references in n 12.

10 Explicitly stated in the same manner by Michael Bobek, *Comparative reasoning in European Supreme Courts* (Oxford University Press 2013), 19: 'situations in which the judge has a choice'.

– **finally,** if the comparison is made to promote the application and interpretation of one's own law.[11]

2. The Use of Comparative Law in the Court

A closer look at the judgments' reasonings reveals that comparative law certainly does not represent a fifth method of interpretation in German constitutional jurisprudence, as the German constitutional lawyer Peter Häberle[12] once called for. From a quantitative perspective, a comparative approach is the exception rather than the rule.[13] However, one may doubt whether one can speak of a general deficit of comparative law analysis in the jurisprudence of the Federal Constitutional Court.[14] Contrary to some of the opinions expressed in the academic debate,[15] the use of arguments derived from comparative legal analysis by the Federal Constitutional Court has increased in the last 20 years. This observation is supported by the highly commendable and well-supported study conducted by Stefan Martini. He has meticulously examined the first 131 volumes of the Federal Constitutional Court's official collection of decisions for comparative legal references, using quantitative and qualitative methods of analysis.[16] Over the entire period of the study, he has identified comparative law references in approximately every twentieth decision, corresponding to a rate of about 5%. In an international comparison of supreme and constitutional courts, the Federal Constitutional Court thus ranks in the middle, ahead of the supreme courts of the USA, Japan and Russia, but behind those of South Africa, Australia and Israel.

11 Martini (n. 8), 360.

12 Cf. Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat', JuristenZeitung 44 (1989), 913, 916; Peter Häberle, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (Duncker & Humblot 1992); Peter Häberle and Markus Kotzur, *Europäische Verfassungslehre* (8th edn, Nomos 2016), paras 699 ff.

13 Likewise, Baer (n. 8), 391-392, 397. For further comparison Classen (n. 5), para. 51.

14 Peter Häberle, 'Das deutsche BVerfG, eine "Nachlese" zu 60 Jahren seiner Tätigkeit' in: Peter Häberle (ed.), *Verfassungsgerichtsbarkeit – Verfassungsprozessrecht* (Duncker & Humblot 2014), 251, 256-257.

15 Cf. for example Sommermann (n. 1), para. 86; Angelika Nußberger, 'Wer zitiert wen?', JuristenZeitung 61 (2006), 763, 770; Cheryl Saunders, 'Judicial Engagement with Comparative Law' in: Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011), 571, 574; Bobek (n. 10), 150.

16 Martini (n. 8), 72 ff.

From its early decisions on,[17] the Federal Constitutional Court has considered other legal systems.[18] In the so-called *Lüth* judgement, the fundamental right to freedom of expression (Article 5 para. 1 s. 1 of the Basic Law) was compared to the Declaration of the Rights of Man and of the Citizen of 1789, and it was stated that this was one of the most noble human rights of all.[19] Furthermore, the decision explicitly refers to the liberal US Supreme Court Justice Benjamin N. Cardozo (1870-1938), sharing his conviction that the right to express one's opinion is the foundation of almost every other freedom.[20] A few years later, comparative legal considerations appear in a decision dealing with the tension between the freedom of the press (Article 5 para. 1 s. 2 of the Basic Law) and national security: In the *Spiegel* ruling, there are many references to other legal systems.[21] However, the court did not only engage in comparative legal analysis in decisions on the fundamental rights of freedom of expression and freedom of the press. It also took on a broader view beyond the boundaries of its own constitutional order on more specific issues. This applies, for instance, to the right to conscientious objection (Article 4 of the Basic Law)[22] or the interpretation of the concept of 'home' in the context of the right to privacy (Article 13 of the Basic Law)[23] and to the former ban on marriage in cases where one partner has been in a premarital relationship with a relative of their new partner (Article 6 of the Basic Law)[24]. Over the years, court

17 Comparative legal remarks are most commonly found in senate-decisions and less common in chamber-decisions (formerly known as 'three-person-committees' ['Dreier-Ausschüsse']), as these decisions are not the place to elaborate complex questions of constitutional legal doctrine and usually considerably less far-reaching than the senate-decisions; see also Baer (n. 8), 395-396.

18 An overview of the comparative legal remarks in the Federal Constitutional Court's early decisions is supplied by Jörg Manfred Mössner, 'Rechtsvergleichung und Verfassungsrechtsprechung', Archiv des öffentlichen Rechts 99 (1974), 193, 228 ff.

19 BVerfGE 7, 198 (208) – Lüth.

20 BVerfGE 7, 198 (208) – Lüth; see also Justice Benjamin N. Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

21 BVerfGE 20, 162 (208, 220-221) – Spiegel.

22 BVerfGE 28, 243 (258-259) – Kriegsdienstverweigerung.

23 BVerfGE 32, 54 (70) – Betriebsbetretungsrecht.

24 BVerfGE 36, 146 (165) – Eheverbot.

decisions from various legal systems[25] have found their way into the official collection of the rulings of the Federal Constitutional Court.[26]

The current jurisprudence of the Federal Constitutional Court is influenced by other constitutional courts as well: In its *Fraport* decision from 2011, for example, the Court referred to criteria developed by the highest courts of the United States and Canada on the 'public forum' doctrine. This doctrine was employed to clarify the conditions under which the freedom of assembly (Article 8 of the Basic Law) includes places outside public streets, roads and squares.[27] Furthermore, the Federal Constitutional Court's practice of directly applying the European Charter of Fundamental Rights in fully harmonised areas of law was introduced with reference to the legal situation in Austria, Belgium, France and Italy.[28] Another example of detailed comparative law considerations is the decision on assisted suicide in 2020.[29] Moreover, when the Court ruled on the subject of the European Central Bank's OMT programme, it intensively consulted the case law of other European constitutional and supreme courts on the fundamental question of the primacy of EU law.[30] The same goes for the Court's application of the principle of proportionality in the so-called *PSPP* ruling.[31]

C. Relationship Between the Court and Comparative Law Scholarship

I. The Increase in Comparative Constitutional Law Scholarship

The increase in comparative legal analysis in constitutional jurisprudence is due to various factors. However, it is probably no coincidence that it goes hand in hand with an increased academic interest in comparative constitutional law over the last two decades. Comparative law seems to

25 On the systematics of legal systems cf. Uwe Kischel, *Rechtsvergleichung* (C.H. Beck 2015), § 4.

26 Cf. not only the work by Martini (n. 8) for the Federal Constitutional Court's jurisprudence between the years 1951 and 2007, but also the empirical analysis by Aura María Cárdenas Paulsen, *Über die Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts* (Verlag Dr. Kovač 2009).

27 BVerfGE 128, 226 (253) – Fraport.

28 BVerfGE 152, 216 (236, para. 50) – Recht auf Vergessen II.

29 BVerfGE 153, 182 (200-206, paras 26–32) – Suizidhilfe.

30 BVerfGE 142, 123 (197-198, para. 142) – OMT.

31 BVerfGE 154, 17 (99 ff., paras 123–125) – PSPP.

adjust to the needs of the times.[32] Some also speak of a 'renaissance of constitutional comparison'.[33] Looking back, modern comparative law[34] has indeed gone through different periods: phases of flourishing alternated with phases of disillusionment. This applies not only to comparative private law, which was for a long time the main domain of comparative law,[35] but also to comparative constitutional law. Particularly in the early years of the Federal Republic of Germany, the main focus was on the German constitution.[36] Only the Basic Law's legislative materials feature a few references to comparative law.[37] Possible reasons for this introverted attitude are

32 Christoph Schönberger, 'Verfassungsvergleichung heute: Der schwierige Abschied vom ptolemäischen Weltbild', Verfassung und Recht in Übersee 43 (2010), 6; András Jakab, *European Constitutional Language* (Cambridge University Press 2016), 55, who speaks of a 'global phenomenon or trend'.

33 Ran Hirschl, *Comparative Matters, The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014). Hirschl's primary concern is a methodical realignment of comparative constitutional law. Critical towards this Armin von Bogdandy, 'Zur sozialwissenschaftlichen Runderneuerung der Verfassungsvergleichung', Der Staat 55 (2016), 103 ff. For further elaboration on this issue see Baer (n. 8), 1 ff.

34 The 1900 Congress of Comparative Law ('Congrès international de droit comparé') in Paris is seen as an important initiator of modern comparative law, cf. Ralf Michaels, 'Im Westen nichts Neues? 100 Jahre Pariser Kongreß für Rechtsvergleichung – Gedanken anläßlich einer Jubiläumskonferenz in New Orleans', Rabels Zeitschrift für ausländisches und internationales Privatrecht 66 (2002), 97, 98 ff. On the history of comparative law Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, Mohr Siebeck 1996), 47 ff.; see also Walther Hug, 'The History of Comparative Law', Harvard Law Review 45 (1931/32), 1027, 1029 ff.

35 Cf. Zweigert and Kötz (n. 34) 3; regarding the history of comparative administrative law see for instance Eberhard Schmidt-Aßmann, 'Zum Standort der Rechtsvergleichung im Verwaltungsrecht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 78 (2018), 807, 813 ff.; Nikolaus Marsch, 'Rechtsvergleichung' in: Andreas Voßkuhle, Martin Eifert and Christoph Möllers (eds), *Grundlagen des Verwaltungsrechts* (3rd edn, C.H. Beck 2022), vol. I, § 3 paras 4 ff.

36 Schönberger (n. 32), 7 ff., speaks of the 'constitutional lawyers' Ptolemaic conception of the world'; cf. in the context of administrative law Schmidt-Aßmann (n. 35).

37 For instance, occasional comparative approaches taken up by the *Parlamentarischer Rat* can be found regarding the principle of democracy (Jahrbuch des öffentlichen Rechts der Gegenwart 1 [1951], 197) and the transfer of sovereign rights (Jahrbuch des öffentlichen Rechts der Gegenwart 1 [1951], 223 including n. 3); further examples: Jahrbuch des öffentlichen Rechts der Gegenwart 1 (1951), 65 (Art. 2 Basic Law) 409 including n. 7 (Art. 56 Basic Law), 897-898 including n. 2 (Art. 139 Basic Law). For information on the alignment of the *Parlamentarischer Rat* with the Allies' desires see Carlo Schmid, *Erinnerungen* (S. Hirzel Verlag 1979), 368 ff. Furthermore Heinrich Wilms, *Ausländische Einwirkungen auf die Entstehung des Grundgesetzes* (Kohlhammer 1999). In general, see also Walter Haller, 'Verfassungsvergleichung als Impuls für die Verfassungsgebung' in: Peter Hänni (ed.), *Festgabe für Thomas Fleiner zum 65.*

'language barriers, a lack of personnel capacity to examine and evaluate foreign material, a concentration on overcoming the law established during the National Socialist era and implementing the new law created after the war, as well as a rather underdeveloped comparative legal method within German public law, and, somewhat later, possibly also satisfaction with the "successful model" of the Basic Law.'[38]

Comparative methods in public law received a new impetus in the late 1980s. Initiated primarily by the work of Peter Häberle,[39] the study of the public law of other states increased significantly in Germany.[40] This applies to comparative constitutional law in particular.[41] Of the many publications, only the monographs by Bernd Wieser,[42] Aura Maria Cárdenas Paulsen,[43] Albrecht Weber,[44] Nick Oberheiden,[45] Triantafyllos Zolotas[46] and Uwe

Geburtstag (Editions Universitaires Fribourg Suisse 2003), 311 ff.; also, Claudia Fuchs, 'Verfassungsvergleichung und Gesetzgebung', Journal für Rechtspolitik 21 (2013), 2 ff.

38 Andreas Voßkuhle, 'Rechtspluralismus als Herausforderung', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 79 (2019), 481, 489. Regarding further reasons cf. Schönberger (n. 32), 12 ff.

39 Häberle (n. 12), 913 ff.; Peter Häberle, 'Die Entwicklungsländer im Prozeß der Textstufendifferenzierung des Verfassungsstaates', Verfassung und Recht in Übersee 23 (1990), 225 ff.; Häberle (n. 4), 261; Peter Häberle, 'Die Entwicklungsstufe des heutigen Verfassungsstaates', Rechtstheorie 22 (1991), 431 ff. See also (n. 12).

40 Instead of many, cf. Christian Starck, 'Rechtsvergleichung im Öffentlichen Recht', JuristenZeitung 52 (1997), 1021 ff.; Rainer Grote, 'Rechtskreise im öffentlichen Recht', Archiv des öffentlichen Rechts 126 (2001), 10 ff.; Carl-David von Busse, *Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht* (Nomos 2015).

41 Cf. for example Rainer Wahl, 'Verfassungsvergleichung als Kulturvergleichung' in: Rainer Wahl (ed.), *Verfassungsstaat, Europäisierung, Internationalisierung* (Suhrkamp 2003), 96 ff.; Susanne Baer, 'Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 64 (2004), 735 ff.; Hans-Peter Schneider, 'Verfassung und Verfassungsrecht im Zeichen der Globalisierung – zwischen nationaler Entgrenzung und transnationaler Entfaltung', Jahrbuch des öffentlichen Rechts der Gegenwart neue Folge 65 (2017), 295, 309-310.

42 Bernd Wieser, *Vergleichendes Verfassungsrecht* (2nd edn, Verlag Österreich 2020).

43 Paulsen (n. 26).

44 Albrecht Weber, *Europäische Verfassungsvergleichung* (C.H. Beck 2010).

45 Nick Oberheiden, *Typologie und Grenzen des richterlichen Verfassungsvergleichs* (Nomos 2011).

46 Triantafyllos Zolotas, *Gerichtliche Heranziehung der Grundrechtsvergleichung* (Carl Heymanns 2012).

Kischel,[47] as well as the handbook '*Ius Publicum Europaeum*' edited by Armin von Bogdandy and Peter M. Huber,[48] which has meanwhile grown to nine volumes, shall be mentioned here, in addition to the study by Stefan Martini[49] already cited above. Since the end of the 1990s, interest in the subject has also increased outside of Germany. The number of relevant essays,[50] monographs and comprehensive compendia[51] on comparative constitutional law and the use of 'Foreign Precedents by Constitutional Judges'[52] is overwhelming.

47 Kischel (n. 25); Uwe Kischel, 'Fragmentierungen im Öffentlichen Recht: Diskursvergleich im internationalen und nationalen Recht', Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 77 (2018), 285 ff.

48 Armin von Bogdandy and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum*, vol I until vol IX, (C.F. Müller 2007-2021).

49 Martini (n. 8).

50 Selected overview: Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law', American Journal of Comparative Law 53 (2015), 125 ff.; Vicki C. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement', Harvard Law Review 119 (2005), 109 ff.; Eric A. Posner and Cass R. Sunstein, 'The Law of Other States', Stanford Law Review 59 (2006), 131 ff.; Mark C. Rahdert, 'Comparative Constitutional Advocacy', American University Law Review 56 (2007), 553 ff.; Nathan J. Brown, 'Reason, Interest, Rationality, and Passion in Constitution Drafting', Perspectives on Politics 6 (2008), 675 ff.; Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', American Journal of International Law 102 (2008), 241 ff.; David Fontana, 'The Rise and Fall of Comparative Constitutional Law in the Postwar Era', Yale Journal of International Law 36 (2011), 1 ff.; David S. Law and Mila Versteeg, 'Sham Constitutions', California Law Review 101 (2013), 863 ff.; Mark Tushnet, 'Authoritarian Consitutionalism', Cornell Law Review 100 (2015), 391 ff.

51 Cf. for example Francois Venter, *The Language of Constitutional Comparison* (Edward Elgar Publishing 2000); Norman Dorsen, Michel Rosenfeld, András Sajó and Susanne Baer, *Comparative Constitutionalism. Cases and Materials* (3rd edn, West Academic Publishing 2016); Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012); Mark Tushnet (ed.), *Comparative Constitutional Law*, vols I-III, (Edward Elgar Publishing 2017); Aydin Atilgan, *Global Constitutionalism*, (Springer 2018); Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019); Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press 2020, Oxford); Xenphon Coutiades and Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2021).

52 Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedent by Constitutional Judges* (Hart Publishing 2013). For specific information on comparative constitutional law practiced by courts see for example Ulrich Drobning and Sjef van Erp (eds), *The Use of Comparative Law by Courts* (Kluwer Law International 1999); Guy Canivet et al. (eds), *Comparative Law before the Courts* (British Institute

One of the reasons for this development is the emergence of new comparative material. 'After the downfall of the socialist constitutional systems at the end of the Cold War, the states of Eastern Europe oriented themselves towards Western models in their transformation into democratic constitutional states. This fact must be urgently recalled, given the current and very worrying events in Poland and Hungary. New constitutions have also been created in other parts of the world, such as South Africa and some South American states. In general, the growing international integration and the increasing harmonisation of law have certainly promoted interest in comparative methods in public law. Today, the problems associated with the emergence of new technologies or social change no longer originate at a national, but at a global level.[53] To name a few keywords: globalisation and digitalisation, or more concretely, migration and climate change.

Apart from this, the appeal of comparative constitutional law lies in its subject matter. Constitutional law differs from non-constitutional law in that it has a larger number of indeterminate legal concepts. The combination of these legal concepts with general legal principles, constitutional purposes and the state's structural principles increases the interpretative leeway even more. This leeway invites comparison[54] but does not automatically make comparative legal analysis easier.[55] As constitutions and constitutional law are closely tied to a specific state as their object of reference and to a specific legal culture,[56] constitutional comparisons are also subject to some preconditions that inhibit comparative legal analysis.

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of International and Comparative Law 2004); Andrew Harding and Peter Leyland (eds), *Constitutional Courts. A Comparative Study* (Wildy, Simmonds & Hill 2009); Andenas and Fairgrieve (n. 2); Giuseppe Franco Ferrari (ed.), *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems* (Brill 2020).

53 Voßkuhle (n. 38), 491-492.

54 Cf. only Manfred Mössner, 'Rechtsvergleichung und Verfassungsrechtsprechung', Archiv des öffentlichen Rechts 99 (1974), 193, 214; Armin von Bogdandy, *Gubernative Rechtssetzung* (Mohr Siebeck 2000), 11; Bobek (n. 10), 256; Martini (n. 8), 45.

55 On the occasionally shared conviction that comparative legal analysis is especially hard within the area of public law, cf. only Claudia Fuchs, 'Verfassungsvergleichung und Gesetzgebung', Journal für Rechtspolitik 21 (2013), 2.

56 Brun-Otto Bryde, 'Warum Verfassungsvergleichung?', Jahrbuch des öffentlichen Rechts der Gegenwart neue Folge 64 (2016), 431, 438.

2. Constitutional Comparison and Academic Support

Despite the personal exchange between the judges of the constitutional and supreme courts and the establishment of numerous databases, constitutional courts remain dependent on academic support. As my former colleague at the Federal Constitutional Court, Brun-Otto Bryde, once vividly remarked: 'A constitutional court is not a comparative law institute and never will become one'.[57] The Federal Constitutional Court receives support, for example, from the multi-volume series 'Constitutions of the Countries of the World (CCW)', published by the Max Planck Institute for Comparative Public Law and International Law for over ten years now. Also of great use is the online database 'Max Planck Encyclopedia of Comparative Constitutional Law (MPECCoL)'[58], maintained by the Max Planck Foundation for International Peace and the Rule of Law. The database aims to cover all areas of constitutional law from a comparative perspective, considering all legal cultures and the various methods of comparative constitutional law. Other works that are popular as an introduction in everyday life are, for example, the short textbook by Albrecht Weber on comparative European constitutional law (2010), the textbook 'Französisches und Deutsches Verfassungsrecht' by Nikolaus Marsch, Yoan Vilain and Mattias Wendel (2015), the already mentioned textbook by Armin von Bogdandy and Peter M. Huber, or the various English-language handbooks on comparative constitutional law.[59] Specifically related to comparative constitutional law practice are, for example, the works 'Comparative Constitutional Reasoning' edited by András Jakab and others[60], 'Courts and Comparative Law' edited by Mads Andenas and Duncan Fairgrieve (2015) and the compendium 'Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems' (2020). As such, there is no lack of support.

57 Bryde (n. 2), 298.

58 Accessible under http://oxcon.ouplaw.com/home/MPECCOL.

59 Cf. the references in n. 51.

60 András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017).

D. The Legitimacy and Limits of Judicial Constitutional Comparison

I. Legitimacy

Despite the existing practice of various constitutional courts, there is no lack of fundamental criticism of constitutional comparison. As an example, I would like to point to the conflict between the Justices of the US Supreme Court. Especially among those who advocate in favour of originalism,[61] a comparative approach is vehemently rejected. They argue that one's own constitutional order cannot be interpreted by comparison with the norms and concepts developed in another jurisdiction and its jurisprudence.[62] To quote the late US Supreme Court Justice Antonin Scalia, in whose opinion comparative law may be inspiring but is irrelevant from a constitutional perspective as it violates the principle of democracy: 'It is quite impossible for the courts, creatures and agents of the people of the United States, to impose upon those people of the United States norms that those people themselves (through their democratic institutions) have not accepted.'[63] Even in the German constitutional law discourse, there are many reservations concerning comparative law. It is often claimed that arguments derived from foreign constitutional law, constitutional jurisprudence or literature can only be viable if they remain within the boundaries set out by the content of the German Basic Law itself. Otherwise, it is argued, such an approach would infringe upon 'the proprium of jurisprudence': 'The

61 Cf. Werner Heun, 'Original Intent und Wille des historischen Verfassungsgebers als Interpretationsmaximen' in: Werner Heun (ed.), *Verfassung und Verfassungsgerichtsbarkeit im Vergleich* (Mohr Siebeck 2014), 213 ff.

62 For some time, those who emphasise the benefit of constitutional comparison have been gaining traction, cf. the references at Sebastian Müller-Franken, 'Verfassungsvergleichung' in: Otto Depenheuer and Christoph Grabenwarter (eds), *Verfassungstheorie* (Mohr Siebeck 2010), § 26 para. 31 and n. 110 (906-907).

63 Antonin Scalia, 'Commentary', Saint Louis University Law Journal 40 (1996), 1119. Cf; also, *Thompson v. Oklahoma*, 487 U. S. 815, 868 with n. 4 (1988) (Scalia, J., dissenting opinion). Cf; also, Norman Dorsen, 'The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Beyer', International Journal of Constitutional Law 3 (2005), 519 ff. Despite this debate, the US Supreme Court itself has repeatedly engaged in comparative law, cf. for example Christoph Bezemek, 'Dangerous Dicta? Verfassungsvergleichung in der Rechtsprechung des US Supreme Court', Journal für Rechtspolitik 18 (2010), 207 ff.

practitioners would operate outside the law.'[64] Ultimately, this proves to be a question of democratic legitimacy. To put it in the words of *Christian Walter*[65]: 'If judicial review as such always needs to be justified in light of the principle of democracy, how much more must this apply if it is to be carried out based on foreign norms?'

In contrast, the constitutions of other states explicitly encourage their constitutional courts to use arguments derived from comparative legal analysis. The Constitution of South Africa, for example, explicitly allows the courts to consider foreign law.[66] Nevertheless, such an explicit reference to foreign law is not necessary for legitimising judicial constitutional comparisons. If – as continuously practised by the Federal Constitutional Court of Germany – the interpretation of a law is based on the objectified will of the legislature rather than its original intent, comparative legal arguments can be integrated quite easily into the teleological legal interpretation.[67] This

64 Müller-Franken (n. 62), para. 29. Generally critical towards this already Hans Nawiasky, 'Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung', Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 3 (1927), 25, 26: 'Just as it is impossible to gain interpretative aspects from two states of law separated by history, it is impossible to gain interpretative aspects from two states of law separated by jurisdiction.' (Translation by the author). A practical objection against constitutional comparison (at least when practiced by courts) emphasises that comprehensive comparative practice would require great manpower and that courts are already faced with a great strain from decision-making, cf. Christian Hillgruber, 'Die Bedeutung der Rechtsvergleichung für das deutsche Verfassungsrecht und die verfassungsgerichtliche Rechtsprechung in Deutschland', Jahrbuch des öffentlichen Rechts der Gegenwart neue Folge 63 (2015), 367, 385. On this aspect, cf. also Kaiser (n. 8), 206, who pleads for restraint when it comes to using comparative constitutional legal arguments. Cf. also Anna-Bettina Kaiser, '"It Isn't True that England Is the Moon": Comparative Constitutional Law as a Means of Constitutional Interpretation by the Courts?', German Law Journal 18 (2018), 293, 304 ff.

65 Christian Walter, 'Dezentrale Konstitutionalisierung durch nationale und internationale Gerichte' in: Janbernd Oebbecke (ed.), *Nicht-normative Steuerung in dezentralen Systemen* (2005), 205, 225 (Translation by the author).

66 Art. 39 Section 1: 'When interpreting the Bill of Rights, a court, tribunal or forum (a.) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b.) must consider international law; and (c.) may consider foreign law.'.

67 Likewise, in his conclusion Müller-Franken (n. 62), para. 31. Cf. for example also Starck (n. 40), 1021, 1024; Classen (n. 5), para. 29, favours the historical interpretation as the place for comparative constitutional law.

way, comparative legal argumentation causes an 'implicit normativity of the other law in one's own'.[68]

2. Jurisdictional Limits

The Federal Constitutional Court's comparative constitutional analysis has traditionally focused on the other EU member states and the US.[69] I can think of several reasons for this practice: On the one hand, there is a particular need for intra-European comparative law. The European legal area is characterised by a unique combination of European primary law, the European Convention on Human Rights and the national constitutions. As Armin von Bogdandy has observed, the legal area unites different regimes of constitutional normativity by law without merging them into one legal order, as the different regimes retain their autonomous self-conception.[70] On the other hand, the jurisprudence of the US Supreme Court concretises the oldest liberal constitutional order in the Western world. When the Federal Constitutional Court of Germany began its work in 1951, *Marbury v. Madison* (1803) was almost 150 years old, and no other court came close to the radiance of the US Supreme Court.

In the meantime, the situation has somewhat changed. European fundamental rights jurisprudence faces the challenge of putting its own Eurocentric worldview into perspective and must overcome colonial thought patterns. At the same time, the nationally introverted and over-politicised US Supreme Court hardly serves as a good example anymore.[71]

3. Motives

As I stated before, comparative law in constitutional jurisdiction is – in general – legitimate. This must not obscure that constitutional courts can have various motives for conducting constitutional comparison and

68 Thomas Coendet, *Rechtsvergleichende Argumentation. Phänomenologie der Veränderung im rechtlichen Diskurs* (Mohr Siebeck 2012), 75 (Translation by the author).

69 Cf. Martini (n. 8), 114 ff. with further references. Cf. also Baer (n. 8), 392; and the overview by Paulsen (n. 26), 44 ff.

70 von Bogdandy (n. 33), 114. Cf. also instead of many Sommermann (n. 1), para. 22 with further references.

71 Both developments are impressively illustrated by Baer (n. 8).

disclosing this fact in a decision.[72] I can think of four possible reasons for constitutional comparison:

- The court can expect new insights concerning the concretisation of constitutional principles and norms. In the academic debate, this function is referred to as 'interpretative assistance'. I would call it the **epistemological function**.[73]
- Constitutional comparison can also have a **confirming function** when it serves to confirm an interpretation derived from national law.
- Furthermore, it can serve to signal the existence of a consensus across legal systems – I call this the **standardisation function**.[74]
- Finally, comparative legal references can also serve to make one's own argumentation more convincing by referring to foreign legal systems and judgments of other courts to confirm, contrast or illustrate one's own view. In this case, the references are used as a 'persuasive authority'. This is the **justification function** of constitutional comparison[75].

Sometimes, however, arguments based on comparative law are also misused to legitimise problematic legal opinions.[76] A recent example is the reference to the PSPP ruling of the Federal Constitutional Court of Germany by the

72 Similarly, to the following remarks but with a different terminology and extensive examples from the Federal Constitutional Courts' jurisprudence Martini (n. 8), 127 ff. Generally, on the reasons for constitutional comparison Hirschl (n. 33). Hirschl identifies eight main types of constitutional comparisons: (1) freestanding, single-country studies, (2) genealogies and taxonomic labelling of legal systems, (3) surveys aimed at finding the 'best' or most suitable rule across cultures, (4) surveys aimed at self-reflection, (5) concept formation through descriptions of the same constitutional phenomena across countries, (6) normative or philosophical contemplation of abstract concepts, (7) 'small-N' analysis aimed at illustrating causal arguments that may be applicable beyond the studied cases, (8) 'large-N' studies that draw upon multivariate statistical analyses of a large number of observations in order to determine correlations among pertinent variables. Cf. also Baer (n. 8), 23-24.

73 Regarding this function see Sommermann (n. 1), paras 26 ff.

74 Wendel (n. 7), 357 ff., who outlines the standardisation function under reference to the works of Peter Häberle under the heading 'European genealogic evolutionary context' (Translation by the authour; original: '*Europaweiter genealogischer Entwicklungszusammenhang*').

75 Wendel (n. 7), 359. For corresponding examples from the Federal Constitutional Court's jurisprudence, see Classen (n. 5), para. 53.

76 Insightful and with a lot of examples Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing* (Oxford University Press 2021).

Polish Constitutional Court to justify the fundamental relativisation of the primacy of EU law.[77]

E. Methods of Constitutional Comparison

I. No Methodologically Sound Concept

Those who conclude from existing practice that constitutional comparison follows a methodologically sound concept will be disappointed.[78] The Federal Constitutional Court conducts constitutional comparisons without methodological reflection as well.[79] Whether a comparative analysis is done, what is compared and how the comparison is done remains, to a certain extent, arbitrary.[80] There is agreement insofar as the comparison must go beyond merely compiling differences and similarities or comparing concepts or norms.[81] Instead, sophisticated legal comparison regularly goes through several stages: The comparison begins with sifting and describing the material, followed by an explanatory stage. The actual core of the comparison consists of contrasting and evaluating the material.[82]

As constitutional jurisprudence concerns applying the law, a comparative method directed at solving a specific problem is of interest in this context.[83]

77 Cf. also Andreas Voßkuhle, 'Applaus von der falschen Seite. Zur Folgenverantwortung von Verfassungsgerichten' in: Andreas Voßkuhle (ed.), *Europa, Demokratie, Verfassungsgerichte* (Suhrkamp 2021), 334 ff.

78 This is the '*basso continuo*' of comparative legal literature since the 19th century, as correctly pointed out by Sommermann (n. 8), para. 50 and n. 162. Cf. also the contributions in: Anna Gamper and Bea Verschraegen (eds), *Rechtsvergleichung als juristische Auslegungsmethode* (Jan Sramek Verlag 2013).

79 Martini (n. 8), 101 ff. with further references.

80 Explicitly Kaiser (n. 64), 304 ff. Cf. also Busse (n. 34), 538 ff.; Classen (n. 5), paras 32 ff., all with further references. For the different motives underlying constitutional comparison cf. Section D.3 of this text.

81 Zweigert and Kötz (n. 34), 42-43.

82 Cf. in general already Léontin-Jean Constantinesco, *Rechtsvergleichung*, vol II (Heymann 1972), 137 ff., who divides the methodological process in three phases (Knowledge – Comprehension – Comparison). Cf. also the clear outline by Sommermann (n. 1), paras 53 ff. and Franz Reimer, *Juristische Methodenlehre* (2nd edn, Nomos 2020), paras 395-396.

83 Accordingly, the specific work of constitutional courts is the place where the practicability of comparative law can be put to the test, likewise Mads Andenas and Duncan Fairgrieve, 'Introduction – Courts and Comparative Law: In Search of Common

A functional comparative analysis, comparing the solutions provided by different legal systems to address a specific problem, meets these needs.[84] Hence, it dominates the practice of the Federal Constitutional Court.

However, as I have already emphasised elsewhere,[85] comparative constitutional law should not be blind to the specific cultural context in which a specific legal solution is embedded:[86] 'Comparative constitutional law always requires a certain degree of cultural comparison or at least sufficient sensitivity for the cultural character of normative statements. Constitutions reflect – albeit to different degrees – the realities of 'their' state. People's needs and mentalities are not the same everywhere. Therefore, comparative law does well to recognise this reality's cultural dimension and take it seriously.' A certain form of 'osmosis' (Peter Häberle) between the world's constitutions can be observed in many places.[87] The interest in solutions from other cultural circles and the cooperation in a universal constitutionalism is inherent in every comparative law argument. However, this should not lead to the neglect of one's own constitutional identity. Finding the right balance between development and preservation is a particular challenge.

2. Constitutional Comparison as Part of a Permanent Judicial Dialogue

Constitutional comparison is not only vital when dealing with specific cases but also an important topic in the personal interaction of judges

Language for Open Legal Systems' in: Andenas and Fairgrieve (n. 2), 4: 'courts have become the laboratories of comparative law'.

84 For further details see Kischel (n. 25), § 1 paras 14 ff., § 3 paras 6 ff. with further references; cf. also already Fritz Münch, 'Einführung in die Verfassungsvergleichung', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 33 (1973), 126 (139 ff.). Regarding the criticism cf. the overview given by Susanne Augenhofer, 'Rechtsvergleichung' in: Julian Krüper (ed.), *Grundlagen des Rechts* (4th edn, Nomos 2021), § 10 para. 47 and Baer (n. 8).

85 Voßkuhle (n. 38), 499-500 with further references.

86 For further details see Wahl (n. 41), 96 ff; Susanne Baer, 'Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 64 (2004), 735 ff.

87 In this context, the metaphor of 'migration' is also happily used, cf. only Soujid Choudhry (ed.), *Migration of Constitutional Ideas* (Cambridge University Press 2007) and Élisabeth Zoller (ed.), *Migrations constitutionelles d'hier et d'aujourd'hui* (Éditions Panthéon-Assas 2017); cf. further Susanne Baer, 'Travelling Concepts: Substantive Equality on the Road', Tulsa Law Review 46 (2010), 59 ff.

of European and international constitutional and supreme courts.[88] The insights gained when judges meet to exchange knowledge and experience often find their way into constitutional jurisprudence.[89] Opportunities for this '*dialogue des juges*' arise during mutual visits of European or foreign courts[90], symposia, larger conferences or personal meetings and discussions. There are also multilateral meetings, for example, within the framework of the Conference of European Constitutional Courts[91], the World Conference on Constitutional Courts, the so-called '*Sechsertreffen*', a meeting of the German-language constitutional courts, the Court of Justice of the European Union and the European Court of Human Rights, or the Heidelberg Discussion Group 'Constitutional Court Network', and bilateral meetings. For example, the Federal Constitutional Court meets regularly with colleagues from the Austrian Constitutional Court, the French Conseil Constitutionnel, the UK Supreme Court and the Italian Corte Costituzionale. Another important place for exchange is the Venice Commission.[92] There, judges from different countries can find out whether (constitutional) case law on specific issues already exists in the member states of the Council of Europe. In addition, the Federal Constitutional Court keeps itself informed of the current case law of other constitutional courts from North America to Africa and Asia. Since 2017, the monthly

88 Cf. also Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks', Utrecht Law Review 8 (2012), 100 ff.; Michael Nunner, *Kooperation internationaler Gerichte. Lösung zwischengerichtlicher Konflikte durch herrschaftsfreien Diskurs* (Mohr Siebeck 2009).

89 Cf. Anne-Marie Slaughter, 'Global Community of Courts', Harvard International Law Journal 44 (2003), 191 ff.; Jutta Limbach, 'Globalization of Constitutional Law through Interaction of Judges', Verfassung und Recht in Übersee 41 (2008), 51 ff.; Susanne Baer, 'Praxen des Verfassungsrechts: Text, Gericht und Gespräche im Konstitutionalismus' in: Michael Bäuerle et al. (eds), *Demokratie-Perspektiven. Festschrift für Brun-Otto Bryde*, (Mohr Siebeck 2013), 3 ff.

90 On average, the Federal Constitutional Court welcomes five delegations from European and international Courts a year and likewise pays five other highest or constitutional courts a visit.

91 For further details see Karl-Georg Zierlein, 'Entwicklung und Möglichkeiten einer Union: Die Konferenz der Europäischen Verfassungsgerichte' in: Walther Fürst, Roman Herzog and Dieter C. Umbach (eds), *Festschrift für Wolfgang Zeidler*, vol I (De Gruyter 1987), 315 ff.

92 The Venice Commission, for instance, publishes a bulletin on Constitutional Case-Law for the Council of Europe's area since 1993 (all issues since the year 2003 are available under http://www.venice.coe.int/WebForms/pages/?p=02_02Bulletins); it also provides the electronic database 'CODICES', which can be accessed under (http://www.codices.coe.int/NXT/gateway.dll?f=templat es&fn=default.htm).

'Newsletter International' has been published in-house, presenting foreign decisions in condensed form and directly accessible to the judges and all other employees.

F. Conclusion: Constitutional Comparison and Judicial Self-Reflection

Let me conclude with one last personal observation. We have seen that comparative constitutional law is part of constitutional judges' everyday life but it remains a difficult and usually not very transparent business, supported by neither a clear motive nor clear methodological guidelines. Nevertheless, as Susanne Baer rightly points out, it remains heuristically valuable because not just any ideas but very specific information is introduced into a debate.[93] This promotes the deliberative process within internal discussions and stimulates self-reflection.[94] It is often the engagement with the unfamiliar that leads to a deeper understanding of the well-known. This is perhaps the most important function of judicial constitutional comparison.

93 Baer (n. 8), 398.

94 Plainly on this aspect Markus Kotzur, '"Verstehen durch Hinwegdenken" und/oder "Ausweitung der Kampfzone"?', Jahrbuch des öffentlichen Rechts der Gegenwart neue Folge 63 (2015), 355, 356-357.