Comparing Courts

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Keywords: judicial independence, standing, embedded constitutionalism, appointments, tenure, politicization, comparative perspective

A. Introduction

Constitutional courts are, largely, black boxes. People do predict the outcome of cases, and some even tell stories of how a ruling came about. However, there is often more attribution than knowledge, more inclination to create judicial heroism than understanding of actual work routines, and more excitement than behind those doors. However, it is but one more reason to engage in studies of such institutions. Here, comparative studies,[1] and even more so, a critical comparative perspective may again be revealing.[2] Overall, it seems useful to further study what I suggest calling 'varieties of

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1 Canonical is Martin Shapiro, *Courts: A Comparative and Political analysis* (Chicago Press 2013). See also the overview by Georg Vanberg, 'Constitutional courts in Comparative Perspective: A Theoretical Assessment', Annual Review of Political Science 18 (2015), 167-185.

2 Critical is key to any research, but specific questions challenge widespread normalcy assumptions about the law and courts, i.e. regarding their gendered nature in feminist legal studies, their in-build racism in critical race studies, their colonial nature etc. Re gender, see Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge 2012); Ulrike Schultz and Shaw Gisela, *Gender and Judging* (Onati 2013). On race, see the Special Issue on Race and Courts, Race and Justice 7(2017). On colonialism, see, i.e., Ibhawoh Bonny, *Imperial Justice: Africans in Empire's Court* (Oxford University Press 2013); Hakeem Yusuf and O. Tanzil Chowdhury, 'The Persistence of Colonial Constitutionalism in British Overseas Territories', Global Constitutionalism 8 (2019), 157-190.

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constitutionalism'.[3] The courts then include both specialized institutions, as in Germany or Austria, as well as those supreme courts that serve, in addition to the task of clarification and harmonization of law, as constitutional tribunals. To study them, details matter, and not everything vanishes in broad notions of 'politics'[4] or 'governing', by judges,[5] or references to 'culture' or 'regimes', now more or less 'juridical'. We must do better. So how should one go about it?

In this essay, I highlight three aspects worth studying: independence, standing, and embedded constitutionalism. Certainly, the scenario is much more colorful than that. We need a multidimensional analysis to understand the key institution of what some call 'new constitutionalism',[6] i.e. constitutional courts.

To start with these courts, one must take the rulings into account. Certainly, these courts, with their jurisdiction and ensuing tasks, are actors in an always changing larger political landscape. Yet, as courts, they are not just another institution but emblematic of the notion of the rule of

3 The concept of varieties is taken from comparative studies of capitalist welfare state regimes by Peter Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001). See also Philipp Bobbitt, *Constitutional Interpretation* (Blackwell 1993), on 'modalities of constitutional argument' that are also used in politics.

4 Seminal: Theodore Lewis Becker, *Comparative judicial politics: The Political Functionings of Courts* (Rand McNally 1970); Glendon A Schubert and David Joseph Danelski, *Comparative Judicial Behavior: Cross-cultural Studies of Political Decision-making in the East and West* (Oxford University Press 1969); on the concept see Hubert Rottleuthner, *Richterliches Handeln* (Athenäum 1973); a recent take by Michael Wrase and Christian Boulanger, *Die Politik des Verfassungsrechts* (Nomos 2013). Illustrating the challenges Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan, *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press 2013), 398-412.

5 Work on the political effect of constitutional jurisprudence is highly informative. Yet it does not capture the nature of the beast if the institutional specificities of courts are not properly understood. Compare Peter Häberle, 'Role and Impact of Constitutional Courts in a Comparative Perspective' in: Ingolf Pernice, Juliane Kokott and Cheryl Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos 2006), 65-77, with Alec Stone Sweet, *Governing with judges: constitutional politics in Europe* (Oxford University Press 2000). Very handy is Axel Tschentscher, 'Comparing Constitutions and International Constitutional Law: A Primer' (2011) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1502125.

6 Others emphasize a link to neoliberal economics, i.e. Stephen Gill, *Claire* Cutler, *New Constitutionalism and World Order* (Cambridge University Press 2014).

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law,[7] specifically designed, with specific features, powers, and functions. Therefore, there is no proper analysis of constitutional courts without a close look at their legal utterings, thus a necessity to read the rulings; it is thus necessary to read the rulings in full length, as the courts' prime emanations.[8]

Some turn to press releases which most constitutional courts issue these days. This is another set of interesting material for a comparative study. But they do not replace the study of the rulings. Instead, they should be studied on their own, with public relations becoming ever more important, as efforts to explain what courts do, how and why, to a general audience, to foster trust or preempt critics.

Also, it is highly informative to take a closer look at the courts' materiality, be it artefacts or architecture.[9] In this regard, supreme, constitutional, human rights, and international courts do differ significantly, as space, on-site, and location. This affects access to them, their work, their image of themselves, and their reputation[10], even the standing I point out here.

However, I will emphasize institutional design and its effects on judicial independence and institutional standing.[11] And there is a reason for that. It is exactly these elements of constitutionalism that are targeted when autocrats set out to destroy or capture the one institution with the formal power to stand in their way: the constitutional court. There, we see how much independence and standing matter. In addition, the global nature of

7 On controversies around the rule of law, see Susanne Baer, 'The Rule of – and not by any – Law. On Constitutionalism', Current Legal Problems 71 (2018), 335-368.

8 Casebooks are but excerpts, albeit organized based on a conceptual take, i.e., of constitutionalism, as in Norman Dorsen, Michel Rosenfeld, András Sajó, Susanne Baer and Susanna Mancini, *Comparative Constitutionalism: Cases and Materials* (4th edn, Thomson West 2022). On concepts, see Michel Rosenfeld and András Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

9 Judith Resnik and Dennis Curtis, 'Inventing democratic courts: A New and Iconic Supreme Court', Journal of Supreme Court History 38 (2013), 207-251.

10 Generally, see Nuno Garoupa and Tom Ginsburg, 'Reputation, Information and the Organization of the Judiciary', Journal of Comparative Law 4 (2009), 228.

11 Note the approach based on socio-legal studies Ralf Rogowski and Thomas Gawron, *Constitutional courts in comparison: the US Supreme Court and the German Federal Constitutional Court* (Berghahn Books 2016) (access, success and case selection; decision making; impact, implementation and evaluation; organization). See also John R .Schmidhauser, *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis*, vol. 6 (Elsevier 2013).

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so many problems calls for attention to the international embeddedness of national courts.

B. Who "Owns" a Court

The discussion of what matters in comparative studies of constitutional courts surfaced in a conversation on notions of ownership of such courts,[12] which provokes some interesting questions. Whose court is the Supreme Court of the United States – a U.S. President's institution, as in 'Obama's Court'? Or, to turn to another side of the Atlantic, whose court is 'Karlsruhe', the *Bundesverfassungsgericht* as the Federal Constitutional Court of Germany – is it, or has it been, 'Merkel's Court'?

Conceptually, the question is whether there can ever be ownership of a constitutional court that still deserves the label. I suggest that once such courts may be described as someone's property, they stopped to function, to deliver their task. It may be tempting to personalize because it is a more entertaining story to tell, but it seems unhelpful, if not dangerous, to stick to personalized notions of ownership of courts.

The idea of court ownership seems to point to the appointment process for judges.[13] This is indeed one of the most important facets of the institutional design of courts. It is specifically challenging when it comes to supreme or constitutional courts with the mandate to intervene in politics. In some countries, appointments are made by a president, as in the U.S., while others give this power to some members of parliament or to the plenary and may require a large majority, as in Germany. Yet, others have some or all judges appointed by professional circles, like top judges or lawyers, as in the UK. The latter tends to be a rather exclusive system of traditional elites, i.e. formed by white male upper class specific college graduates, yet has traditionally been defended as rational, in the sense of merit based. In such contexts, it seems rather ironic that attempts to diversify are labeled one-sided, biased, and political precisely by those interested in leaving their privilege untouched.

However, any assessment of appointment procedures certainly depends on the expectation one attaches to the process, the practice, and the out-

12 These were the focus of the Workshop at which an earlier version was developed.

13 For more, see Kate Malleson and Peter H. Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto 2016).

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come. And again, the legitimating effect of having a say, the quality of the work done by those on the bench, and the respect for the court by politics, thus independence and standing of the court, may be the more important ones. If the power to appoint judges affects a notion of ownership of a court, the period of service on a bench must inform such a notion as well. Some may wonder whether appointees forget those who did appoint them the longer they serve. Others retell stories of institutions being stronger than any individual ever appointed, assuming that even very political people turn 'judgy' once on the bench, while there are, by now, quite worrisome counter-narratives around. However, it seems also helpful to consider whether there is an option for judges to be reappointed or reelected after one term. This may motivate a closer connection between a judge and their 'owner', but also inspire additional distance to counter any doubt.

More generally, there is a plausible assumption that formal and informal affiliations between judges and politicians matter. Therefore, it seems worth studying what I would call the *cultures of contact* that judges of a country, a region, or the United Nations' highest courts entertain in such different settings.

However, at least in the U.S., courts are often framed as belonging to one person, the Chief Justice. This motivates calling 'SCOTUS' the 'Roberts' court', or in the past, the Rehnquist, Warren, Burger, etc. courts. The history of a court is then told in sequences of chief justices or president's terms. Yet again, comparative as well as critical studies may help us understand that better because legal cultures differ, and leadership usually carries structural inequalities. In Germany, most people, including researchers,[14] are not able or inclined to name the presidents of the German Federal Constitutional Court. Instead, the institution's history is mostly told in relation to rulings and the political reactions to them. More generally, in contexts less impressed with individuals and more inclined to focus on the institution, individual leaders are not as important. In addition, some courts are, but many courts are not governed by a 'chief', which is understood as a factor of judicial independence as well. Thus, one must ask, rather than assume, how much of an effect a chief justice or president has on 'the Court'. It

14 The exception is Rolf Lamprecht, *Das Bundesverfassungsgericht. Geschichte und Entwicklung* (Bonn 2011), who segments history in terms of office of the Court's president, yet also frames these periods in light of the political context and seminal rulings, thus focuses on the 'standing' of the Court, as discussed below.

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depends on rules of procedure as well as informal rules and rituals, the latter subject to rather subtle change, and both are reinterpreted by every new person in charge and all others serving. In studies of organizations, it is rather well known that leadership leaves a mark, and this is a good reason not to underestimate this factor in courts. However, because of the special nature of a collegiate of independent individuals, sometimes deliberately composed to differ, there is no reason to focus on leaders alone.

Yet even if we turn to the whole collective and study all serving judges as 'owners' of a court, what is it we are interested in? Personality? Biography? Legal philosophy? Professional formation? Epistemic community? And how can we know anything about this? In Germany, not much can be found on the GFCC Justices, while quite a lot is written on the members of the U.S. Supreme Court, more or less scholarly, theoretically informed as well as anecdotal. Regarding 'The Nine',[15] bestsellers carry the promise of revealing insider knowledge, as if they were lifting the veil that protects such institutions, sneaking in as clerks or watching closely from the media sidelines. They thus cater to a particular type of curiosity, more focused on the person than on the institution and even less on rulings. Why are there almost no such books on the German Federal Constitutional Court? In addition, U.S. Supreme Court Justices themselves talk and write about what they do, while German FCC Justices do that much more rarely, and if so, rather different in style.[16] This is motivated by and contributes to U.S. Supreme Court Justices being, for many reasons fed from many sources, celebrities, while Germans are not. What does such celebrity status do to the people, to the institution, and to constitutionalism?

And judges are not alone. It seems relevant that courts and their judges are couched in what may be called epistemic communities.[17] In Germany, this is, specifically, a community of scholars. And again, legal scholarship engaging with constitutional courts varies tremendously in methodology,

15 This refers to one of the more popular books on the SCOTUS, Jeffrey Toobin, *The nine: Inside the secret world of the Supreme Court* (Anchor 2008).

16 A rare incident of inside story-telling is Thomas Dieterichs biography, *Ein Richterleben im Arbeits- und Verfassungsrecht* (Berliner Wissenschafts-Verlag 2016). The 'other' member of the French Conseil d'Etat shared her impressions in Dominique Schnapper, *Une sociologue au Conseil constitutionnel* (Gallimard 2010). In Italy, Sabino Cassese published his memories as *Governare gli Italiani: Storia dello Stato* (Il Mulino 2014).

17 For a study of a Supreme Court of Labour Law and its epistemic communities, Britta Rehder, *Rechtsprechung als Politik: Der Beitrag des Bundesarbeitsgerichts zur Entwicklung der Arbeitsbeziehungen in Deutschland* (Campus 2011).

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targeted audience, status, and political significance. As an example, there are almost no quantitative counts of judges' votes in the German court, partly due to the culture of consensus and much less shortcut attribution of appointing politicians to judicial opinion, which is very different from the U.S. Also, much U.S. scholarship seems to be much more housed in conceptual and theoretical ivory towers, while German constitutional law scholars are expected to move on the ground, in the form of government advisory work, legislative expertise or constitutional litigation. Also, German scholarship consists of commentaries and case notes as prime formats, different from law review articles and books edited for a general audience, as in the U.S. And it leaves a mark that German judges are disciplined by the discipline of legal academia primarily engaged in Dogmatik (which is not just doctrine), theoretically refined as a '*Staatsrechtslehre*' deeply entrenched in a traditional notion of the state. The more adequate current version is '*Verfassungsrechtswissenschaft*', the study of constitutional law embedded in trans- and international developments, which also opens the German court to embeddedness, while the U.S. one still struggles with it.

In addition, the U.S. court seems to be intensely watched by media, think tanks, and commentators, which seems to make U.S. constitutional doctrine float all over the place, an element of the political-civic religion. In Germany, the press may be the court's most important interpretive community, yet different from the U.S., there is a plurality of voices with conservative, middle-ground, and progressive quality reporting covering the court, as well as national public TV and regional public radio. Somewhat paradoxically, it seems that critical communities of constitutional interpretation circling around courts would matter even more where judges serve for life and where most do not come from the academy themselves or from an academy less engaged with judicial practice. However, this is another dimension of courts to be studied.

Comparing courts with a focus on people results in many differences as well. Certainly, it seems terribly interesting to understand how individuals live their lives as judges anywhere. However, that does not replace a proper analysis of the institution. Indeed, it may overshadow, or taint, such an analysis when one is carried away by the magnetism of the complexity of lives lived. This is enhanced by the attractive illusion of really knowing what's going on, or in fact, having met so and so, or heard from inside, etc. Yet rumors, or attributions they live by, are not scholarship. And such accounts do not only cater to specific curiosities but also feed rather problematic

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images, like that of heroism, which is entirely inadequate to describe and understand collegial institutions negotiating compromise.

However, there are alternative focus options when we set out to compare courts. It seems extremely rewarding to look at the experiences that inform peoples' mindsets because they shape the perspective judges take on a case at hand and the decisions they make. The paradigmatic example is the account of the grand South African Justice Albie Sachs, who aptly, and humbly, ponders *The Strange Alchemy of Life and Law* (2009). It is, to me, one of the best reads to understand what constitutions stand for, what judging requires, and what judges of constitutional courts should stand for in the world today. And it would be wonderful to have such comparable, or even comparative, accounts[18]. Yet there are not many.

C. Raw Numbers?

Without so many thick descriptions, one may turn to raw numbers. In Germany, there is a grand tradition of socio-legal '*Justizforschung*', studying courts with an eye on demographics, elitist education and language, as well as normalcy assumptions.[19] Others compare courts based on quantitative data on caseloads and rulings, look at numbers and types of dissents or concurrences, and count, and at best contextualize, the explicit use of comparative material in published rulings.[20]

However, in times of growing pressure on constitutionalism and attacks on the rule of law more generally, there is an urgent need to study, when comparing courts, the structural factors that inform a court's independence, as well as the substance and style that inform its standing. My argument is that these factors matter most to such institutions, always, we hope, stronger than the people who serve. The call for a more institutional focus is, then, also a call for urgent action, in that constitutional courts,

18 There are judges who serve on more than one court with supreme or constitutional function. One example is Renate Jaeger, who served as a Justice of the GFCC to then move on to the ECtHR.

19 With many references, see Susanne Baer, *Rechssoziologie* (5th edn, Nomos 2022), ch. 8.

20 For the German court, see Stefan Martini, *Vergleichende Verfassungsrechtsprechung* (Duncker & Humblot 2018); and my review in Jahrbuch des öffentlichen Rechts der Gegenwart 69 (2021), 1-6, as well as Susanne Baer, 'Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus', Jahrbuch des öffentlichen Rechts der Gegenwart 63 (2015), 389-400.

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in particular, need a sound analysis to adequately defend them, specifically regarding their independence and standing.

1. Urgent Calls to Understand the Institution

The urgency to better understand the structural context and design of constitutional courts is contingent. Yet the position of constitutional courts in any political system, and thus, constitutionalism as such, always calls for a proper institutional analysis. Currently, pressure on constitutional courts grows more quickly than imagined after 1989 in Hungary, in Poland, and Russia, as well as in Turkey and, last but not least, in the U.S. In fact, the 21st century sees signs of a demise of constitutionalism rather than its rise. In the late 20th century, many thought 'we got it', and the constitutional century has come, after colonial rule or communist autocrats. But this looks very different today.

In many countries, constitutional courts are in danger, and some, as has been said about the Polish Constitutional Tribunal under the PiS government, have been 'going down with dignity',[21] while others are simply captured, and thus immobilized or even worse, utilized to cater to autocratic needs. Therefore, one needs to understand what really matters regarding such courts to not let that happen, and eventually reverse so-called reforms when they did. And this is not a matter of Eastern Europe or a larger East, nor a challenge in young democracies only. Radical attacks on constitutionalism, and on 'those judges' as 'enemies of the people',[22] have gained widespread attention in long-standing democracies as well. They seem to run deeper than the recurring crises that arise from challenges, i.e. secession as in Spain, or economic transitions as in Latin America, or geopolitical strategies, as on the African continent. Yet such crises are worrying anywhere when they gain momentum.

2. A Good Court?

What should a good court look like, and what must motivate us, and in fact does motivate people, to come to its defense? Put differently, it matters why

21 Tomasz Tadeusz Koncewicz, 'Polish Constitutional Tribunal goes down with Dignity', Verfassungsblog, 25 August 2016.
22 There are many such quotes from a former U.S. President, as well a UK tabloid commenting the Brexit decision of the British Supreme Court.

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a court matters to you, because you need to know when and why to defend one. It thus matters what makes a court a good court, because we need to know why, when, and what kind of constitutional courts should get away with what they do, even in moments when we do not like what they say.

The starting point is the division – and more precisely: the distribution – of powers. Constitutional courts are meant to intervene in politics, and as such, they are always, by design, a specifically endangered species.[23] This is why there is a lasting and basic need to understand, and eventually defend, such institutions as a necessary component of democratic politics itself.

It takes much longer to build independence and standing than it takes to destroy it. Again, look at some countries in Europe, like Hungary, and some countries in Africa: There, constitutional courts started out strongly, namely in Central and Eastern Europe after 1989 and in postcolonial and newly independent Africa. But in many places, independence is gone and standing weak. Also, look at the U.S. Past 1945, the Supreme Court of the U.S. has been a leading if not a towering figure in the world of courts. But this has changed as well. In 2012, Law and Versteeg published a study of constitutions around the world,[24] eventually picked up by the New York Times: '*We the people* lose appeal around the world', the paper reported.[25] It also quoted then Justice Ruth Bader Ginsburg saying, 'I would not look at the US constitution today',[26] when drafting new constitutions. Does the same apply to judging? Due to the long-lasting impact of U.S. legal education on elites around the world, U.S. constitutional law is still influential as a comparator. But which court and whose rulings would one look at today, and why?

D. The External and the Internal Side of Institutions

To understand constitutional courts as constitutional courts, with their specific power to intervene in and effectively stop or block politics, and not as decorative or simply dismissed sprinkles on the in-fact authoritarian

23 From another angle, Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015).

24 David S. Law and Mila Versteeg, 'The declining influence of the United States Constitution', New York University Law Review 87 (2012), 762-858.

25 New Yort Times, 6 February 2012.

26 New York Times, referring to a televised interview in Egypt in 2012. She recommended the constitutions of South Africa, Canada, and the ECHR.

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cake, nor as forces in a more or less democratic regime, I suggest to at least also focus on independence and standing. Obviously, both are interrelated, but they also point in different directions. While independence refers to institutional design and internal factors that shape a court, standing refers to the institution's activity directed at and recognized by the audience and by observers as its external side.

1. A Court's Independence

To start with the external side: What makes a court sufficiently independent, and what indicates that independence really exists, or is missing, or under threat? Again, there are many aspects to consider, and I will highlight only some. However, they strike me as particularly interesting watching the U.S. court and considering the attacks on other such courts.

One factor of court independence is the power over resources, thus the budget. In the history of courts, and namely in the struggles of constitutional courts for independence, governments have often fiddled with that. Salaries are one part of the story, and pensions are additional ones. Funds to represent the institution, up to the proper robe and building, to dress the judges and house the work, are important, and today, technology, and staff, including professional media relations management and, last but not least, translators seem indispensable. The weaker you want a court, the less you give for that. Therefore, it is significant, and should remain that way, that the German FCC negotiates its budget directly with parliament, while all other 'regular' courts are funded by the Ministry in charge. And note that the GFCC is also subject to fiscal review by an independent institution and has traditionally avoided all expenses that would cater to the image of an elite.

In addition, a court's independence is very much informed by the power of the institution to run itself, by procedural rules or by-laws. This may sound rather technical and politically boring, but there is excessive potential for abuse. To start, rules of access to a court matter tremendously, in that they may allow, or may hinder, citizens, the political opposition, or foreigners, to bring cases and thus find a forum for their claims. Such access rules are often made by legislation, which, in fact, means by the government, and are not always protected against abusive reform by, i.e., large majority requirements. Then, there are rules of internal procedures to define how to handle a case, communicate with others, render rulings, etc.

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As such, they should be largely self-defined to support independence. At best, it is neither politics nor a president who runs that show, but the sitting justices themselves, publishing rules to allocate and handle cases and avoid any impression and opportunity of political abuse.

The risks involved here could be studied in Poland. There, the PiS government legislated new procedural rules. They changed the majority needed in votes or the order in which cases are decided, and this, in fact, turned a court from an independent institution into a lame duck, ready to be eaten alive. By contrast, the U.S. Supreme Court ranges at the other end of the spectrum, with a high degree of internal independence, it seems, with the freedom whether to take a case and with a leadership system with a Chief Justice assigning cases, thus not as collegial or rule-driven as, i.e., in Germany. In comparison, the German FCC emphasizes it as a court identity driven by rules only, to exactly avoid any impression or temptation to pick and choose, last but not least politically. If perceived as biased, the court's standing suffers. Then, its jurisprudence seems obviously political, bound to partisan appointment politics, as people, as particularities.

On the contrary, the German FCC is, legally, obliged to take all that comes and decide at least in chambers of three, in full consensus. Certainly, procedural rules also must be interpreted and give room for choice. Yet, overall, the court's standing does not seem to suffer from an impression of pick and choose. The price to pay is that this court is eventually drowned in files. This is why the rules of procedure eventually allowed the court to not give extensive reasons in the small cases. This also carries a risk, but re-standing based on independence seems to be a smaller one. And it is quite the opposite of the Polish refusal to publish a court ruling in the official gazette to prevent it from coming into effect. Rather, both the U.S. and the German court do not rely on somebody else to validate decisions, i.e., by publication.

Another internal indicator of independence is, both in the SCOTUS and the GFCC, the freedom of priority. In both courts, each panel or each reporting judge decides at what time to act and, specifically, to speed up urgent matters. It may seem highly plausible to take a case in the order it arrives at court. But it will render a constitutional court entirely useless if you can flood its desks with petty claims, to never have it intervene in the larger political conflicts.

Then, what matters in a court's independence is people. Who chooses and who can be chosen as a judge to sit on the highest court of a land,

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and what are the criteria? Again, the power to nominate or choose does not indicate ownership. But it is important, nonetheless. Notably, in the U.S., the process of 'appointing' Supreme Court justices centers around a President, with U.S. Senate hearings shedding light on that presidential choice. By comparison, in Germany, political parties 'nominate' candidates, who are then, eventually, yet not always, 'elected' by a 2/3 majority at least.[27] To date, this has required the governing parties to include the opposition without much noise, and it has always happened more or less in time, with rules that prevent an empty seat. But there is also a discussion on how this could be preserved when populist autocrats grow.

Looked at in more detail, there are several comparative differences beyond that. In Germany, a person proposed to become a GFCC justice needs a minimum qualification and a minimum age. In addition, and maybe more importantly, there is a limited term of now 12 years and a maximum age as well. Also, all must be fully qualified lawyers, which means four to five years of law school and two years of training in courts, with prosecutors and in law offices, with two state exams, admitted to the bar, and there must be at least three career judges in each Senate of eight, while others traditionally come from academia, or more rarely, politics. The emphasis in the selection processes is, thus, on legal aptitude. However, the members of parliament in charge of identifying candidates have, at least in the past, also asked for secondary qualities, like a broader understanding of the power of the office and respect for parliament, and the willingness to work towards consensus with people over a long period of time that are in many ways very different from oneself. Thus, beyond the official acknowledgment that candidates will be sought by different parties with different political leanings and worldviews, ideology is not considered a positive trait, nor is social ineptitude, while courage in exposing ideas and social engagement seem to matter. As such, the process to select constitutional court justices in Germany is considered to be political per se, but at the same time designed to not be overly politicized, and not endorse ideology.

By contrast, in the U.S., the justices are proposed by the President, scrutinized by both highly professional as well as largely polarized civil society organizations, and an item of publicly highly political ideologized and

27 The rules were changed in 2015 (Act of 24. 06. 2015, in effect from 30.06. 2015, BGBl. I S. 973). Before that, judges were elected, in the Bundestag, by the judiciary committee. Half the seats on the constitutional court are filled by a vote from the Bundesrat, thus the state government´s chamber. Compact information can be found at http://www.bundesverfassungsgericht.de/EN/.

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scandal-driven media democracy. Candidates seem to be treated as running for a political office rather than chosen for a demanding and complicated position. Before and after, they also seem to be, in a culture infatuated with stars, highly individualized as well as privatized and tested to eventually fail. In the process, candidates are molded from legal professionals into moral humans, and legal arguments are taken as world views and turned into ideologies, sometimes called methodological stances. One effect is that this downsizes the pool of talents because it seems the less known about a candidate before a nomination, the better. In turn, this suggests that the more engaged and even courageous, the fewer options to ever make it to the Supreme Court. This may work in favor of a mainstream but primarily blocks critical positions. It may also prevent very good people from serving, and it seems to at least allow for the creation of polarized camps. By comparison, a multi-perspective proposal system of judges for highest courts can at least shed light on the many shades that may, or even should, color such an institution. For sure, German Justices are proposed by 'their' party, with their seat being the 'party's seat', and some are members of these parties as well. Yet, they seem to be rather diverse in perspective, less predictable as 'camps', and much less ideologized than their U.S. colleagues.

When we compare the independence of courts, there are, in addition to the question of who serves, thus: people, some less obvious and less regulated matters to consider. For one, there is the very construction of 'justice' that differs tremendously across legal systems and cultures, it seems. What is seen as contributing to a judge's 'independence'? In the U.S., the position on the Supreme Court is a seat for life, for a small number of people, with high visibility, scrutinized as professional and private individuals, motivated, in a common law tradition, to concur or dissent or author a ruling, thus speak as 'I' and be yourself. The ideal image seems to be a judge on his or her own, and it is no surprise that influential U.S. legal theory uses the image of Hercules.[28] This may indicate very independent minds, but it is also a rather ambivalent aspect of independence when it comes to collegial judicial institutions. Note that life tenure means you never return to another community, while German academic Justices do return to their university positions after 12 years before they retire. Also, note that groups

28 Ronald Dworkin, 'Hard Cases', Harvard Law Review 88 (1974), 1057, reprinted in *Taking Rights Seriously* (Harvard UP & Duckworth 1977), 105-106. See also Erika Rackley, 'Representations of the (woman) Judge: Hercules, the Little Mermaid, and the vain and Naked Emperor', Legal Studies 22 (2002), 602-624.

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tend to develop a defensive insider identity, routine interaction, and a sort of family constellation with often competing roles assigned, which may make for 'grand judges' yet not support collegiality in a court. By contrast, the German image of a 'good judge' seems to be much more geared towards consensus among those that differ at the start by design, yet come together in one text, generally.[29] It seems that in Germany, Hercules is not at all the calling.[30]

And there is more. Note that the German Federal Constitutional Court consists of two Senates, or panels, with eight Justices each, which is not merely challenging in keeping doctrine in sync, but which creates an internal check not to wander too far astray, at least not from each other. In addition, German legal studies, which are sometimes denounced as 'merely doctrinal', do, in fact, form a very attentive external watchdog community quickly commenting on anything the Court utters.

Then, there is style. Note the rather formal style of German rulings, compared to the narrative style in common law jurisprudence, the latter at least inviting not only contextual arguments but also moral and political considerations. One paradigmatic example is the German by now ubiquitous use[31] of the principle of proportionality, and, in its last stage, a very structured type of balancing including the concept of practical concordance, while U.S. style balancing of rights or levels of scrutiny in equality doctrine seems much more open-ended to me, again allowing for more ideological claims.[32]

A related factor that informs any court's independence is judicial ethics. Some courts are not only bound by legislation but subject to police and

29 The empirical study Uwe Kranenpohl, 'Hinter dem Schleier des Beratungsgeheimnisses: der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts' [Behind the veil of secrecy of deliberations of the court: the opinion-shaping and decision-making process of the Federal Constitutional Court] (VS Verlag 2010).

30 For a German study, see Heike Jung, *Richterbilder* [Images of Judges] (Nomos 2005).

31 According to the 'newest formula' in equality doctrine, proportionality is not only the standard of review in liberty cases, but also applied to attempts to justify distinctions that amount to disadvantage. A starting point is GFCC, Order of the First Senate of 7 July 2009 - 1 BvR 1164/07, paras 85-87.

32 Generally, see Aharon Barak, 'Proportionality and principled balancing', Law & Ethics of Human Rights 4 (2010), 1-16; Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence', Toronto Law Journal 57 (2007), 383. See also Taly Steiner, Liat Netzer and Raanan Sulitzeanu-Kenan, 'Necessity or balancing: The Protection of Rights under Different Proportionality Tests – Experimental Evidence', I-Con 20 (2022), 642–663.

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governmental budgetary or even disciplinary power – as when many magistrates as well as two Constitutional Court Justices were jailed in Turkey, which has been heavily criticized by the Venice Commission as well as the U.N. Special Rapporteur on the Independence of Judges and Lawyers, and has led to several cases in the European Court of Human Rights.[33] Other courts make their own by-laws, publish standards and create procedures of accountability, while others run by references to tradition, as perpetuated consensus, implicit or outspoken, but an internal affair. Anyways, it is relevant who issues and who really defines the rules in a court, often based on age, length of service, expertise, position, reputation or personality. Here again, comparing courts may teach us that institutional design informs independence. But that independence has to be understood as more than what is formally defined.

2. The Standing of Constitutional Courts

A second aspect of comparing courts that seems to matter in light of the pressure on such institutions around the world is standing. Usually, the term defines a subject's access to courts in that individuals, companies, or states may or may not have standing to bring a case. However, 'standing' may also describe the power of an actor in a given socio-political context. It is not the power to change things but the ability to with*stand* such power, thus to *stand* one's ground and do the job assigned. As such, *standing* is not proactive but reactive, and thus, an apt description of the very nature of courts being reactive institutions. They do not do a thing when not properly asked, and constitutional courts enjoy no power of the sword or purse. Thus, *standing* must be the source, the bone, and the backup of what such courts can do.

Traditionally, standing relates to political context. Specifically, what matters is the specific separation, or more precisely: distribution of powers.[34] Thus, to understand the U.S. Supreme Court, one needs to also understand

33 For more, see Ivana Jelić and Dimitrios Kapetanakis 'European judicial supervision of the rule of law: The Protection of the Independence of National Judges by the CJEU and the ECtHR', Hague Journal on the Rule of Law 13 (2021), 45-77; Tahiroglu Merve, 'How Turkey's Leaders Dismantled the Rule of Law', The Fletcher Forum of World Affairs 44 (2020), 67-96.

34 Robert van Ooyen and Martin Möllers, *Das Bundesverfassungsgericht im politischen System* (VS Verlag 2006).

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U.S. politics, including institutions, political parties, and movements, as well as federalism; and to understand 'Karlsruhe', one needs to understand the German historical commitment to *never again* after 1945 and the unified wish for a constitutional democracy after 1989, a tradition of multi-party coalition politics and the dynamics of European integration, the Bundestag as a political player and that other version of federalism or media arrangements long gone in the U.S., etc.[35]

But there is more. What are the factors that inform a constitutional court's standing? Again, this may lead us to discuss what makes a court a good court that deserves respect, support, and, eventually, defense when under attack. To start, standing is certainly informed by institutional design, as is independence. Internal rules and practices matter. As one example, the option to pick and choose cases is an indicator of independence as well as a factor of standing because it may inform acceptance of decisions to speed up or delay. Standing, then, is the external side of independence, thus both often closely connected and in rather complex or even contradictory ways. Here, the power to pick and choose indicates independence, yet it also carries the risk of introducing politics into a court and endangering its standing when it is not accepted as a judicial actor, as a court. Put differently, a court not seen and trusted as an institution that applies the law, is bound by rules and acts in juridical mode only, based on legal rationale, may still be independent, but may lack standing.

A court's standing also seems to be related to caseload. This is not just the quantity of files. Here, courts differ tremendously, in that the German court receives around 10.000 filings per year, and decides around 6.000 cases, while the U.S. Supreme Court gets between 5 to 7.000 cases a year but decides around 70. And what does this mean in light of the Colombian Constitutional Court caseload of more than 30.000 tutela actions per anno and a time limit set by law to decide? In addition, even these numbers are hard to compare because supreme courts decide regular review cases and act as constitutional courts, as in the U.S., while the German court is a specialized institution for constitutional matters only.

In addition, the input of all files that reach the court and the output of decisions are but one item. A court's standing seems to depend much more on what cases are taken, decided, and get attention. Here, the qualitative option counts to address matters that matter, at a given moment in time,

35 Christine Landfried, *Constitutional review and legislation: An International Comparison* (Nomos 1988).

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to actors with voice. And certainly, access, types of proceedings, third-party interventions and knowledge management as well as available remedies matter as well. Thus, the standing of a court is not entirely in its own hands. Also, it does not only depend on public attention, but it may be shaped by litigation to bring the type of cases a court may need. Germany may serve as an example. There, respect for and trust in Karlsruhe is commonly attributed to the early introduction of individual complaint proceedings, without an obligation to be represented by a lawyer and at no cost. This was used to paint a credible image of a 'citizen's court', and the early grand rulings seemed to all protect the individual against the power of the state. This resulted in a degree of standing no sensible politician would attack. And the Court knew. It did not want the additional power of prior assessments of constitutionality, as in the French Conseil until 2010, because it wanted to remain on the citizen's side and not fall victim to more obvious political games. Standing, then, relates to what cases are and can be brought, and by who. Studying courts, one, therefore, needs to understand the practice and culture of strategic and class litigation as well as media coverage, thus, to understand how constitutional law is mobilized and to what effect.

Here again, technical rules of procedure matter tremendously, and autocrats know that. In Hungary or Turkey, autocrats simply removed some types of cases from judicial review, or fiddled with the order of files, or the judges' retirement age.[36] Dull technicalities, some even borrowed from other countries in which they work, while serving a destructive goal on site. Attempts to justify such moves range from 'abuse constitutionalism'[37] to assumed necessities for an 'exceptional state',[38] from a need for 'reform' to 'quality control'. However, it is noteworthy that in several countries, including Poland and Israel, people took to the streets to defend their court against such attacks. They were very clear as to what technical rules can do, they ran to defend the independence of 'their' court, and they were

36 The ECJ intervened, somewhat ignoring the politics behind the measure, by striking down retirement age changes because of violating EU age discrimination law; ECJ, C 286/12 (EC/Hungary) (13.07.2012).

37 David Landau, 'Abusive Constitutionalism', University of California, Davis Law Review 47 (2013), 89.

38 GFCC, Judgment of the First Senate of 24 April 2013 - 1 BvR 1215/07 [available online in English, at www.bverfg.de] (Counter Terrorism Database Decision - ATDG). The Senate explicitly refused, in para. 133, to handle police and security concerns as exceptions that may justify a more lenient standard, thus less protection of fundamental rights.

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motivated by its institutional standing it had accumulated before, because the new rules were to destroy both.

One additional element of a court's standing is what I call its knowledge regime.[39] It seems to matter who is heard, what arguments count, what kind of knowledge is present and represented, and what the court treats as truth and facts. As controversies around climate change or Covid vaccines show, it will become more and more demanding to navigate knowledge properly. And a court's standing will depend on whether it succeeds in doing so. To start, constitutional courts' standing is certainly affected by who is heard along the way to a ruling, be it invited, as in Germany by the GFCC, or be it as amici curiae in the U.S.[40] Which system and practice brings more voices to the fore, and which ones why? Is the spectrum more or less diverse? Are accounts more or less 'authentic' or legalized, contributions framed as expertise or experience, targeting a wider audience or the judges, and if so, all, some, or one? And there is more to study.

Beyond access and decisions and the knowledge regime, the standing of a court also seems to be informed by style. This refers both to the linguistic style of decisions[41] and to the appearance of the court, from the building to public relations activities, from the behavior of leaders to all other judges in various public fora. A court's style is, then, more than the juridical mode categorically different from politics. Certainly, and again, respect for a court's authority as the base of its standing depends on its ability to act as a court and be seen as such, independent from and withstanding pressure from politics. Yet, its standing also depends on style, the ability to frame cases as legal problems with legal solutions, and the remedies they find. Per se, constitutional courts must draw red lines for politics. However, it is wise to leave room for political maneuvers. To do so, standards must not yield, but remedies must be shaped accordingly. In addition, it requires

39 The concept is used in studies of political economies (i.e., J. L. Campbell, O. K. Pedersen), in sociology (i.e., S. Böschen) and I add ideas from works of Michel Foucault.

40 See Paul M. Collins, Pamela C. Corley and Jesse Hamner, 'The Influence of Amicus Curiae Briefs on US Supreme Court Opinion Content', Law & Society Review 49 (2015), 917-944; Robert A. Kagan and Gregory Elinson, 'Constitutional Litigation in the United States' in: Ralf Rogowski and Thomas Gawron (eds), *Constitutional Courts in Comparison: The US Supreme Court and the German Federal Constitutional Court* (Berghahn 2016), 25-61; see also Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago Press 1998).

41 Famously studies by Basil Markesinis, 'Judicial Style and Judicial Reasoning in England and Germany', Cambridge Law Journal 59 (2000), 294-309.

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the members of a court to behave accordingly and act in a judicial style, whether sitting or not. For a comparative and critical assessment, this requires a nuanced analysis of activities, informed by an understanding of the gendered and racialized dimensions of who judges are, what they do, and how this is read in a given setting. The discussion of Justice Sonia Sotomayors reference to a 'wise Latina woman' is a U.S. case in point,[42] and comments on a homosexual judge as a sign of a 'colorful' state of affairs may serve as a German example[43].

Finally, standing is very much informed by the socio-political context in which courts act. This may be conceptualized as a constitutional culture.[44] To name one aspect, what matters for courts is more than public opinion or demoscopic trends, although courts, like any other institution with such powers, cannot afford to disrespect or disregard (good) news. But the real point is to study when, why, and how constitutional courts react to what, since judges must exactly not follow published publicity as long as their courts deserve the label. Internally, this may be called independence, yet it is also an aspect of a court's external standing.

Beyond a constitutional culture, one may look for more. I tend to call this the political economy of constitutionalism, which informs not just contextual but, again, critical comparative studies of courts. In the U.S., there is certainly a need to understand how money drives politics, to better understand the court's ruling in Citizens United,[45] and to understand, as always, the gendered nature of that economy as well as its religious underpinnings, to properly assess the decision in Hobby Lobby, compared

42 She made several such statements which was subject to the confirmation hearings in the U.S. Senate. See an early account by Sonia Sotomayor, 'A Latina judge's voice', Berkeley La Raza Law Journal 13 (2002), 87, and the analysis by Sally J. Kenney, 'Wise Latinas, Strategic Minnesotans, and the Feminist Standpoint: The Backlash Against Women Judges', Thomas Jefferson Law Review 36 (2013), 43.

43 This was a national newspaper (small) headline when I was elected to the GFCC, in 2011. For an Australian perspective on the issue, see Leslie J. Moran, 'Judicial diversity and the challenge of sexuality: Some preliminary findings', Sydney Law Review 28 (2006), 565.

44 There are different approaches to such studies, from Peter Häberles more traditional anthropological studies to political science anaylsis, André Brodocz, *Die Macht der Judikative* (VS Verlag 2009); Hans Vorländer, *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (VS Verlag 2006); Rainer Schmidt, *Verfassungskultur und Verfassungssoziologie* (Springer 2012). A comparative study between the U.S. and Poland has been done by Daniel Witte and Marta Bucholc, 'Verfassungssoziologie als Rechtskulturvergleich', Zeitschrift für Rechtssoziologie 37 (2017), 266-312.

45 SCOTUS, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

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to headscarf rulings of the German Constitutional Court,[46] one needs to understand the specific German church-state-arrangement, as well as racist Islamophobia in a country long based on the illusionary tale of no immigration. Also, to understand jurisprudence on affirmative action schemes or positive measures,[47] or on police powers,[48] on voting,[49] the economic dimension could be worth taking into account, as in the analysis of or the radicalism in interpreting the U.S. 2nd Amendment's right to carry deadly weapons.

Cultural and economic factors matter because the standing of a constitutional court is not only informed by how and whether a court positions itself among powerful state actors and what those actors think of the court, how they deal with and talk about it (which may be very different indeed). In addition, it matters to a court's standing whether it has the courage to intervene with cultural and larger political effects to implement constitutionalism, namely: fundamental rights, democracy, and the rule of law. The comparative question is, then, what makes a court take a big decision – and what is it exactly that makes a decision big? Does a court limit elected as well as 'felt' majorities, and does it step up against populist belief and perpetuated privilege? Again, the standing of courts is not only a question of separated, as specifically distributed powers. Rather, standing is an element that informs power in societies. Here, the winds of resistance, support, and change, and the muddy waters of trust, respect, loyalty, rejection, distrust, abandonment, etc. could be taken into account. The point is that courts do

46 *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014); compared to GFCC, Order of the First Senate of 27 January 2015 - 1 BvR 471/10 (Headscarf II: no general ban for teachers), but also Judgment of the Second Senate of 24 September 2003 - 2 BvR 1436/02 (Headscarf I - statute needed) and Order of the Second Senate of 14 January 2020 - 2 BvR 1333/17 (Headscarf III - legal trainees). Also, free speech law is often compared without an analysis of the political economy of the field. I.e., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (KKK cross burning), compared to GFCC, Order of the First Senate of 04 November 2009 - 1 BvR 2150/08 – (Wunsiedel - criminal law against propagandistic condonation of the National Socialist arbitrary force).

47 Notably, *Fisher II v. University of Texas*, 579 U.S. 365 (2016). The German Constitutional Court has not ruled on the matter, but the ECJ in various German cases, i.e., ECJ C-409/95, 11. November 1997 (Marschall/Land Nordrhein-Westfalen).

48 Notably, Sotomayor´s dissent in *Utah v. Strieff*, 579 U.S. 232 (2016) may be compared to GFCC, Order of the First Senate of 20 April 2016 - 1 BvR 966/09 – (Federal Police Agency).

49 *Shelby County v. Holder*, 570 U.S. 2 (2013), an early 5:4 decision with a notable dissent by the liberal minority.

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know and care, but they do so differently depending on and impacting on their standing.

To name but one more aspect, the standing of courts is also a question of courage. Here, this is not a moral category nor the 'courage of convictions' that inspires people to fight for fundamental rights.[50] Rather, in the context of courts, I use the term to describe the nature and degree of resistance a court is up against and the strategies it employs to do it.[51] One may pointedly ask what makes constitutional courts get away with what they do. In fact, they limit the power of the elected political majority by striking down legislation. And they do so even in core areas, like election law that triggers specific animosities among political elites who directly profit from its status quo. What makes courts intervene anyway, or not? Also, constitutional courts do stop governments and strike down executive decisions even when terrorism calls for action, as in a long line of German rulings.[52] But when do courts do this, or not? More and more constitutional courts also address private power, as in the obvious case of campaign financing or in just as relevant tax law decisions, or in relation to corporations that now own formerly public space, i.e., airports.[53] What informs such bold moves, their courage? And what makes a court find the courage to counter populist belief and hegemonic understandings, as in decisions that foster paradigmatic social chance by demanding respect for racialized or sexualized minorities or minority religions? Is such courage related to unanimity, to a specific type of leadership, to a political constellation, to other push and pull factors, to path dependency, or to international friends? Thus, I suggest to take courage into account when comparing courts to understand why and when they really matter.

50 Peter H. Irons, *The courage of their convictions* (Simon and Schuster 2016).

51 Cf. David F. Levi, 'Protecting Fair and Impartial Courts: Reflections on Judicial Independence', Judicature 104 (2020), 58. The question of courage is an element in discussions of restraint or courts going 'small'. See Françoise Tulkens, 'Judicial Activism v Judicial Restraint: Practical Experience of This (False) Dilemma at the European Court of Human Rights', European Convention on Human Rights Law Review 3 (2022), 293-300. More generally on the 'vital mix of courage and care', see Susanne Baer, 'Who cares? A defence of Judicial Review', Journal of the British Academy 8 (2020), 75-104.

52 With a summary of earlier jurisprudence, GFCC, Judgment of the First Senate of 20 April 2016 - 1 BvR 966/09 (BKA).

53 GFCC, Judgment of the First Senate of 22 February 2011 - 1 BvR 699/06 (Fraport).

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E. Embedded Constitutionalism

When it comes to courts that deserve the label, independence matters, informed by institutional design and practice, and standing matters, informed by political context, constitutional culture, and courage. However, in the early 21st century, there is another feature worth mentioning. It is a reaction to the fact that today, no court is on its own, not even national supreme or constitutional courts, which results in a necessity to address legal and institutional pluralism. It is normative in that national constitutional law is embedded in trans- and international norms, and it is institutional in that national courts interact with supra- and international judicial institutions as well, both in many ways. Thus, to understand constitutional courts, their embeddedness has to be taken into account.

The concept of embedded constitutionalism attempts to capture the transnational entanglement, both normative and institutional, that informs the doings of national constitutional courts as well as their trans- and international counterparts as well. Its normative side is the interconnected nature of national, trans- and international law, starting from fundamental human rights guaranteed in constitutions and treaties to the protection of democracy in multilevel governance arrangements like the EU. Notably, the German Federal Constitutional Court has interpreted the German Basic Law 'in light of' the European Convention of Human Rights,[54] takes UN human rights conventions into account gradually as well,[55] and has argued, in its Climate Ruling, that the Paris Accord plays a constitutional role as well.[56] Different from that, the U.S. Supreme Court hesitates, to say the least, to live up to the international calling. There, conservativism seems to inform national parochialism, which hinders the court from contributing to the conversation that is taking place.[57]

54 GFCC, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04, paras 30 et seq. (Görgülü).

55 Re the Hague Convention on Abduction, see GFCC, Order of the Second Senate of 29 October 1998 - 2 BvR 1206/98, para 43.

56 GFCC, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18 -, i.e. paras 180, 204.

57 For a different perspective, see Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Vintage 2015).

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On the institutional side, embedded constitutionalism is, today, more than what Slaughter coined the 'community of courts',[58] while Germans tend to refer to a cooperative bond, the *Verfassungsgerichtsverbund*.[59] In fact, there are multiple forms of transnational conversations among judges.[60] Some take place in formal organizations with an official mandate (i.e., the Venice Commission of the Council of Europe), others connect courts either focusing on a region (i.e., the Conference of European Constitutional Courts) or targeting the world (World Conference on Constitutional Justice), while yet others cater to individuals (i.e., the International Association of Women Judges), and many meet in more or less informal and more or less closed circles. What seems at least as interesting to study is when, and why, how, and to what effect courts engage in formal conversations. This is done by referring to each other either on the level of arguments or in formal proceedings where possible. A complicated yet maybe paradigmatic case is the relationship between member states and the EU. In Germany, the national court claims both: the power to control the supranational one in its *ultra vires review*,[61] but also defers to it when fundamental rights standards are fully Europeanized.[62] Some other national courts followed that route, but it remains to be seen where it leads.

However, embedded constitutionalism is, today, a calling for courts whether they engage in it or not. A court's standing is already and will be, I believe, more and more informed by the way this court engages

58 Anne M. Slaughter, 'A global community of courts', Harvard International Law Journal 44 (2003), 191.

59 The concept of 'Verbund' comes from Ingolf Pernice, 'Bestandssicherung der Verfassungen' in: Roland Bieber and Pierre Widmer (eds),' *L'espace constitutionnel européen. Der europäische Verfassungsraum, The European constitutional area* (Schulthess Polygraphischer Verlag 1995), 225-273, and appeared in the Maastricht Judgment of the Second Senate of the GFCC, 12 October 1993 - 2 BvR 2134/92, 2 BvR 2159/92. It has been applied to courts by Andreas Voβkuhle, 'Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund', European Constitutional Law Review 6 (2010), 175-198.

60 Susanne Baer, 'Praxen des Verfassungsrechts: Text, Gericht und Gespräche im Konstitutionalismus' in: Michael Bäuerle et al. (eds), *Demokratie-Perspektiven. Festschrift für Brun-Otto Bryde zum 70. Geburtstag* (Mohr Siebeck 2013), Brun-Otto Bryde, 'The Constitutional Judge and the International Constitutionalist Dialogue', Tulane Law Review 80 (2005), 203.

61 The test has been applied in several case, some meeting severe criticism, namely GFCC, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 (PSPP).

62 The Orders of the First Senate from 2019 are known as Right to be Forgotten I - 1 BvR 16/13 - and II - 1 BvR 276/17.

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the world. Scholars have noted that the U.S. Supreme Court has shown more resistance than convergence or engagement,[63] and acts much more localist than globalist,[64] sometimes indeed with what looks like an almost stubborn jurisprudential nationalism. Certainly, U.S. localism has made the Court lose appeal around the world, not taking part in the conversation on constitutionalism in the search for the best way to protect fundamental rights and democracy governed by the rule of law. One question is how this informs or is informed by American foreign policy, but this again is yours to study.

F. Courts that Deserve the Label

Comparing courts, independence and standing, as well as their international embeddedness, seem to be, particularly in light of the worrying threats to constitutional courts at the beginning of the 21st century, indispensable ingredients of constitutionalism. They come in varieties, but if constitutional courts deserve the label, they need these, one way or another. Constitutions remain an empty promise when there are no independent institutions to make sure they matter, and when these institutions do not enjoy a minimum degree of standing, and the ways such institutions are embedded in the law of their land, their region, and the globe. To avoid abusive comparisons, you want to be clear as to what exactly you are looking at, and why.

63 Vicki C. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement', Harvard Law Review 119 (2005), 109-128.

64 Elaine Mak, *Judicial decision-making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (A&C Black 2014).

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