Understanding the Law in a Wider Context: On the Value of Comparative Law

Markus Kotzur[*]

Keywords: contextual comparison, customary law, interconnectedness, self-reflection, cultural pluralism

A. Comparing as 'Thinking out of the Box'

Even critics of comparative and in particular comparative constitutional law[1] would – most likely – agree that the approach is worth its while as stimulating intellectual enterprise for encyclopaedically educated lawyers, cosmopolitan *hommes de lettres* so to speak, and as an inspirational mean to enrich deliberative options available to judges[2], but no matter how talented both may be and how carefully both may work, at the end of the day all-encompassing comparison remains a mission impossible. Too many too different things have to be compared to/compared with too many other, too different things: texts (the language barriers and the risk of misleading translation, *traduttore traditore,* the translator is the traitor, as the Italians say), pre-texts, sub-texts and contexts, positive norms, judgements, doctrines, customs, traditions, last but not least legal cultures as such with their various relevant underpinnings. Law comparison is ne-

* Markus Kotzur is Professor of Public International Law and European Law at the University of Hamburg. This chapter builds on a previous contribution, see Markus Kotzur, '"Verstehen durch Hinzudenken" und/oder "Ausweitung der Kampfzone"? Vom Wert der Rechtsvergleichung als Verbundtechnik', Jahrbuch des öffentlichen Rechts 63 (2015), 355-365.

1 A strong and classic advocate of the comparative method: Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat. Zugleich zur Rechtsvergleichung als "fünfter" Auslegungsmethode', Juristenzeitung 44 (1989), 913; *id.*, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates. Methoden und Inhalte, Kleinstaaten und Entwicklungsländer* (1992).

2 Aharon Barak, 'Response to the Judge as Comparatist', Tulane Law Review 80 (2005), 195 (196).

cessarily 'work in context', comparative law necessarily 'law in context'.[3] Among German constitutional scholars, Peter Häberle has already in 1979 provided a remarkable definition of contextualization meaning '*Verstehen durch Hinzudenken*', literally translated as 'Understanding by adding other relevant thought(s)'.[4] Adding other thought(s) relates to widening perspectives/horizons and friends of classic French literature might associate this with the title of a famous novel written by Michel Houellebecq in 1994: '*Extension du domaine de la lutte*' in the original, 'Expansion of the battle zone' in literal translation. The English edition of the book has, however, been published under the title 'Whatever'. This 'Whatever' is exactly the biggest problem and the greatest challenge for the comparative lawyer.

Law comparison[5] is often misconceived as an 'anything goes' approach: an outcome-oriented process, adding 'whatever' if it supports the desirable result and corresponds to the interpreter's own preconceptions. This, however, is not a unique feature of the comparative method. All modes of judicial review depend, as Hans-Georg Gadamer and Josef Esser famously pointed out, on a judge's '*Vorverständnis*' and thus can never be completely 'freed' from manifold subjective moments such as social backgrounds or individual preferences and from the sub-texts of political power and policy interests.[6] To phrase it in simple words: Everyone is biased. Admittedly,

3 William Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press 1997); William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009); David Nelken, *Beyond Law in Context - Developing a Sociological Understanding of Law* (Routledge 2009); see also Anthony G. Amsterdam and Jerome Bruner, *Minding the Law* (Harvard University Press 2000).

4 Peter Häberle, *Kommentierte Verfassungsrechtsprechung* (1979), 44; Andreas Voßkuhle and Thomas Wischmeyer, 'Der Jurist im Kontext: Peter Häberle zum 80. Geburtstag', Jahrbuch des Öffentlichen Rechts 63 (2015), 401.

5 See, e.g., Peter de Cruz, *Comparative Law in a Changing World* (3th edn, Routledge 2007); Mathias Siems, *Comparative Law* (3rd edn, 2022); Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, 2019); Uwe Kischel, *Rechtsvergleichung* (2015); Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, Mohr 1996); Bernhard Grossfeld, *Macht und Ohnmacht der Rechtsvergleichung* (1984); Max Rheinstein, 'Comparative Law – Its Functions, Methods and Usages', Arkansas Law Review 415 (1968), 421; Josef Kohler, 'Über die Methode der Rechtsvergleichung', Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart 11 (1901), 273.

6 Both are already classics in German hermeneutics, legal and constitutional thought: Hans-Georg Gadamer, *Wahrheit und Methode* (1960); Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (1972); see also Christine Jolls, Cass R. Sunstein and Richard H. Thaler, 'A Behavioural Approach to Law and Economics', Stanford Law Review 50 (1997-1998), 1471.

even the convinced comparatist will not be able to completely dismiss the well-known epistemological problems with apples and oranges, to fully ignore the risks of too-far reaching judicial activism through progressive comparison and to generally deny that unbound comparative creativity might result in a lack of democratic legitimacy. Despite all the resulting doubts about her or his (methodological) tools, however, the comparative lawyer is both encouraged and inspired by the chance to develop a better-informed and more reflected argument through further knowledge – precisely through knowledge created when widening the *scope of reflection* which further expands the *potential for reflection*.[7] The above-mentioned Häberlian approach of '*Verstehen durch Hinzudenken*' finds resemblance in the often-demanded 'thinking out of the box'. Both consider different options of framing a legal argument and believe in a productive competition between these different options offering different solutions for a given problem.[8] Applying Michel Houellebecq and his '*Extension du domaine de la lutte*' to the art of law comparison, the latter one brings about an '*Extension du domaine de l´argumentation*'. This kind of extension aims at a *comparative* as well as *competitive* gain in reflection. Competition, however, is all the more important within multi-level political respectively constitutional systems.[9]

Thus, comparison is anything but a copy-paste from foreign blueprints. On the contrary, it is all about gaining *own* knowledge by 'thinking' or 'comparing out of the box'. In that sense, comparison can be described as both a *knowledge-creating technique* and a *knowledge-oriented discovery process* which aims at unfolding the embeddedness of the (national) law in its (transnational, international) multi-perspectivity.[10] The telos that Ernst

7 Christoph Schönberger, 'Verfassungsvergleich heute: Der schwierige Abschied vom ptolemäischen Weltbild', Verfassung und Recht in Übersee 43 (2010), 6.

8 Regarding the importance of different options and alternatives for democratic politics see Peter Häberle, 'Demokratische Verfassungstheorie im Lichte des Möglichkeitsdenkens', Archiv des öffentlichen Rechts 102 (1977), 27; Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (1998), 56; furthermore Jens Kersten, *Die Notwendigkeit der Zuspitzung. Anmerkungen zur Verfassungstheorie* (2020), 14.

9 Anne Peters and Thomas Giegerich, 'Wettbewerb von Rechtsordnungen', Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 69 (2010), 7, 57 respectively.

10 On the multi-perspective nature of jurisprudence Oliver Lepsius 'Themes of a Theory of Jurisprudence' in: Matthias Jestaedt and Oliver Lepsius (eds), *Rechtswissenschaftstheorie* (2008), 1 (10).

Rabel classically postulated for his supreme discipline of comparative law is decisive: 'The name of its goal is simply: knowledge.'[11]

Parallels can be drawn between this knowledge-dimension and historical insights. The study of comparative law and the study of history struggle to a certain extent over the same subject and share the same fate: both are concerned with *gaining knowledge* through comparison. History primarily pursues comparison in time, comparative studies primarily pursue comparison in space, without, of course, being ahistorical.[12] Their fate: both are met with a certain degree of skepticism, sometimes even unwillingness, if (rash) lessons are to be drawn from them. With regard to history, Kurt Kister pointedly stated: 'On the one hand, almost any lesson can be drawn from almost any historical process, depending on the viewpoint and the interpretive will of the observer. On the other hand, politicians (...) always and with pleasure use history as the handmaiden of politics.'[13] Replace 'politicians" with lawyers in the second sentence, 'politics' with the search for law, and you have formulated no less succinctly the double doubt about legal comparison that has already been mentioned: the danger of arbitrariness and the danger of instrumentalization to consolidate one's own point of view, which has long been preconceived. However, those who understand comparison as an *offer of reflection* do not succumb to this danger. On the contrary, intuitive associations, eclectic juxtapositions and even more or less arbitrarily selected references can be transformed into opportunities.[14] Comparative studies and history do not offer lessons that simply can be learned or (re-)implanted on present-day problems in a given country. Rather, they outline a 'road map', draw a 'search picture' approaching from space and time,[15] invite the seeker to critically-reflective

11 Ernst Rabel, 'Aufgabe und Notwendigkeit der Rechtsvergleichung' in: Hans G. Leser (ed.), *Rabel, Ernst, Gesammelte Aufsätze*, vol. 3 (1967), 1.

12 As to these two interdependent dimensions Peter Häberle, 'Die WRV – in ihren Texten und Kontexten. Ein kulturwissenschaftlicher Rückblick, Umblick und Ausblick' in: Markus Kotzur and Bernhard Ehrenzeller (eds), *Verfassung – Gemeinwohl – Frieden* (2020), 109.

13 Kurt Kister, 'Funktionen der Erinnerung', Süddeutsche Zeitung (30 June 2014) 9 (translation provided by the author).

14 Axel Tschentscher, 'Dialektische Rechtsvergleichung – zur Methode der Komparatistik im öffentlichen Recht', Juristenzeitung (2007), 807 (807).

15 Andreas von Arnauld, 'Öffnung der öffentlich-rechtlichen Methode durch Internationalität und Interdisziplinarität: Erscheinungsformen, Chancen, Grenzen', Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 74 (2015) 39 (40) refers to the jurisprudential method as such as a 'search image' and thereby refers

theory-building and productive development of their own (interpretative) insights. Their concern is not imitation, as a kind of legal mimicry, the comparative lawyer rather bases her or his own creations on historical and/or comparative knowledge. She or he engages in dialectical discourses with 'the ancient' and/or 'the other(s)', the outcome of which can either inspire them to adopt their reasoning or to consciously distinguish themselves from the other reasoning/the reasoning of the others.[16]

Peter Häberle understands the (not only epistemological) richness of this creative process in a variation of a famous Goethe dictum: 'He who does not know foreign legal orders knows nothing of his own'.[17] And Christoph Schönberger continues the thought. For him, it is not the self-interested curiosity 'about the foreign, the unknown or the exotic' that drives the comparative lawyer: 'Rather, comparison leads us back to our own through the foreign, in a sense makes us acquainted with ourselves in a new and different way.'[18] Nevertheless, many nationally introverted constitutional lawyers remained for a long time – and some still remain – suspicious of such a critically reflective 'discovery of the self through comprehension of the other'.[19] Certainly, the philosopher of law, also the legal theorist, and to some extent the legal historian, have always been expected to transnationally exchange fundamental ideas with a universal claim and in horizons that span the world. The scholar of international law has always found her/his very own profession beyond the state, and unbound of the state anyway, but the scholar of constitutional law – and this does not only apply to the German one – was only too happy to conceive of the respective state's own legal system as an autonomous and self-contained object of study. The more the connection between the nation-state and the constitution is understood as essential, the less relevance is attributed to comparative thinking beyond national borders.[20] There are, of course, early counter-ex-

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to a metaphor coined by Uwe Volkmann, 'Verfassungsrecht zwischen normativem Anspruch und politischer Wirklichkeit', Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 67 (2008), 57 (88): 'Suchbild Verfassung'.

16 Peter Häberle, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (1992).

17 Peter Häberle, Vergleichende *Verfassungstheorie und Verfassungspraxis. Letzte Schriften und Gespräche* (2016), 307.

18 Schönberger (n. 6), 7.

19 Cf. Günter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law', Harvard International Law Journal 26 (1985), 411.

20 Susanne Bär, 'Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 64 (2004), 735, 737.

amples such as Klaus Vogel's 'open statehood'[21] or Peter Häberle's doctrine of the 'cooperative constitutional state'.[22] In the process of Europeanisation, their approaches have found ever more emphatic confirmation; in the process of globalisation, the previously firmly established boundaries of inside and outside are becoming even more blurred and a 'world domestic law' (Jost Delbrück[23], further thinking Carl Friedrich von Weizsäcker's 'world domestic policy'[24]) is becoming – despite all setbacks and crises-driven dystopias – a more concrete and doubtlessly positive utopia. In view of this changing world of (public) law,[25] the expectations of/towards comparative law are also growing and changing.

B. In-between 'Mission Impossible' and 'Mission Accomplished': On the Potential of Law Comparison

Anyone who wanted to draw more than an al fresco picture of these 'great expectations' would have to consult the literature on legal methodology, constitutional theory, European integration theory, international law theory as well as (global) governance research in a broader sense. She or he had to be sociologically informed since any type of comparison also includes the empirical process of mapping, describing realties, and observing changes of reality. Comparison, in other words, is a reflexive method requiring

21 Klaus Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit* (1964); see furthermore Frank Schorkopf, *Grundgesetz und Überstaatlichkeit* (2007), § 11 I, 221.

22 Peter Häberle, 'Der kooperative Verfassungsstaat (1978)' in: *id.*, *Verfassung als öffentlicher Prozess* (3rd edn, 1998), 407.; *id.*, *Der kooperative Verfassungsstaat – aus Kultur und als Kultur* (2013); furthermore Udo di Fabio, *Das Recht offener Staaten* (1998); Stephan Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz* (1998); *id.*, 'Der kooperationsoffene Verfassungsstaat', Der Staat 37 (1998), 521; Karl-Peter Sommermann, 'Der entgrenzte Verfassungsstaat' in: Detlef Merten (ed.), *Der Staat am Ende des 20. Jahrhunderts* (1998), 19.

23 Jost Delbrück, 'Perspektiven für ein "Weltinnenrecht"? – Rechtsentwicklungen in einem sich wandelnden Internationalen System' in: Joachim Jickeli et al. (eds), *Gedächtnisschrift für Jürgen Sonnenschein* (2003), 793.

24 Carl Friedrich von Weizsäcker, *Bedingungen des Friedens* (4th edn, 1964), 13; later Dieter Senghaas, 'Weltinnenpolitik – Ansätze für ein Konzept', Europa-Archiv 47(1992), 643.

25 Some authors speak even of 'global law/world law', in German 'Weltrecht': Angelika Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (2007); Martin Schulte and Rudolf Stichweh (eds), 'Weltrecht', Sonderheft Rechtstheorie 39 (2008).

both intersubjective and intercultural competences.[26] The overly complex demands made on the comparative lawyer and the not less complex list of possible research questions – which without any claim to completeness have just been briefly mentioned – raises immediate doubts about the very sense and feasibility of the comparative undertaking. Can/could scientific research, let alone a judge called upon to decide a legal case in a limited period of time,[27] achieve what Léontin J. Constantinesco's famous 'three-phase model' of comparative law demands: (1.) ascertaining, (2.) understanding and (3.) comparing?[28] Given the manifold fragmentations within pluralistic (global) legal orders, can a more or less arbitrary selection[29] of legal systems that are to be compared to each other[30], meet scientific standards of rationality and sound methodology at all? What is the basis for determining the comparative perspective, when might micro-comparison be more promising than macro-comparison or vice versa? What are useful objects of comparison? Doubtlessly, the written law and its literal understanding – including also new (more progressive) variants of older legal texts[31] – mark a promising starting point but a focus on semantics only would be an obvious shortcoming. Law comparison aims at disclosing the meaning, not the wording. When it comes to common law, any approach exclusively based on written norms would be doomed to fail anyway. It is, as already stated and now to be reemphasized, always necessary to also consider the judgements and doctrines, the concepts and methods, and ultimately all contexts which the law is embedded in – first and foremost culture. Just as law only gains reality and becomes effective in and from its (cultural) contexts, comparative law can only be successful as a (cultural) contextual comparison.[32]

So, it does not come as a surprise that 'many of the tools necessary to engage in the systematic study of constitutionalism across polities can be

26 Bär (n. 20), 735.
27 Otherwise effective legal protection would be denied.
28 Léontin-Jean Constantinesco, *Rechtsvergleichung*, vol. 2 (1973), 141.
29 Depending on the knowledge, the language skills, and not the least the personal preferences of the comparatist.
30 This selection necessarily precedes the first phase in Constantinesco's model.
31 Thus, Peter Häberle metaphorically speaks of a 'Textstufenpradigma' identifying different 'textual stages' a certain legal guarantee reaches in course of its development: Textstufen als Entwicklungswege des Verfassungsstaates (1989), in: id., *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (1992), 3.
32 Häberle (n. 8); id., *Der kooperative Verfassungsstaat – aus Kultur und als Kultur. Vorstudien zu einer universalen Verfassungslehre* (2013).

found in the social sciences in general, and political sciences in particular.'[33] The 'comparative turn' and what some describe as the 'empirical turn'[34] in legal studies – others envisage a 'new legal realism'[35] – might very well go hand in hand. So, the ideal comparative study would not only have to take into account the relevant theoretical conceptualizations. It would have for example, to follow recent developments in the cultural sciences,[36] to refer back to theories of contestatory practices as developed by the political sciences,[37] or – aiming at the global plane – to consider the postcolonial studies movement.[38] Many more aspects requiring cultural sensitivity and inter-cultural discourse[39] could be added. Nevertheless, also without doing so it becomes, at least to a certain extent, obvious that a perfectly holistic cultural comparison is hardly feasible due to its over-complexity. The sophisticated, differentiated systematic framework and the overall concept of a comprehensive (cultural) context comparison can, of course, be scientifically contoured and pass the rationality test. However, daily legal practice and passing the feasibility test are a different story even if the comparative lawyer has thoroughly researched country reports at hand and the best interdisciplinary expertise at her/his disposal.

This is precisely what the sceptics are aiming at in their criticism of comparative law. They simply argue: Because comparison cannot be systematically structured and precisely translated in legal dogmatics, it is

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

34 Tom Ginsbury and Gregory Shaffer, 'The Empirical Turn in International Legal Scholarship', American Journal of International Law 106 (2012), 1.

35 Elizabeth Mertz, Stewart Macaulay and Thomas W. Mitchell (eds), *The New Legal Realism. Translating Law-And-Society for Today´s Legal Practice* (Cambridge University Press 2016).

36 See, e.g., Stuart Hall, *Cultural studies 1983. A Theoretical History* (edited by Jennifer Daryl Slack and Lawrence Grossberg) (Duke University Press 2016).

37 Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge University Press 2008); id., *A Theory of Contestation* (Springer 2014).

38 Pramod K. Nayar, *The Postcolonial Studies Dictionary* (John Wiley & Sons 2015).

39 Maurizio Gotti and Christopher John Williams (eds), *Legal Discourse Across Languages and Cultures* (Peter Lang 2010); Vijay K. Bhatia, Christopher Candlin and Paola Evangelisti Allori (eds) *Language, Culture and the Law: The Formulation of Legal Concepts Across Systems and Cultures* (Peter Lang 2008). To find a 'common language' can, from a practice-oriented point a view, be a very difficult task for a Euro-Asian dialogue, see Marina Timoteo, 'Law and Language: Issues Related to Legal Translation and Interpretation of Chinese Rules on Tortious Liability of Environmental Pollution', China-EU Law Journal 4 (2015), 121.

ultimately unscientific and therefore neither a suitable method for nor a suitable approach to theory building. However, the premise of a 'perfect system' conceived in this way either plays very consciously with excessive expectations or unconsciously succumbs to hermeneutic naivety. There is no doubt that comparative law, whether conceived as a method of interpretation or a theoretical meta-order, remains a presupposition-laden undertaking. However, it does not demand the comprehensively informed and neutral position of the comparatist. It only requires that the comparative lawyer discloses her/his necessarily selective comparison criteria and his necessarily subjective pre-understanding. It is not Hercules, the all-rounder (judge Hercules[40] is R. Dworkin's hypothetical if not fictitious ideal of a superhuman judge, omniscient, of infinite intelligence, competence, and resourcefulness[41] who became the main protagonist in Dworkin's seminal 'Law's Empire') but Socrates, who is aware of his ignorance, who is the godfather of skepticism and critical self-reflection. Law comparison, in that regard, qualifies as a truly *Socratic method*.

The first aspect of this contrasting juxtaposition Hercules vs. Socrates concerns the excessive expectations that not even a Hercules could fulfil and a Socrates certainly would not want to fulfil. The cognitive goal of comparative law is not the discovery of the allegedly right result and even less the finding of unquestionable truths; its goal is rather the *critical self-assurance* of not having succumbed to national narrow-mindedness: 'I know that I know nothing' – translated into 'I know that I know little if I only know my own law'.[42] The informed comparatist can be intuitive, shall be inspired by associations, should not be afraid of electiveness and she or he is not supposed to make premature affirmative claims but to engage in critical discourses with the other and the others. The discursive dialectics of comparison never live from uncritical adoption or unreflected copy-paste reception – then selectivity would be highly precarious and democratically not legitimate – but from exchanging ideas and mutual learning in and through dialogue. Comparative work will bring about fruitful contradictions and provoke what the political scientist Antje Wiener

40 Ronald Dworkin, 'Hard Cases', Harvard Law Review 88 (1975), 1057 (1083).

41 Ibid. See also Arvindh Rai, 'Dworkin's Hercules as a Model for Judges', Manchester Review of Law, Crime & Ethics 58 (2017), 58 (58).

42 Axel Tschentscher, 'Dialektische Rechtsvergleichung – zur Methode der Komparatistik im öffentlichen Recht', Juristenzeitung 62 (2007), 807 (815).

describes as 'contestations'.[43] Comparison means a mode of conflict resolution through communication, it is doubtful and curious, 'brooding' and actively progressing at the same time, it is willing to learn, not unwilling to teach, but never a self-satisfied or conceited end in itself. Comparison, in other words, has a considerable 'deliberative potential'.[44]

The comparative enterprise not being an end in itself simultaneously addresses the second aspect of the Hercules-Socrates-confrontation, namely the disclosure of the pre-understanding combined with its *questioning* by the other(s) and the resulting necessity to *re-evaluate* one's own. In the global village of the 21st century, the networked individual forms his or her pre-understanding, consciously or unconsciously, in intercultural communication processes. The omnipresent other – present via globally active media, the World Wide Web or social networks, to name just three examples – co-determines the individual in her/his thoughts and actions (even where she/he wants to isolate himself for whatever motivations). The reservoirs of meaning from which the comparative lawyer draws, given her/his role as an interpreter of law, are therefore enriched by a wealth of hardly reconstructible 'non-own' contexts of meaning. The endeavour of legal interpretation can never, even if it wanted to do so and followed the ideal of Montesquieu's '*bouche de la loi*', fully free itself from these 'non-own' contexts. To put this very pointedly: Whoever interprets also compares - or: 'I think, therefore I compare!' The understanding (thus unfolding the meaning) of a text – a legal text, a written decision, a scientifically formulated doctrine – is never discovery only, it is always creation, too. It is never merely a process of reproduction, but always also of production.[45] When in September 2014 the international law expert James Crawford was asked to 'unfold the history of 100 years of public international law' on the occasion of the centenary of the Kiel Walther Schücking Institute, he opened his lecture smugly: '(...) but there is nothing to unfold since the fabric did not yet exist'.[46] The hermeneutic dilemmas of the creation of law through interpretation could not be summed up more beautifully. Today, more than ever, the genesis of normative claims is linked to *comparative*

43 Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge University Press 2008); Antje Wiener, *A Theory of Contestation* (2014).

44 Sandra Fredman, 'Foreign Fads or Fashions: The Role of Comparativism in Human Rights Law', International and Comparative Law Quaterly 64 (2015), 631.

45 Hans Robert Jauß, *Literaturgeschichte als Provokation* (10th edn, 1992), 47.

46 Anniversary lecture on 19 September 2014 in Kiel.

creativity – all the more so where, in the process of constitution-making, constitutional amendment (total or partial revision) or, more generally, law-making, deliberate recourse is made to models of reception.

C. Comparative Perspectives

The latter aspect is particularly familiar to international and European law scholars. Their specific subject matter, law beyond the state and detached (unbound) from state-centered legislative processes, cannot be implemented and enforced without comparison. Even more, it owes its very existence to comparative work. Comparison is to some extent a *condition of existence* of transnational law or international law. Art. 38 para. 1 lit. b ICJ Statute identifies customary law, Art. 38 para. 1 lit. c the general principles of law as one of the formal sources of international law. Customary law presupposes a long-lasting state practice (*longa consuetudo*), which is supported by a corresponding conviction of legal obligation (*opinio iuris*) and can be expressed in the form of a legal statute. But how can state practice be determined? Only through a comparative synopsis of actions that can be observed in the reality of state conduct! But how can the *opinio iuris* be proven? Only through a comparative synopsis of objectively tangible manifestations that allow sufficient conclusions to be drawn about a corresponding legal conviction, about a corresponding will to be legally bound! All the systematic hurdles, which, as we have just shown, are generally put forward against comparative law, also apply here in terms of their factual logic. They may even be *more pervasive,* because the comparison not only provides the basis for reflection or offers interpretations, but also becomes an *act of creation* of law. And yet, customary law, borne by comparison, has always been written into the pedigree of international law's formal sources. It should only be noted in passing that it also relativizes the metaphor of 'sources'[47], because existing law does not simply flow from a source, but is a creation in itself: the result of creative processes of reflection.

This finding applies even more obviously to the general principles of law. General principles of law are understood here as norms/principles that express elementary ideas of law and justice and which – with culturally specific variations, nuances and differentiations – more or less every legal

47 See Peter Häberle, 'Rechtsquellenprobleme im Spiegel neuerer Verfassungen – ein Textstufenvergleich', ARSP 58 (1995), 127 (132).

system (from the world community to local municipalities) has implemented/applies/follows/is obliged to.[48] Thus, the frame of reference under international law according to Art. 38 para. 1 lit. c ICJ Statute is formed by the 'civilized nations', translated in non-authentic German as '*Kulturvölker*' – itself a not unproblematic term[49]; the rather self-evident frame of reference under European law (referring to European law in the narrower sense as EU law) is the member states of the European Union. First of all, with regard to international law: the precarious qualifier of culture/civilization, which is rooted in the colonial age and seems to distinguish between civilized and non-civilized nations, must be read differently today. In the post-colonial world, it no longer serves as a distinguishing criterion between 'cultural' states on the one hand, and 'non-civilized' states on the other, but refers – intentionally or unintentionally – to the more deeply grounded dimension of culture in the creation of law. General principles of law result from *cultural achievements*[50] of those involved in the genesis of law at the national, European and international levels. Above all, the different cultural experiences, the respective culturally shaped pre-understanding of the decision-makers should flow into *judicial* law-making. Judgement becomes an intercultural dialogue based on comparison.At the same time, Art. 38 para. 1 lit. c ICJ Statute forces the comparative lawyer to make an assessment of her/his own. For the attribution of quality to the 'general' always requires *qualitative* and not only *quantitative* verification. A mere 'that's how everyone does it', no matter how well it is empirically supported and morally grounded, would not satisfy the claim of *legitimacy through rationality* which is associated with every normative setting. Through such 'evaluative legal comparison', the comparatist is necessarily a co-creator of the law.

The 'evaluative comparison of law' or 'weighing law comparison' also builds a bridge to European law, and not only terminologically. For a European Union in the process of being constituted, the general principles of law, which in their claim to qualitative generality can only be developed

48 Andreas von Arnauld, 'Rechtsangleichung durch allgemeine Rechtsgrundsätze? - European Community Law and International Law in Comparison' in: Karl Riesenhuber and Kanako Takayama (eds), *Grundlagen und Methoden der Rechtsangleichung* (2006), 247.

49 Alain Pellet in: Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice. A Commentary* (3rd edn, 2012), Art. 38 para 245 and following.

50 Häberle (n. 8), 715.

through weighing law comparison, formulate essential *constitutional structural decisions* – structural decisions not of a purely formal, but of an *axiological nature*.[51]

Article 6 (3) TEU and the Preamble to the Charter of Fundamental Rights refer to the 'constitutional traditions common to the Member States', which the ECJ has been using since the end of the 1960s to develop unwritten fundamental rights of the Union. In any case, they have long had a home in positive law in Article 340 (2) TFEU, the successor to Article 288 (2) TEC. Comparison as a source of legal knowledge is just as familiar to the European Union as it is to the international community. Creating legal knowledge means conducting the '*legal as cultural conversation*' (Adolf Arndt).[52] The ECJ (see Article 19 (1) TEU) has a special responsibility in doing so. The Court is called upon to uphold the law in the interpretation and application of the Treaties and is thus obliged to uphold the idea of justice. This idea of justice and the legal principles derived from it are, however, difficult to grasp, both in their conditions of origin and in their concrete manifestations, and are thus also difficult to contour with methodological precision. The vagueness that comparative law is often accused of, is also caused by the vagueness of its subject matter. The fact that the ECJ sometimes receives harsh criticism for its 'weighing comparison' from those who find it difficult to reconcile legal dogmatic respectively its claim to rationally achieved legal certainty with vagueness and uncertainties remains understandable, but does not lead anywhere. 'Weighing law' comparison is a necessary tool to discover and unfold the meaning of EU law and not a *tactical glass bead game*. The Luxembourg court seeks neither maximum standards nor merely the lowest common denominator in general, but case-by-case solutions that best do justice to the values, goals and interests of the Union.[53] Such comparative studies do not seek simple assimilation or even the uncritical adoption of models that have been successfully tried and tested elsewhere; rather, they seek to open up participation in the discourse on a legal problem to be solved or on a disputed scientific hypothesis to

51 Armin von Bogdandy, 'Grundprinzipien' in: Armin von Bogdandy and Jürgen Bast (eds), *Europäisches Verfassungsrecht*, (2nd edn, 2009), 13.

52 As to Adolf Arndt see furthermore Franz C. Mayer, 'Das Verhältnis von Rechtswissenschaft und Rechtspraxis im Verfassungsrecht in Deutschland', Juristenzeitung 71 (2016), 857.

53 Pierre Pescatore, 'Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des États membres', RID comp. (1980), 337.

actors who are diversified in terms of legal culture.[54] As described at the beginning, comparison qualifies as a 'road map' or 'search picture', here specifically tailored to the member states of the Union. And wherever its Court embarks on this 'search picture', follows this 'road map', it does not embark on a voyage of discovery for a once-and-for-all reservoir of legal principles, but rather productively picks up on what is always emerging anew in the common European legal discourse thanks to processes of cultural growth and change.

It is precisely this dynamic from the interplay of 'own' and 'other' that makes the comparison a fruitful method of reflection even for the national constitutional lawyer and quickly exposes how short-sighted some polemics against constitutional comparison are. Antonin Scalia, the famous late US Supreme Court-judge, was certainly one of its most outspoken, equally astute and sharp-tongued exponents: 'If there was any thought absolutely foreign to the founders of our country, surely it was the notion that we Americans should be governed the way Europeans are. (...). What reason is there to believe that other dispositions of a foreign country are so obviously suitable to the morals and manners of our people that they can be judicially imposed through constitutional adjudication? Is it really an appropriate function of judges to say which are and which are not?'[55] Scalia paints a distorted picture of comparative constitutional work. The 'to be governed' assumes normative binding force of the comparative legal order through simple incorporation into the judge's decision. In fact, however, it is not a matter of *mirror-image reception,* but of interpreting one's own in *the mirror of the other*, the foreign. The original remains the standard even where the interpreter of the norm opens herself/himself up to comparative law and interdisciplinarity. Comparative constitutional law offers interpretations, it does not impose them. The more intensively legal systems are intertwined, the more precarious becomes self-sufficient ignorance, even if it is dressed up in the high pathos of democratic self-determination. The 'morals' and 'manners' of the others are no more directly normative than one's own 'morals' and 'manners'. They provide a framework for reflection,

54 Alberto Vespaziani, 'Die Europäische Verfassungslehre im Wandel zur post-ontologischen Rechtsvergleichung' in: Alexander Blankenagel, Ingolf Pernice and Helmuth Schulze-Fielitz (eds), *Verfassung im Diskurs der Welt – Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag* (Mohr Siebeck 2004), 455 (476).

55 Antonin Scalia, 'Foreign Legal Authority in the Federal Courts, Keynote address to the Annual Meeting of the American Society of International Law (March 31 to April 3, 2004)', American Society of International Law Proceedings 98 (2004) 305, 310.

facilitate understanding by adding to it and expand the 'combat zone' for the most convincing variant of interpretation.

D. Connecting Through Comparison

The 'combat zone' is moreover expanded through the trans- or internationalization of legal subject matters. This not only means that different norms of different normative systems regulate one and the same issue, but also that new, not simply hierarchical, models of classification must be found to solve such regulatory conflicts. Norms overlap with each other. They grow together, according to a metaphor developed in legal theory, into a kind of 'meshwork of loose rods, ribbons, ropes, branches and other knitting', which has a very different density at its various points and whose sub-segments lie partly 'intertwined', 'partly unconnected' next to each other, sometimes also 'on top of each other', be it 'clamped, laced or hooked'.[56] The image is idiosyncratic, but illustrative and explanatory in its descriptive power. It becomes clear that overly complex entanglements can only rarely be disentangled in the classical categories of '*lex superior*', '*lex posterior*' or '*lex specialis*'. Other, or at least additional, techniques or 'search images' are needed to enable the alternate connection and linkage of the 'loose norm ends'. This is where comparative law comes into play as a technique of interconnection or interweaving, with technique understood in the original sense of the Greek *τέχνη* as art and skill: 'artistry'.

Why the metaphor of interconnectedness? The answer should be attempted from the perspective of the European lawyer who thinks in terms of transnational and national law. Just as traditional approaches to defining the relationship between legal systems hierarchically no longer do justice to the gradual genesis of constitutional Europe internally,[57] this constitutional Europe lives externally in political spaces that are characterized by mutual interconnections, interlocking, overlapping, in short, a complex *interweaving* of interests, and perhaps more importantly, by *over-complex dependencies* in the power to act and shape. The concept of interconnected-

56 Christian Bumke, *Relative Rechtswidrigkeit* (Mohr Siebeck 2004), 36 (translation provided by the author).

57 Armin von Bogdandy and Stephan Schill, 'Zur unionsrechtlichen Rolle nationaler Verfassungsrecht und zur Überwindung des absoluten Vorrangs', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 70 (2010), 701 (703).

ness is primarily concerned with describing the partly very specific, partly still rather unspecific ways in which complex multi-level interdependencies function, without defining the exact mechanisms of the interplay in advance.[58] In this context, the network is a *dynamic idea of order* that refers more to an ever-new interconnectedness than to static interconnectedness. This interconnectedness lives from (partly diffuse) processes of reception and interrelationships that can hardly be analytically dissected and traced in detail.[59] It has already been indicated in connection with the general principles of law: from public international law principles and principles of the member states, which may have grown there in multiple processes of reception, their union counterparts emerge through new reception. Even during these subsequent reception processes of the next stage, what has been received is in turn enriched, modified, relativized, and productively updated by the recipient, primarily the ECJ. Union law then in turn has repercussions on the legal systems of the member states, re-receptions take place, precisely because the courts of the member states are required to interpret the national law that opens up to Union law 'in conformity with European law'. At the same time, however, the Union legal order is also a space for reflection and a mediator of reception for processes of exchange among the member states. It thus indirectly opens up doors for the intrusion of foreign legal thinking into national legal systems.

All these processes of interconnection thrive on comparative law, which ultimately makes them possible in the first place. It helps to uncover the productive dichotomies or contrasts of 'connecting'/to be connected: unity and multiplicity; homogeneity and plurality; renunciation of sovereignty and preservation of sovereignty; independence and cooperation, exclusion and inclusion, integration and self-assertion. This can be precisely defined by typical interconnection mechanisms. The approximation or harmonization of laws presupposes a common standard *supported by* all member states' legal systems and *tolerable* for all member states' legal systems. What is necessary is what Anne-Marie Slaughter describes as the starting point of all interconnection and what she recognizes as a characteristic of compar-

58 Andreas Voßkuhle, 'Der europäische Verfassungsgerichtsverbund', Neue Zeitschrift für Verwaltungsrecht 29 (2010), 1.

59 Konrad Zweigert, 'Der Einfluss des Europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten', Rabels Zeitschrift für ausländisches und internationales Privatrecht 28 (1964), 601; Peter Häberle, 'Theorieelemente eines allgemeinen juristischen Rezeptionsmodells', Juristenzeitung 47 (1992), 1033.

ative law: simply 'a process of collective judicial deliberation on a set of common problems'.[60] The principle of mutual recognition cannot succeed without sufficient knowledge of the standards of the other. Otherwise, the necessary relativization of one's own position would become a game of vabanques without responsibility. Those who want unity in diversity should use comparison as a means of conflict resolution and collision prevention. The multiplicity of constitutional rights secures cultural diversity in mutual respect and recognition. And from this moment of recognition grows the common basis for 'universal minimalia', for example in matters of democracy, the rule of law and human rights protection.[61]

This universal moment being intrinsic to a '*Verfassungsverbund*', could easily be interpreted as hostile to comparison. What would be the point of empirical synopsis if universality – thought of in Platonic terms – eludes the real world as an abstract philosophical category, ideal or even utopia. The universality with which transnational law has to work in theory-building is not, however, an ahistorical, inescapable prerequisite. Principles that have the potential for later universal application often first manifest themselves in specific cultural contexts. Conversely, specific legal texts, especially national constitutional texts, receive and concretize principles that were previously postulated with a universal claim. This creates a *universalizing* mutual exchange: on the one hand, between the respective national legal cultures, on the other hand, between the national legal spaces and the transnational legal space. The concept of universality may have been a '*specificum Europaeum*' rooted in Christian natural law[62] and was initially thought of as a postulate of rationality in the spirit of the (European) Enlightenment, but today it has gained a decisive *connection to humanity* – thanks to the *connecting 'search image' of* comparative law.

What does this mean in concrete terms? Universal principles of law emerge more than ever from comparative reflection on existential human needs and threats (to be defined, for example, by the classical triad of life, freedom and property). What constitutes universal experiences of injustice is easier to convey interculturally and intersubjectively than culture-specific values. The negative conception of man by Thomas Hobbes has universal implications, as does the positive one by John Locke. Man herself/himself is

60 Anne-Marie Slaughter, 'A Typology of Transjudicial Communication', University of Richmond Law Review 29 (1994), 99, 119.

61 Bär (n. 20), 737.

62 Hans Maier, *Wie universell sind die Menschenrechte?* (2007), 53.

the first and last reason for every legal order and every political community. The development of universal principles of law must be measured against her/his existential needs. It must therefore be conceived anthropologically, thought of as a process and gained through comparison. Universal contours grow out of cultural particularities. Universal minimum standards do not want to suggest a pretended unity, but rather make it possible to think opposites together in continuous processes.

E. To Conclude: Know Thyself - so Compare!

The outcome of this paper can be summarized in the following theses:

1. Comparative work starts with comparing problems (problem settings) and not solutions.
2. Far from simply seeking a *blueprint* of fixed solutions – let's do it like the others! –, the comparative lawyer is in constant search of a *matrix* that allows her/him to weigh, to probe, and to critically reconsider her/his own arguments against the background of experiences that others have made or solutions that others have found.[63] Law comparison is not based on (scientific) curiosity as an end in itself; it is not an idle glass bead game with the foreign, the unknown, or, even more exciting, the exotic.[64] Comparison shall reflect the 'own' in the light of the 'other' and help to get to know oneself better, one's own legal system and one´s own legal culture: Discover yourself by understanding others![65] Consequently, to simply copy-paste a rule from another legal system or restate a judgement of a foreign court has nothing to do with serious comparative work meeting scientific standards. It would both misconceive the cultural heterogeneity of the legal world and ignore a political community´s own *legal identity* as *cultural identity*.[66] Meaningful comparative work may not limit itself to the idea of comparing 'the laws' (that is to say written

63 Constitutionalism in Europa, the Americas or in Asia should thus be engaged in a permanent dialogue on constitutionalism; for die Asian example Albert H. Y. Chen (ed.), *Constitutionalism in Asia in the Early Twenty-First Century* (2014).

64 Schönberger (n. 7), 6, 7.

65 Ibid.

66 For further relevant discussions: Fiona Cownie, *Legal Academics. Cultures and Identities* (Bloomsbury 2004).

norms, legal texts or, with specific importance in common law systems[67], judgements) but it has, in a broader sense, to encompass a more sensitive *comparison of cultures*.[68]

3. Whoever wants to undertake the endeavour of this *holistic comparison*[69] must necessarily descend from the ivory tower of pure legal thought, without losing themselves in the narrow world of law-school-comparison all too often limiting itself to rather fruitless *semantic exercises*. Analytically skilled and dogmatically trained lawyers tend to explain the world before they have described it. For the comparative lawyer, however, 'mapping first',[70] 'description before explanation', should be the *epistemic creed*. A shift from comparative constitutional law *stricto sensu* to a more generous notion of comparative constitutional studies is the obvious consequence.[71]
4. Pluralism qualifies as an *essential structure* of modern democracies.[72] Consequently, laws and constitutional regimes are equally pluralist in nature.[73] They face *cultural pluralism* and have to deal with cultural diversity – even within the nation state let alone beyond. In such a cul-

67 See in this context also Mahendra P. Singh, *German Administrative Law in a Common Law Perspective* (Springer 1985).

68 A classic of such an approach is Häberle (n. 8), 463.; later Rainer Wahl, 'Verfassungsvergleichung als Kulturvergleichung' in: Dietrich Murswiek, Ulrich Storost and Heinrich A. Wolff (eds), *Staat – Souveränität – Verfassung: Festschrift für Helmut Quaritsch* (Duncker & Humblot 2000), 163, 173; furthermore Csaba Varga (ed.), *Comparative Legal Cultures* (1992); Henry W. Ehrmann, *Comparative Legal Cultures* (Prentice-Hall 1976).

69 Ran Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014), at 13 suggests 'that for historical, analytical, and methodological reasons, maintaining the disciplinary divide between comparative constitutional law and other closely relates disciplines that study various aspects of the same constitutional phenomena artificially and unnecessarily limits our horizons'.

70 See also Sionaidh Douglas-Scott, *Law after Modernity* (Bloomsbury 2014).

71 Ibid, 151.

72 Ernst Fraenkel, *Der Pluralismus als Strukturelement der freiheitlich-rechtsstaatlichen Demokratie*: Festvortrag Verhandlungen des 45. Deutschen Juristentags, 2 vols (Beck 1965); Peter Häberle, *Die Verfassung des Pluralismus. Studien zur Verfassungstheorie der offenen Gesellschaft* (Athenäum 1980); Häberle (n. 8), 134; Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (Routledge 1999); Gregor McLennan, *Pluralism* (University of Minnesota Press 1995); more recently John Williams (ed.), *Ethics, Diversity, and World Politics: Saving Pluralism from Itself* (Oxford University Press 2015).

73 Neil Walker, 'The Idea of Constitutional Pluralism', Modern Law Review 65 (2002), 317.

turally diverse real world, law depends on its contexts.[74] It is embedded in culture; it lives in a certain cultural ambiance;[75] it itself is an 'emanation of culture' (Peter Häberle). That has, of course, methodological consequences. Comparative and trans-disciplinary openness are twin siblings.

5. Even though comparison has to be aware of their mostly culturally particular origins, it can help to 'universalize' legal standards.[76] The comparative method, as stated above, is not limited to the comparison of legal texts, but extends to broader cultural, economic, political, social etc. contexts. *Comparing* these *contexts* (by describing, by mapping e.g.) is a first step in *universalizing* their *contents*. Universality has, admittedly, always been a principle of European Constitutionalism and based upon the Platonic (or anti-Platonic) tradition of European philosophy, but the very idea of universality reaches far beyond the cultural boundaries of Europe.[77] Its origins might be European: the concept itself – aiming at universal needs, threats, vulnerabilities etc. – is a global one. To figure out what best serves these needs, what best fights these threats and what best addresses these vulnerabilities, requires worldwide law comparison including microstates, developing countries, and democracies undergoing reformation or transformation.
6. In particular, the European and public international lawyer is invited to put legal cultures in a comparative perspective in order to see what common legal principles (see Art. 6 (3) TEU) can be discovered or universal legal standards can be developed at the end of the day. She or he has to be context-aware, pay attention to cultural ambiances, and, most

74 For an early and programmatic law in context-approach Peter Häberle, *Kommentierte Verfassungsrechtsprechung* (1979), 44 et passim; recently Voßkuhle and Wischmeyer (n. 4), 401.

75 This concept is, in particular, pursued in the field of human rights law, see Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press 2014); see also Upendra Baxi, *The Future of Human Rights* (Oxford University Press India 2012); Upendra Baxi, *Human Rights in a Posthuman World* (Oxford University Press 2009).

76 'A global intellectual history' might be a useful mean to support such an endeavour: Samuel Moyn and Andrew Sartori (eds), *Global Intellectual History* (Colombia University Press 2013).

77 Sebastian Heselhaus, 'Universality of International Law in the 20th Century' in: Thilo Marauhn and Heinhard Steiger (eds), *Universality and Continuity in International Law* (Eleven International Publishing 2011) 471; Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner', European Journal of International Law 20 (2009), 265.

importantly, identify *crossovers* (instead of getting stuck in dichotomies) between the local and the global, between the culturally particular (or relative) and the universal. In this regard, law comparison is an art of the 'in-betweens'.

As much as comparison, with its associations and intuitions, with its selective and eclectic moments, cannot be comprehensively methodically tamed or comprehensively dogmatically contained, it is a legitimizing necessity wherever unity is to emerge from multiplicity. Political fashions would perhaps call it 'without alternative', but for reflected legal 'cognition' it is in any case the *better alternative*. Because law can neither gain reality nor become efficient in normative self-sufficiency, comparison is becoming an indispensable source of knowledge in *intercultural communication* and *dialectical discourse*. Comparison does not want to deny difference, does not want to give up the standard of one's own. In the confrontation with the other, it generates unavoidable but – at least potentially – fruitful friction. The expansion of the battle zone! It opens up spaces for reflection on the problems of humanity. Connecting! What remains is the inviting admonition that once adorned the Temple of Apollo at Delphi: 'Know thyself'. What can be added from the experiences the 21st century's 'globalized' world has brought about: 'Do it by comparison'.