von Bogdandy | Schmidt-Aßmann [Eds.]

Theorising Comparative Public Law

A Reader from Germany

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ausländischen öffentlichen Recht und Völkerrecht

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Armin von Bogdandy | Eberhard Schmidt-Aßmann [Eds.]

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Preface

This reader presents contributions that help theorize comparative public law. Its main aim is to advance the transnational field of comparative public law by reflecting on its rationales, methods, and practices. Focusing on comparative *public* law is to showcase its specificities. We do not deny the many commonalities with private comparative law nor the general field of comparative law *tout court*.

When selecting among the many possible contributions, nationality was a key criterion. Indeed, presenting contributions from Germany is this reader's second aim. Comparative public law scholarship (as public international law or European public law) continues to be influenced by national traditions and contexts. Reflecting those traditions and contexts, disputed as they are, helps building a transnational, but rooted field of comparative public law. Such rootedness is valuable in a world that celebrates diversity and self-determination.

The contributions come in three groups according to their main theoretical thrust. Those of the first group mainly reflect *rationales* of comparative public law, while the second are more reflective of *methods* and the third theorizes specific *practices*. Of course, the lines between rationales, methods and practices are rather blurred and many contributions traverse through these categories. Therefore, the presentation under the broad categories of 'rationales', 'methods' and 'practices' is not meant to pigeonhole them into sealed compartments. So the texts could be classified differently. Indeed, academic work, including editorial work, is always a reflection of the situatedness of the scholar, an insight best proven by reflecting on comparative public law.

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Reflecting Rationales

The Germanic Tradition of Comparative Administrative Law

Karl-Peter Sommermann[*]

Keywords: Comparative administrative law, universalism, culturalism, European multi-level governance, administrative cooperation, transnational administrative law

A. Introduction

There is still a widespread view among legal comparatists that administrative law belongs to those fields of law where national peculiarity is most pronounced.[1] This opinion casts doubts on the purpose of any comparison

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* Karl-Peter Sommermann is Chair of Public Law, Political Science and Comparative Law at the German University of Administrative Sciences Speyer. Slightly revised version of a contribution that first appeared in Karl-Peter Sommermann, 'The Germanic Tradition of Comparative Administrative Law' in: Peter Cane, Herwig C. H. Hofmann, Eric C. Ip and Peter L. Lindseth (eds), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2021), 53-77.

1 See Ulrich Scheuner, 'Der Einfluss des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung', Die Öffentliche Verwaltung 16 (1963), 714-719; Helmut Strebel, 'Vergleichung und vergleichende Methode im öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 405, 409, 428; for a similar perspective see Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law', The Modern Law Review 37 (1974), 1, 17 ('All rules which organise constitutional, legislative, administrative or judicial institutions and procedures, are designed to allocate power, rule making, decision making, above all, policy making power. These are the rules which are closest to the „organic" end of our continuum, they are the ones most resistant to transplantations.'); Sabino Cassese, 'La costruzione del diritto amministrativo: Francia e Regno Unito' in: Sabino Cassese (ed.), *Trattato di diritto amministrativo* (Giuffrè 2000), 1, 3 (one of the characteristics of administrative law is 'suo legame con le tradizioni nazionali'); Eberhard Schmidt-Aßmann and Stéphanie Dagron, 'Deutsches und französisches Verwaltungsrecht im Vergleich ihrer Ordnungsideen', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 67 (2007) 395, 396 (with reference to Cassese and Auby). Already in the nineteenth century, Lorenz von Stein underlined that the individual differences of the States reflect 'the true, inexhaustible wealth of life in the world […] which is nowhere greater than in the field of public administration and its law', see Lorenz von Stein, *Handbuch der Verwaltungslehre und des Verwaltungsrechts* (Cotta 1870), 13.

of different administrative law systems that goes beyond an academic interest in identifying differences and similarities. By contrast, the comparison of private law has always been considered to be of utmost practical importance because transboundary social and commercial relations require a legal framing and entail, from the perspective of contracting parties, the necessity of choosing the applicable law.[2] A rational choice can only be made if those who choose have enough knowledge of the relevant foreign law and of the advantages and disadvantages that different legal solutions offer for the resolution of conflicts.

However, comparison of public law has been gaining increasing importance in recent decades. The greater role that comparative constitutional law and comparative administrative law nowadays play even in the context of legal practice is not only attributable to the fact that the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) have made legal comparison an integral part of their hermeneutic approach to European law and have thus drawn the attention of practising lawyers to comparative aspects.[3] A need for common substantive principles and inter-operable administrative structures pushes academics and practitioners to investigate and study public law of other European countries,[4] and more and more frequently also of systems outside Europe. Often, the identification of the preconditions that must be met if a legal regulation is to be compatible with vertical and horizontal co-operation in the European Union (EU) results from an exchange and a collaboration between academics and practitioners. And increasingly, national legislators take inspiration from foreign laws identified by comparative studies.

Although the diversification of epistemic and practical interests of comparative public law[5] can be perceived as a phenomenon associated with

2 Cf. Jaakko Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015), 12.

3 For the ECtHR see Marten Breuer, 'Verfassungsgerichte und Verfassungsvergleichung: Die Perspektive des Europäischen Gerichtshofs für Menschenrechte', Journal für Rechtspolitik 18 (2010), 223 ff., for the ECJ Carl-David von Busse, *Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht* (Nomos 2015), 217 ff.

4 See Karl-Peter Sommermann, 'Objectives and Methods of a Transnational Science of Administrative Law' in: Hermann-Josef Blanke, Pedro Cruz Villalón, Tonio Klein and Jacques Ziller (eds), *Common European Legal Thinking. Essays in Honour of Albrecht Weber* (Springer 2016), 552-553.

5 See Karl-Peter Sommermann, 'Erkenntnisinteressen der Rechtsvergleichung im Verwaltungsrecht' in: Anna Gamper and Bea Verschraegen (eds), *Rechtsvergleichung als juristische Auslegungsmethode* (Sramek 2013), 195-210.

the processes of Europeanization and globalization, a look back into legal history reveals that essential elements of modern comparative law can already be seen much earlier. In the Germanic tradition, as in the traditions of other European countries, comparative approaches to public law in the eighteenth and nineteenth century are of special interest. It was then that rationalism and, later, legal positivism gave rise to the first forms of 'universalist' and 'culturalist' approaches to legal comparison. While universalist approaches focus on generic legal and institutional problems of political communities and, therefore, look for common solutions, culturalist approaches emphasize the historical and cultural imprint of the law and consequently remain suspicious of universal solutions.

B. Governance as a Subject of Comparative Studies in the Era of Enlightenment

Legal thinking in the era of the Enlightenment is characterized by new approaches to the epistemic sources of the law. Religion as the primary source of natural law, which, in turn, should give orientation to the positive law was progressively replaced by legal principles derived from rational reasoning. Recourse to reason soon led to questioning of the political order as well, which was no longer deemed to be set in stone. Political philosophers and legal scholars now perceived more clearly and critically differences between the existing political and legal cultures, taking their insights as the starting point for the development of general principles of legal rationality.

1. Growing Interest in the Comparison of Political and Administrative Cultures

A key work for the development of legal and political thinking in Europe and in North America in the eighteenth century was 'The Spirit of the Laws' written by Montesquieu and deliberately published in Geneva (i.e. outside of absolutist France) in 1748.[6] It exercised an important influence on German authors. Three aspects have to be highlighted: First, Mont-

6 Charles de Secondat Montesquieu, *De l'esprit des loix ou du rapport que les loix doivent avoir avec la constitution de chaque gouvernement, les mœurs, le climat, la religion, le commerce, etc.*, vol. 2 (Barillot & Fils 1748).

esquieu discussed prominent ancient statesmen and political philosophers such as Solon, Plato, Aristotle, and Cicero, thus paying respect to an old European tradition; second, although starting from classical typologies, he systematically developed a culturalist approach for the comparison of governments and laws, pointing out their relationship with climatic and geographic circumstances and cultural particularities; and third, he utilized the description of foreign political and legal systems for an implicit criticism of the situation in his own country, in particular by describing the government and laws of England in an idealizing manner, leaving the intended comparison with France to the reader.

One of the German-speaking authors strongly influenced by Montesquieu was Johann Heinrich Gottlob von Justi (1720-71) who, in 1762, published his work *Comparison between the European and the Asian and other allegedly barbarian governments*.[7] Notably, Justi focuses his gaze on countries of other continents, in particular on China and Peru, and criticizes the arrogance of Europeans towards so-called 'barbarian cultures'. Their governments, institutions, and laws including, for instance, their tax law systems, are then analysed, on the basis of reports given by missionaries and explorers, and described as more developed and humane in some respects than those of European states. Seventy years later, the insight that the political and legal order of a country has to be seen in its cultural context was prominently exposed in the study by Friedrich Murhard (1779-1853) on 'The right of nations to strive for political constitutions that are modern and appropriate to their degree of cultural development'.[8] Murhard, a representative of liberal thinking and, like other liberals, highly interested in political ideas originating from England, took a special interest in the constitutional arrangements, put in place after the Glorious Revolution, and their further development. He underlined that the English constitution could not be understood without considering the social and political reality

7 Johann Heinrich Gottlob von Justi, *Vergleichungen der Europäischen mit den Asiatischen und anders vermeintlich Barbarischen Regierungen* (Verlag Johann Heinrich Rüdigers 1762).

8 Friedrich Murhard, *Das Recht der Nationen zur Erstrebung zeitgemäßer, ihrem Kulturgrade angemessener Staatsverfassungen* (Joh. Christ. Hermann'sche Buchhandlung 1832). The adaptation of the form of government to the development of a nation is also pointed out by Gustav von Struve, *Grundzüge der Staatswissenschaft*, vol. I: Von dem Wesen des Staats oder allgemeines Staatsrecht (self-published 1847), 16.

which, over time, had moved away from original constitutional objectives and changed the function of the institutions considerably.[9]

2. Universalism versus Culturalism

However, it would be premature to conclude that already in the eighteenth and early nineteenth centuries, a culturalist view on the political and administrative systems was the dominating comparative approach. During this period, 'General State Law' (*Allgemeines Staatsrecht*), also called 'Natural State Law' (*Natürliches Staatsrecht*), became a prominent scientific subject, sometimes embedded in works on 'General Science of the State' (*Allgemeine Staatswissenschaft*).[10] Suffused with the idea that reason will lead all societies to similar principles relating to the organization and the tasks of government, Heinrich Gottfried Scheidemantel (1739-88), for instance, defined General State Law as 'the laws that are common to all civil societies because they originate in the very nature and essence of the State'.[11] His reflections on the role and organization of government, the economic order and social life are primarily based on political philosophy of the seventeenth and eighteenth centuries as well as ancient political thinkers. Brief examples of historical developments or institutions in different states are given in order to confirm general principles.[12]

For several decades, books on General State Law remained an important academic literary genre. Thus, the Swiss scholar Caspar David Bluntschli (1808-81), at that time professor in Munich, published his renowned work

9 Murhard (n. 8), 335-355; for a further analysis see Günter Lottes, 'Hegels Schrift über die Reformbill im Kontext des deutschen Diskurses über Englands Verfassung im 19. Jahrhundert' in: Christoph Jamme and Elisabeth Weisser-Lohmann (eds), *Politik und Geschichte – Zu den Intentionen von Hegels 'Reformbill'-Schrift* (Bouvier 2016), 151, 161; see also Roland Ludwig, *Die Rezeption der Englischen Revolution im deutschen politischen Denken und in der deutschen Historiographie im 18. und 19. Jahrhundert* (Leipziger Universitätsverlag 2003), 225-227.

10 See, e.g., Christian Daniel Voß, *Handbuch der allgemeinen Staatswissenschaft nach Schlözers Grundriß bearbeitet, Second Part* (Weidmann 1796), 261 ff.; von Struve (n. 8).

11 Heinrich Gottfried Scheidemantel, *Das allgemeine Staatsrecht überhaupt und nach der Regierungsform* (Joh. Rudolph Cröckers 1775), 4; the same definition is given by the Austrian Karl Anton Freiherr von Martini, *Erklärung der Lehrsätze über das allgemeine Staats- und Völkerrecht*, *Part I - Allgemeines Staatsrecht* (self-published 1791), 54 (§ 45).

12 Scheidemantel (n. 11), 34 f., 402 ff.

on the state in the year 1852 under this title[13] and even some later publications were so titled.[14] However, the perspective had changed and was influenced by the evolving positivism in legal theory as well as by the emerging new social sciences. Bluntschli clearly distinguished between general and special State Law[15] and put more emphasis on the respective historical developments of the individual states.[16] Soon, the *General State Law* was succeeded by the 'General Theory of the State' (*Allgemeine Staatslehre*); Bluntschli renamed the fifth edition of his work, published in 1875, accordingly.[17] The General Theory of the State was intended to capture the notion and essence of the state as a whole by opening up the epistemological foundations to approaches of other scientific disciplines.[18] In this way, Georg Jellinek (1851-1911) included in his 'General Theory of the State', published in 1900, a substantive part dealing with empirical aspects, thus transcending the limits of the then-prevailing legal positivism. He distinguishes between the '*Allgemeine Soziallehre des Staates*' (General Social Theory of the State, which integrated knowledge of the evolving modern social sciences) and the '*Allgemeine Staatsrechtslehre*' (General Legal Theory of the State, which focused on legal phenomena).[19] Jellinek can also be seen a predecessor of slightly younger authors who paved the way for a later conceptualization of the law as a living instrument linked to societal development[20] and for a focus on the 'law in action'.[21] Not from a

13 Johann Caspar Bluntschli, *Allgemeines Staatsrecht* (Verlag der literarisch-artistischen Anstalt 1852).

14 Cf. Julius Hatschek, *Allgemeines Staatsrecht auf rechtsvergleichender Grundlage*, 3 vols (Göschen Verlagshandlung 1909), who emphasizes a comparative approach already in the title of his work.

15 Bluntschli, *Allgemeines Staatsrecht* (n. 13), 5 f.

16 Bluntschli, *Allgemeines Staatsrecht* (n. 13), 61 ff., 203 ff.

17 Johann Caspar Bluntschli, *Allgemeine Staatslehre,* 5th reworked edn of the first volume of the General State Law (Cotta 1875).

18 See the exposition of different definitions of the General Theory of the State by Hermann Rehm and his still tentative attempt to find a generally accepted concept in: Hermann Rehm, *Allgemeine Staatslehre* (Mohr 1899), 1-8.

19 See Georg Jellinek, *Allgemeine Staatslehre,* 3rd edn (O. Häring, 1913), 129-379, on the one hand, and 383-795, on the other hand.

20 Eugen Ehrlich, 'Die Erforschung des lebenden Rechts', Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich (Schmollers Jahrbuch) 35 (1911), 129 ff.

21 Roscoe Pound, 'Law in the Books and Law in Action', American Law Review 44 (1910), 12 ff.; Roscoe Pound, *The Spirit of the Common Law* (Marshall Jones Company 1921); new edition (Transaction Publishers 1999), 56, 212 f.

sociological, but from a culturalist perspective, the partisans of the German Historical School had already argued in favour of a dynamic concept of law.[22]

3. Relativization of the Own Political and Legal System

Both lines of comparative reasoning that started to develop in the eighteenth century had the potential to call into question existing political institutions and state order: either by contrasting the present conditions with the natural state law deduced from philosophical, presumptively 'rational' considerations, or by emphasizing the need to adapt the political and legal systems to changing socio-cultural contexts. The idea that the form of government or governmental action is based on traditions ('traditional legitimation' in the sense of Max Weber) was increasingly losing ground. When, in the early nineteenth century, in particular after the foundation of the German Confederation in 1815, the constitutional movement also reached the German territories,[23] the study of foreign constitutions and administrative systems became even more attractive and at the same time more concrete. The comparison opened up new learning processes.

C. The Study of Foreign Law as a Source of Inspiration for the Development of Administrative Law and as a Means of Identity Building

In the beginning of the nineteenth century, traditional institutions that had long been taken for granted, no longer seemed to be set in stone. The American and the French Revolutions had shown that new paradigms of political organization of state power and new institutional arrangements were not bound to remain in the theoretical sphere, but could be made a reality in practice. This insight made it even more attractive for lawyers to

22 See Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr und Zimmer, 1814), 11 ff.

23 The first constitutions, still imposed by the monarchs, were those of Nassau (1814), Schwarzburg-Rudolstadt, Schaumburg-Lippe, Waldeck and Sachsen-Weimar (all 1816), Bavaria and Baden (1818), and Württemberg (1819), see Werner Frotscher and Bodo Pieroth, *Verfassungsgeschichte,* 17th edn (Beck 2018), 134 ff. They primarily served the dynastic-governmental self-assertion, and not to ensure individual freedom, cf. Dieter Grimm, *Verfassung und Privatrecht im 19. Jahrhundert* (Mohr 2017), 190.

study foreign political and administrative systems, which were considered to provide an example for reform.

I. The Special Interest in Anglo-American Law

Whereas the French Revolution finally led to a new monarchic system, the American Revolution had brought about an alternative federal and republican order. The analytical description of 'democracy in America', in particular of the structure and practice of local governance, by Alexis de Tocqueville,[24] based on his own observations made during a journey through North America, also increased interest in the political example of the United States in the German territories. Tocqueville clearly distinguished between governmental und administrative authority according to 'the level of specificity and detail involved in political decisions and actions'.[25] Furthermore, although the American Revolution and the War of Independence had definitively broken with the monarchy of the former motherland, the political system of England equally remained an appealing object of study. Especially since the positive assessment by Montesquieu, numerous authors undertook studies of the English parliamentary system and the mechanisms it used to safeguard individual freedom. Among these were, as has been mentioned, Friedrich Murhard[26] and Alexis de Tocqueville[27] who, however, also depicted and analysed the serious adverse social and political consequences of industrialization.[28] In this context, the German liberal thinker Robert von Mohl (1799-1875) must also be mentioned who had written

24 Alexis de Tocqueville, *De la démocratie en Amérique*, 2 vols (Louis Hauman 1835/40).

25 See Christina Bambrick, '"Neither Precisely National nor Precisely Federal": Governmental and Administrative Authority in Tocqueville's Democracy in America', Publius: The Journal of Federalism 48 (2018), 586 ff.

26 Cf. Murhard (n. 8).

27 Alexis de Tocqueville, *Voyages en Angleterre et en Irlande* (Gallimard 1835; re-published in 1982).

28 For an assessment of Tocqueville's analysis cf. Jimena Hurtado, 'L'inégalité au temps de l'égalité: démocratie, industrialisation et paupérisme chez Alexis de Tocqueville', Cahiers d'économie politique/Papers in Political Economy 59 (2010), 89 ff.

his habilitation thesis[29] on the 'Federal State Law of the United States',[30] and, in 1848, became a member of the Parliament of the Paulskirche in Frankfurt and Minister of Justice. In his work *History and Literature of State Sciences*, he analysed the literature on 'State law' in Switzerland, the US, England, Germany, and particularly France, implicitly delineating the different paths along which the political orders had developed since the Middle Ages.[31] A differentiation between state law and administrative law that starts to develop in the second half of the nineteenth century is not yet explicitly made.[32] Here and in earlier publications, reflection on foreign law, especially on the American political system, served to generate arguments for use in reform discussions.[33]

In the year 1857, almost simultaneously with Mohl's *History and Literature of State Sciences*, Rudolf von Gneist (1816-95) published the first part of his work *Contemporary English Constitutional and Administrative Law*, which focuses on the evolution and structure of the civil service in England.[34] Although he characterized his analysis of English administrative law as 'a walk through the jungle'[35], Gneist emphasized that a comparative view on England had become more important 'since the French political system had ceased to be an exemplary model'. This observation has to be seen against the background of the proclamation of Louis-Napoléon as

29 In the German university system, the 'habilitation', which comes after the doctorate, serves to give scholars the *venia legendi*, i.e. the right to teach certain subject areas (e.g. public law) at a university and thus the qualification to hold a chair.

30 Robert von Mohl, *Das Bundes-Staatsrecht der Vereinigten Staaten von Nordamerika. Erste Abteilung: Verfassungs-Recht* (Cotta 1824). The planned second part has not been published.

31 Robert Mohl, *Die Geschichte und Literatur der Staatswissenschaften*, 3 vols (Enke 1855/56/58); a concise comparative observation can be found in vol. III, 3 ff.

32 However, in a review of an American constitutional commentary published in 1835, Mohl criticises the non-inclusion of administrative law, see Eberhard Schmidt-Aßmann, *Das Verwaltungsrecht der Vereinigten Staaten von Amerika* (Nomos 2021), 29 f.

33 For 'America as argument' cf. Charlotte A. Lerg, *Amerika als Argument. Die deutsche Amerika-Forschung im Vormärz und ihre politische Deutung in der Revolution von 1848/49* (transcript-Verlag 2011).

34 Rudolph Gneist, *Das heutige englische Verfassungs- und Verwaltungsrecht*, I. Teil (Springer 1857).

35 Gneist (n. 34), VI, also quoted by Christoph Schönberger, 'Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum*, vol. IV (C.F. Müller 2011), 493, 523.

Emperor of the French in 1852.[36] In the comparative chapter of his book,[37] Gneist understands the development of administrative law in Germany as a corollary of the formation of administrative organs to which quasi-judicial functions were attributed on the basis that judge-made law and judicial control of the executive, as they existed in England, were lacking in Germany. According to Gneist, the role of the courts also explains why the separation of public from private law did not take place in England.[38] With the benefit of hindsight, this explanation, which was shared by other continental authors[39] is not fully convincing. The separation of private law from public law and the development of a modern administrative law in Germany gained their most pronounced dogmatic development after the creation of independent administrative courts in the 1860s and 1870s.

Gneist deepened his research on England in further books, among them extended studies on English administrative law,[40] local self-government in England[41] and English constitutional history.[42] Younger legal scholars too showed a lively interest in the English constitutional and administrative law. An author who paid special attention to England was Julius Karl Hatschek (1872-1926).[43] In his *State law of England*, published in 1905/06, he dedic-

36 Gneist (n. 34), V.

37 Gneist (n. 34), 678-721.

38 Gneist (n. 34), 687.

39 Cf., e.g., Edouard Lafferière, *Traité de la juridiction administrative et de recours contentieux*, Tome premier, 2nd edn (Berger-Levrault 1896), 96 ff.; Julius Hatschek, *Englisches Staatsrecht mit Berücksichtigung der für Schottland und Irland geltenden Sonderheiten*, *vol. II: Die Verwaltung* (Mohr 1906), 658 ff.

40 Rudolf Gneist, *Das englische Verwaltungsrecht mit Einschluss des Heeres, der Gerichte und der Kirche geschichtlich und systematisch*, 2 vols (Springer 1886); Gneist, *Das Englische Verwaltungsrecht der Gegenwart in Vergleichung mit den Deutschen Verwaltungssystemen*, 2 vols (Springer 1883/84); the two works are fundamentally modified and extended editions of Gneist, *Englisches Verfassungs- und Verwaltungsrecht* (1857).

41 Rudolf Gneist, *Verwaltung, Justiz, Rechtsweg. Staatsverwaltung und Selbstverwaltung nach englischen und deutschen Verhältnissen mit besonderer Rücksicht auf Verwaltungsreformen und Kreisordnungen in Preußen* (Springer, 1869); Gneist, *Die heutige englische Communalverfassung und Communalverwaltung oder das System des Selfgovernment in seiner heutigen Gestalt* (Springer 1860); Gneist, *Selfgovernment: Communalverfassung und Verwaltungsgerichte in England* (Springer 1871).

42 Rudolf Gneist, *Englische Verfassungsgeschichte* (Springer 1882).

43 In addition to his books on English constitutional and administrative law, his study on the English constitutional history and his comparison between the British and the Roman Empire have to be particularly mentioned, see Julius Hatschek, *Englische Verfassungsgeschichte* (Oldenbourg 1913); Hatschek, *Britisches und römisches Weltreich: Eine sozialwissenschaftliche Parallele* (Oldenbourg 1921).

ated one volume to the administration, analysing the different branches of the administration, including, among others, the administration in social and fiscal matters, police, local government, and civil service.[44] At the end of his comprehensive, nearly 700-page overview of the English administrative law,[45] Hatschek poses the question of whether England has an administrative law, a question, as the author remarks, first raised by the French scholar Edouard Lafferière[46] and negatively answered by Albert Venn Dicey.[47] His own answer, following the analysis of Gneist, was that England did not possess an administrative *law* but, rather, administrative *practices* (*Verwaltungsroutine*) that despite sometimes being embodied in cabinet orders, ordinances, or other legal acts were not combined with a public-private law divide.[48] Nevertheless, Gneist and Hatschek titled their books *English Administrative Law*, as did Otto Koellreutter in his habilitation thesis on *Administrative Law and Administrative Jurisprudence in Modern England*.[49] This terminological choice could be justified on the basis that the authors were describing and comparing functional equivalents.

2. The Role of French Law Studies for the Systemization of Administrative Law

Despite the publication of such German studies on English government and administration, it was, in the end, French administrative law that most

44 Julius Hatschek, *Englisches Staatsrecht mit Berücksichtigung der für Schottland und Irland geltenden Sonderheiten, vol. I: Die Verfassung* (Mohr 1905), *vol. II: Die Verwaltung* (Mohr, 1906). A shorter version can be found in Julius Hatschek, *Das Staatsrecht des vereinigten Königreichs Grossbritannien-Irland* (Mohr 1914).

45 Hatschek (n. 39).

46 Edouard Lafferière, *Traité de la juridiction administrative et des recours contentieux*, 2nd edn (Berger-Levrault 1896).

47 Cf. Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1885), in the 8th edn (Macmillan, 1915), 213 ff.

48 Hatschek (n. 39), 650.

49 Otto Koellreutter, *Verwaltungsrecht und Verwaltungsrechtsprechung im modernen England. Eine rechtsvergleichende Studie* (Mohr 1912). It has been said that it was Otto Koellreutter, a German, who wrote the first book on English administrative law (John S. Bell, 'Comparative Administrative Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 1259, 1260 (n. 1)). However, it is Rudolf Gneist who has to be mentioned first.

influenced discussion on the further development of administrative law in Germany which was, at that time still territorially fragmented and, therefore, following a variety of administrative traditions. The aforementioned authors, in particular Robert von Mohl and Julius Hatschek, repeatedly included references to French administrative law in their comparative writings. However, the most important impetus to consider French law as a source of inspiration when developing a modern German administrative law came from the appointment of Otto Mayer (1846-1924) as Professor of the University of Strasbourg in 1882. The University of Strasbourg had become one of the prominent German universities after the cession of Alsace to the German Empire in the Treaty of Versailles, which ended the Franco-German War of 1870/71. Otto Mayer taught French private law and German administrative law. In his *Theory of French Administrative Law*, published in 1886,[50] he extolled the French approach of respecting the public character of the activities of the state rather than treating the state as a subject of private law.[51] The idea that the state or its organs are endowed with subjective rights vis-à-vis citizens in the way that princes in former times enjoyed subjective rights vis-à-vis their subjects was particularly combatted by the French scholar Henri Barthélemy who later wrote a preface to the French translation of Otto Mayer's *German Administrative Law*.[52]

Mayer developed a system of German administrative law by comparing the different laws in the various German territories[53] and by making use of concepts of French administrative law and German private law to forge them into a coherent whole.[54] Thus, the concept of the administrative act (*Verwaltungsakt*) finds its origins in the French *acte adminstratif*; however, the latter also includes *actes administratifs réglementaires*, i.e. normative acts, in contrast to the German concept coined by Mayer.[55] Equally, for in-

50 Otto Mayer, *Theorie des Französischen Verwaltungsrechts* (Verlag von Karl J. Trübner 1886).

51 Mayer (n. 50), VIII f.

52 Barthélemy adresses the subject also in his preface, see Henri Barthélemy in Otto Mayer, *Droit administratif allemand*, vol. I (V. Giard & E. Brière 1903), 6 ff.

53 German general administrative law as a 'product of intra-German comparatistics' cf. Schönberger (n. 35), 522 ff.

54 On Otto Mayer and his conceptual foundations cf. Erich Kaufmann, 'Otto Mayer', Verwaltungsarchiv 30 (1925), 377-402.

55 Cf. Otto Mayer, *Deutsches Verwaltungsrecht*, vol. I, 3rd edn (Duncker & Humblot 1923), 93: 'The administrative act is a pronouncement, attributable to the Administration and endowed with public power, that determines for the subject in the individual case what his rights are.'.

stance the concepts of 'police permit' (*Polizeierlaubnis*)[56] and 'public property' (*öffentliches Eigentum*)[57] have French roots (*permis de police* and *domaine public*).[58] The German concept of 'public undertakings' (*öffentliche Unternehmungen*)[59] was influenced by the then-emerging reorientation of French administrative law[60] through the evolution of the concept of *service public*[61] which later was also to form the basis for the shaping of the concept of *Daseinsvorsorge* by Ernst Forsthoff (1902-74),[62] a fine connoisseur of French constitutional history and public law.[63] Because of the centralized structure of France, the organization of administration did not play a major role in Forsthoff's comparison, in contrast to the interest which Gneist had shown in English self-government as a source of inspiration for reform discussions in Prussia – albeit not always authentically reflected.[64]

By emphasizing juridical method, which started from specific legal concepts, Otto Mayer distanced himself from authors who combined legal thinking with approaches of social sciences and whose most prominent representative was Lorenz von Stein (1815-90).[65] Lorenz von Stein had become a renowned author because of his three-volume work on the *History*

56 Cf. Otto Mayer, *Deutsches Verwaltungsrecht*, vol. I, 3rd edn (Duncker & Humblot 1923), 239 ff.

57 Cf. Otto Mayer, *Deutsches Verwaltungsrecht*, vol. II, 3rd edn (Duncker & Humblot 1924), 39 ff.

58 As for the French law, cf. Otto Mayer, *Theorie des Französischen Verwaltungsrechts* (Verlag von Karl J. Trübner 1886), 227 ff and 167 ff.

59 Cf. Mayer (n. 57), 243 ff.

60 Cf. Winfried Brohm, 'Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung' in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, vol. 30* (De Gruyter 1972) 245, 253 f.

61 The main publications on the *service public* appeared later, see Gaston Jèze, *Les principes généraux du droit administratif*, vol. I, 3rd edn (Girard 1925), 1; Léon Duguit, *Les transformations du droit public* (Colin 1913), in particular 33 ff.

62 Ernst Forsthoff, *Die Verwaltung als Leistungsträger* (Kohlhammer 1938), 6; Forsthoff, *Der Staat der Industriegesellschaft* (Beck 1971), 75 ff; Forsthoff, *Lehrbuch des Verwaltungsrechts*, vol. I, 10th edn (Beck 1973), Vorb. V.

63 Forsthoff translated and edited a German version of Montesquieu, *De l'esprit des lois: Vom Geist der Gesetze* (Mohr Siebeck 1951).

64 See above Section C 1 and Christoph Schönberger, 'Rudolf von Gneist (1816-1895) – Die altenglische Verwaltung als Vorbild für den preußischen Rechtsstaat' in: Stefan Grundmann et al. (eds), *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin* (De Gruyter 2010), 241, 253 ff.

65 With regard to the *Verwaltungslehre* of Stein, Otto Mayer even spoke of 'blooming bombast', see Mayer, 'Otto Mayer' in: Hans Planitz (ed.), *Die Rechtswissenschaft der Gegenwart in Selbstdarstellungen* (Verlag von Felix Meiner 1924), 11.

of the Social Movement in France from 1789 to the Present Day, published in 1850,[66] and his *Verwaltungslehre*[67] that first appeared in 1870 and culminated in a vision of an international, particularly European, administrative law.[68] Stein who also reflected on methodological questions of legal comparison,[69] based his administrative theory on comparative considerations, having special regard to Germany, France, England, and Austria, and on a study of emerging international administrative arrangements.[70] His conviction that it is the mission of comparative law to identify underlying common values and principles in the national legislations,[71] fitted well with the spirit that was subsequently dominant at the First International Congress of Comparative Law in Paris in 1900. The majority of the participants in this Congress, which is considered to constitute the starting point of legal comparativism as a recognized discipline of law, were of the opinion that the various legal systems should no longer be studied only on an individual basis but also as legal resources for the identification of universal principles that underlie the different norms in those individual systems. In contrast to the German term *Rechtsvergleichung*, which describes the process of comparing legal norms or systems, the French, Italian, Spanish and Portuguese expressions for 'comparative law' (*droit comparé, diritto comparato, derecho comparado, direito comparado*) still reflect this ambition to find transnational common legal principles, a *droit commun de l'humanité civilisée,* as one of the participants in the Paris Congress, Raymond Saleilles,

66 Re-edited by G. Salomon: Lorenz von Stein, *Geschichte der sozialen Bewegung in Frankreich*, 3 vols (Drei Masken Verlag 1921). The work is a revised and strongly expanded version of: Lorenz Stein, *Der Socialismus und Communismus des heutigen Frankreich* (Otto Wiegand 1842).

67 Lorenz von Stein, *Handbuch der Verwaltungslehre mit Vergleichung der Literatur und Gesetzgebung von Frankreich, England, Deutschland und Österreich,* 1st edn (Cotta 1870); 2nd edn (Cotta 1876); 3rd, completely revised edn in three volumes (Cotta 1887/88/89).

68 Lorenz von Stein, *Handbuch der Verwaltungslehre mit Vergleichung der Literatur und Gesetzgebung von Frankreich, England, Deutschland und Österreich,* 2nd edn (Cotta 1876), 91 ff; von Stein, 'Einige Bemerkungen über das internationale Verwaltungsrecht', Jahrbuch für Gesetzgebung, Verwaltung und Volkswirthschaft 6 (1882), 396-442.

69 Cf. Schönberger (n. 35), 523 f.

70 For further analysis, cf. Karl-Peter Sommermann, 'Europäisches Verwaltungsrecht als „die großartigste Rechtsbildung der Weltgeschichte"? Die Vision von Lorenz von Stein aus heutiger Perspektive', Die Öffentliche Verwaltung 60 (2007), 850-867.

71 Lorenz von Stein, 'Einige Bemerkungen über das internationale Verwaltungsrecht', Jahrbuch für Gesetzgebung, Verwaltung und Volkswirthschaft 6 (1882), 425.

put it.[72] Although the terms *droit comparé, diritto comparato, derecho comparado*, and so on, continue to be used, they no longer carry the general connotation of a set of universally applicable norms or principles that can be derived from the comparison,[73] notwithstanding the adoption of approaches that seek to identify general legal principles by comparative means in specific legal contexts such as that of the European Union.

3. Public Law Comparison as an Own Field of Research

The new self-awareness of comparative law found expression in new scientific periodicals and the establishment of academic institutions and associations. In Germany, by 1829, the interest in foreign law had led to the foundation of the journal *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* (Critical Journal of Jurisprudence and Legislation Abroad), which, however, ceased publication in 1856. One of the founders was Carl Solomo Zachariae (1769-1843), a law professor from Heidelberg whose wide range of research included state theory and state law (*Staatsrecht*). In 1907, Paul Laband (1838-1918), the already mentioned Georg Jellinek (1851-1911), and Robert von Piloty (1863-1926) founded the *Jahrbuch des Öffentlichen Rechts* (Yearbook of Public Law), which dedicated and still dedicates considerable room to studies of foreign public law, in particular constitutional law. During the Weimar Republic, in 1929 the *Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht* in Berlin launched a new journal of comparative and international law, the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht.* After Second World War, the journal ceased to appear for some years, until the *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*

72 Raymond Saleilles, quoted by Ralf Michaels, 'Im Westen nichts Neues? 100 Jahre Pariser Kongreß für Rechtsvergleichung - Gedanken anlässlich einer Jubiläumskonferenz in New Orleans', Rabels Zeitschrift für ausländisches und internationales Privatrecht 66 (2002), 97, 101.

73 For a critique of the idea that the *droit comparé* constitutes an own legal order cf. Otto Pfersmann, 'Le droit comparé comme interprétation et comme théorie du droit', Revue internationale de droit compare 53 (2001), 275, 277 ff. See, however, Russell A. Miller and Peer C. Zumbansen in their introduction to the volume *Comparative Law as Transnational Law – A Decade of the German Law Journal* (2012), 4, who refer to a widespread understanding of 'the study of transnational law as a process of normative *engagement* through which distinct legal systems increasingly encounter the law and legal culture of other systems'.

(Max Planck Institute for Comparative Public Law and International Law) was created in Heidelberg in 1949 as successor of the *Kaiser-Wilhelm-Institut.* Since then, the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, in English called the *Heidelberg Journal of International Law*, edited by the directors of the Institute, besides playing its role in public international law studies, has provided an important platform for comparative studies in constitutional and administrative law.

The era of National Socialism had devalued the objectives of a liberal-minded comparative law.[74] After the war, the need to rebuild the national legal order did not lead to a simple return to liberal pre-Nazi standards. It enhanced a search for new solutions and generated strong interest in foreign legislation and comparative law even though the science of administrative law more generally remained inwardly focused. One reason might be the concentration on a concretization of the standards of the new constitution, the Basic Law.[75] Efforts to develop public law further at the federal and *Länder* levels aimed at providing effective safeguards against dictatorial and arbitrary exercise of public power. The Basic Law, adopted in the American, British, and French occupation zones in 1949 as Constitution of the Federal Republic of Germany, enshrined strong guarantees of, and judicial protection for, human dignity and fundamental rights. Furthermore, it threw the constitutional order wide open to European integration.

The interest in foreign public law simultaneously induced and enhanced the scientific debate on the objectives and methodological foundations of legal comparison. In this respect, the *Gesellschaft für Rechtsvergleichung* (Society for Comparative Law), established in 1950, became an important forum. In 1963, together with its Austrian counterpart, its 'Public Comparative Law' section held a conference in Vienna that focused on comparison in public law specifically. Helmut Strebel (1911-92) and Rudolf Bernhardt (1925-2021, from 1981 to 1998, judge of the European Court of Human Rights), hinted at the different character of public law and private law. Strebel emphasized that it is the individuality of the organizational

74 For the history of the *Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht* during the period of National Socialism cf. Ingo Hueck, 'Die deutsche Völkerrechtswissenschaft im Nationalsozialismus: Das Berliner Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht, das Hamburger Institut für Auswärtige Politik und das Kieler Institut für Internationales Recht' in: Doris Kaufmann (ed.), *Geschichte der Kaiser-Wilhelm-Gesellschaft im Nationalsozialismus. Bestandsaufnahme und Perspektiven der Forschung* (Wallstein 2000), 490-527.

75 Cf. Schönberger (n. 35), 493, 535.

structures of various states resulting from the different historical, political, and cultural backgrounds that makes a comparison difficult.[76] Bernhardt underlined that the shaping of public law, which primarily refers to the legal relationship between citizen and state, reflects political influences to a higher degree than private law does, and that this often impedes comparison for practical purposes and sometimes makes it difficult to distinguish comparative public law (in particular comparative constitutional law) from comparative politics.[77] Nevertheless, Bernhardt recognized a limited function for legal comparison in understanding national norms, an important role in the making of new laws, and yet-to-be-realized function in identifying general principles of international law and analyzing international treaties.

As far as the methodology of comparative law is concerned, the debate has remained and will remain controversial. Among the methods applied, the functional approach has been most influential. Clearly outlined by Konrad Zweigert (1911-96) and Hein Kötz (born in 1935) in their book on comparative law in the field of private law,[78] it has been explicitly or tacitly accepted and applied by many comparative scholars of public law as a valuable means for identifying functional equivalents in different legal cultures and traditions. The functional approach, in this view, does not primarily search for concordant wordings of laws or isomorphic organizational forms, but aims to grasp the social or juridical function of the compared legal institutions or norms.[79] This presupposes that the comparativist can distance himself or herself from the conceptual and dogmatic background of his or her own legal system and ideally view both of the compared legal orders 'externally' or 'objectively'. Since the function of a regulation or institution can only be explained, if the legal and social environment is taken into consideration, it necessarily includes a contextualization of the objects of comparison. The required depth of the comparison

76 Strebel (n. 1), 405-430.

77 Rudolf Bernhardt, 'Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 431-452.

78 Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, vol. 2 (Mohr 1969); the third edition appeared in an English translation: Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law,* 3rd edn (Oxford University Press 1998).

79 Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3rd edn (Mohr 1996), 33 ff.

undertaken depends on the objective of the research.[80] To give an example: Gaining knowledge about different legal techniques will generally need less contextualization than a comparative evaluation of the effect of judicial instruments, a comparison that also requires empirical studies and social science methodologies. In any case, one has to take care that the material used for the comparison remains – as it has been put – methodologically 'controllable'.[81]

The functional approach has met various criticisms.[82] One critique refers to the use of methods in general. While some authors – in Germany as in other countries – argue that there exists no single method of comparative public law,[83] others maintain that there is no distinctively comparative method at all.[84] The impression of a fundamental lack of methodological basis in comparative law may have arisen not least from the 'omnipresence'[85] of comparisons made without any methodological awareness or reflection.[86] Another critique focuses, from a different perspective, on the limited performance of the functional approach in public law. The arguments range from doubts about the possibility of identifying common

80 Karl-Peter Sommermann, 'Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa', Die Öffentliche Verwaltung 52 (1999), 1017, 1021 ff.

81 Eberhard Schmidt-Aßmann, 'Zum Standort der Rechtsvergleichung im Verwaltungsrecht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 78 (2018), 807, 825.

82 A presentation and analysis of the critical positions can be found in Uwe Kischel, *Rechtsvergleichung* (Beck 2015), 95-108.

83 Giogios Trantas, *Die Anwendung der Rechtsvergleichung bei der Untersuchung des öffentlichen Rechts* (Dresdner Universitätsverlag 1998), 41 ff.; Karl-Peter Sommermann, 'Funktionen und Methoden der Grundrechtsvergleichung' in: Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol. 1 (C.F. Müller 2004), 631, 660.

84 Matthias Ruffert, 'Die Methodik der Verwaltungsrechtswissenschaft in anderen Ländern der Europäischen Union' in: Eberhard Schmidt Aßmann and Wolfgang Hoffmann-Riem (eds), *Methoden der Verwaltungsrechtswissenschaft* (Nomos 2004), 165, 168: 'methodological vacuum'; cf. also Étienne Picard, 'L'état du droit comparé en France, en 1999', Revue internationale de droit comparé 51 (1999), 885, 888.

85 Javier Barnés, 'Sobre el método del análisis comparado en el Derecho. El caso del procedimiento y de la justicia administrativa' in: Pedro Aberastury (ed.), *Estudios de Derecho Comparado* (Editorial Universitaria de Buenos Aires 2016), 53, 54 ff.

86 Cf., also, Axel Tschentscher, 'Dialektische Rechtsvergleichung – Zur Methode der Komparatistik im öffentlichen Recht', Juristenzeitung 62 (2007), 807 ff.

social functions of law or, indeed, any social functions at all,[87] through denying the appropriateness of the functional approach with regard to certain research questions,[88] to the questioning of the presupposed neutrality and objectivity of functional comparativism[89].

Fundamental criticism comes from both legal positivists and postmodern theorists. From the perspective of a severe legal positivism, comparative law should limit itself to the description of different legal systems using general concepts that, at the same time, allow for a sufficient differentiation.[90] On this view, empirical studies would play no part in legal comparison. Postmodern theorists, on the other hand, deny the existence of universal values and emphasize the 'incommensurability of different forms of rationality' in the legal systems.[91] Therefore, they call into question the possibility of a productive outcome of legal comparativism. The postmodern critique can be considered as another form of culturalism. It contains valuable insights, in particular in view of the recognition of the particularities and different perceptions of each legal culture and legal system. However, it underestimates the driving forces behind emerging communities of values. Despite the fact that 'incommensurability does not amount to incomparability',[92] it tends to impede cross-fertilizing comparative discourses.[93]

87 Cf. Kischel (n. 82), 95 ff.; Claus Dieter Classen, *Nationales Verfassungsrecht in der Europäischen Union – Eine integrierte Darstellung von 27 Verfassungsordnungen* (Nomos 2013), 24.

88 Cf. Ralf Michaels, 'The functional method of comparative law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 339, 369 ff.

89 Tschentscher (n. 86), 812 f, who defends a dialectical comparison, that explicitly favours a partisan approach of the comparativist.

90 Pfersmann (n. 73), 286: 'On pourra dès lors appeler « droit comparé » la discipline qui permet de décrire les structures de n'importe quel système juridique à l'aide de concepts généraux présentant la finesse nécessaire et suffisante'.

91 Dominik Richers, 'Postmoderne Theorie der Rechtsvergleichung?', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 67 (2007) 509, 517 (quoting Wolfgang Welsch). A further analysis of the postmodern legal comparison is given by Kischel (n. 82), 103 ff; for a critical assessment cf. also Marie-Claire Ponthoreau, 'Le droit comparé en question(s) entre pragmatisme et outil épistémologique', Revue internationale de droit comparé 57 (2005), 7, 23 ff ; Thierry Rambaud, *Introduction au droit comparé – Les grandes traditions juridiques dans le monde* (Presses Universitaires de France 2014), 22 ff., 32 ff.

92 Pierre Legrand, *Le droit comparé,* 5th edn (Presses Universitaires de France 2015), 75.

93 For the question to which extent legal transfers are possible, cf. Margrit Seckelmann, 'Ist Rechtstransfer möglich? – Lernen vom fremden Beispiel', Rechtstheorie 43 (2012), 419.

Overall, we observe in Germany today, in line with developments in other countries,[94] an increasing pluralism of methods in comparative public law. This pluralism is due not only to scholarly ambitions, but also to the growing practical need for comparative findings in various fields of international cooperation. As a kind of common denominator, one might affirm the simple, but always helpful, insight that the method to be applied depends on the objective pursued by the comparison.[95] In many cases, in particular when searching for convergences between legal orders, the functional approach will play an important role. As long as it does not prematurely assume the existence of equivalent functions or functional equivalents in the compared legal orders, it forestalls recourse to superficial or formal considerations and draws the attention to the functions that a norm or institution fulfils in the respective legal or social order.[96] Understood in a broad sense, it is also sensitive to the path-dependency of legal systems and the cultural, social, and political contexts of legal structures, institutions, and laws.

D. The Contribution of Comparative Administrative Law to the Well-Functioning of European Multi-Level Governance

As already mentioned, studies on comparative administrative law have been encouraged in particular by practical needs of European integration, but also by international cooperation that goes beyond European boundaries.

94 Cf. Ponthoreau, 'Le droit comparé en question(s) entre pragmatisme et outil épistémologique', Revue international de droit comparé 57 (2005), 7, 23 ff.; Rambaud (n. 91), 34 ; Linda Hantrais, *International Comparative Research – Theory, Methods and Practice* (Palgrave Macmillan 2009), 36 ff.; Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014), 1 ff.

95 Christian Starck, 'Rechtsvergleichung im öffentlichen Recht', Juristenzeitung 52 (1997), 1021, 1026; Sommermann (n. 83), 665. Similarly, Catherine Hagenau-Moizard, *Introduction au droit comparé* (Dalloz 2018), 17 f., defends a 'pragmatic' orientation of legal comparisons – in contrast to the traditionally strict and often 'schematic' methodological focus in social sciences. She shares the opinion that legal comparison 'amounts more to heuristics than to a method', as Pierre Legrand had pointed out earlier, see Legrand, *Le droit comparé*, 5th edn (Presses Universitaires de France 2015), 58.

96 Cf. also Christoph Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (Mohr 2005), 8 ff.; Nikolaus Marsch, 'Rechtsvergleichung' in: Andreas Voßkuhle, Martin Eifert and Christoph Möllers (eds), *Grundlagen des Verwaltungsrechts*, vol. 1, 3rd ed. (Beck 2022), 135, 149 f.

Multilateral international treaties increasingly prescribe administrative law principles and administrative procedure. The Aarhus Convention[97] is a prominent example. Such treaties are based on comparative findings in their making and entail comparative considerations in their implementation. Furthermore, knowledge and skills of comparative law are needed in development cooperation, for example when competent advice is requested in the context of legislative reforms. The growth of comparative studies and discourses will have an increasing impact also on the theoretical and methodological orientation of legal science.

I. The Identification and Development of Common Administrative Law Principles

One of the strongest impulses to search for common or converging elements in the legal systems of the European states stems from the jurisprudence of the European Court of Justice according to which the law of the European Union (formerly the European Community) also contains general principles of law derived from the national legal orders. Thus, guarantees like legal certainty, proportionality, the protection of legitimate expectations, and the right to be heard have been identified as general principles. The awareness of common or convergent ideas and principles forms the background of the conceptualization of a 'European Administrative Law' that goes beyond principles and rules of EC/EU.[98] The broad concept, elaborated by Jürgen Schwarze in the 1980s,[99] includes the common basis of administrative law as it is reflected in the national laws of the European states. Therefore, his book *European Administrative Law*, first published

97 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Envi-ronmental Matters of 25 June 1998, UNTS vol. 2161, 447.

98 European administrative law in this narrow sense is dealt with by Paul Craig, *EU Administrative Law*, 3rd edn (Oxford University Press 2018).

99 *Europäisches Verwaltungsrecht im Werden (European Administrative Law in the Making)* was the programmatic title of a volume published by him in 1982. It contains the proceedings of a conference held by the Working Group for European Integration (*Arbeitskreis Europäische Integration*) in Hamburg in 1981.

in German in 1988[100] and later in French[101] and in English,[102] gives not only an analysis of European Community law, but also reports on the guiding administrative law principles in twelve European countries and draws comparative conclusions. It aimed at showing, 'as a kind of handbook, the state of development currently reached in European administrative law' and intended not only to highlight 'the influences of national principles of administrative law on European Community law' but also at revealing 'the repercussions of the newly elaborated European law on the national systems of administrative law'.[103] A similar broad view of European administrative law should also underlie collective volumes, which later appeared in other European countries.[104]

In 2008, Thomas von Danwitz, public law professor and judge of the European Court of Justice, published under the same title (*European Administrative Law*) a systematic study of the national administrative law systems and their interrelation with European Community law.[105] In his view, European administrative law has three dimensions: first, the national laws which form the basis for the execution of community law by the Member States and provide the conceptual sources for Community law; second, the norms and principles developed by the jurisprudence of the ECJ for the execution of community law by European institutions themselves (direct execution); and third, the norms and the principles developed by the ECJ in order to ensure an execution by the national administrative authorities in conformity with community law.[106]

The insight that Community law significantly draws on concepts and rules of national law increases interest in the public law of other EU Member States, which indirectly, by processes of 'Europeanization', might influence one's own legal order. While in former times the study and compilation of foreign administrative laws generally aimed at providing

100 Jürgen Schwarze, *Europäisches Verwaltungsrecht*, 2 vols (Nomos 1988); 2nd edn (Nomos 2005).
101 Jürgen Schwarze, *Droit administratif européen*, 2 vols (Bruylant 1994); 2nd edn (Bruylant 2009).
102 Jürgen Schwarze, *European Administrative Law* (Sweet & Maxwell 2006).
103 Jürgen Schwarze, *Europäisches Verwaltungsrecht*, vol. 1 (Nomos 1988), I.
104 See, in particular, Mario Pilade Chiti and Guido Greco (eds), *Trattato di diritto amministrativo europeo*, 2 vols (Giuffrè 2007); 2nd edn (Giuffrè 2014); Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (eds), *Droit administratif européen*, 2 vols (Bruylant 2007); 2nd edn (Bruylant 2014).
105 Thomas von Danwitz, *Europäisches Verwaltungsrecht* (Mohr 2008).
106 von Danwitz (n. 105), 5 f.

material for general conceptual studies or inspiration for political reform projects,[107] country reports and comparative analyses now had and have to be seen against the background of a 'European administrative compound' (*europäischer Verwaltungsverbund*),[108] characterized by vertical and horizontal cooperation in a European network of administrative actors.[109] Alongside reports and comparative studies on specific topics of administrative law, such as the civil service[110] or the implementation of the EU services directive in the EU Member States,[111] comprehensive works on the administrative law systems[112] and judicial control of public administration[113] in Europe have been published. The most ambitious project is the manual '*Ius Publicum Europaeum*', edited by Armin von Bogdandy and Peter Michael Huber, together with various European colleagues. It undertakes to open up, 'under the perspective of a European legal space in the making', the foundations of public law (constitutional and administrative law)

107 Cf. Franz Becker and Klaus König in their introduction to Carl Hermann Ule, *Verwaltungsverfahrensgesetze des Auslandes*, 2 vols, (Duncker & Humblot 1967-68), vol. I, 3, 14. The second volume already dedicates a chapter to community law. For a discussion of the epistemological and practical goals of comparative public law cf. Starck (n. 95), 1023 ff.; Sommermann (n. 80), 1019 ff.

108 Eberhard Schmidt-Assmann and Bettina Schöndorf-Haubold (eds), *Der Europäische Verwaltungsverbund: Formen und Verfahren der Verwaltungszusammenarbeit in der EU* (Mohr 2005).

109 Cf. Eberhard Schmidt-Aßmann, 'Verfassungsprinzipien für den europäischen Verwaltungsverbund' in: Eberhard Schmidt-Aßmann, Wolfgang Hoffmann-Riem and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol. 1 (Beck 2006), 241-305, § 5 para. 17: 'It [the administrative compound] manifests itself in a growing number of administrative entities in the Union, in decentralized and centralized networks, in a multi-faceted European committee system and in the practical *cooperation* of national and unional administration authorities.' English translation taken from Jörg Philipp Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence* (Springer 2011), 15.

110 Siegfried Magiera and Heinrich Siedentopf (eds), *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft* (Duncker & Humblot 1994).

111 Ulrich Stelkens, Wolfgang Weiß and Michael Mirschberger (eds), *The Implementation of the EU Services Directive* (T.M.C. Asser Press 2012).

112 See Jens-Peter Schneider, *Verwaltungsrecht in Europa*, 2 vols. Vol. 1 presents the administrative law of England and Wales, Spain and the Netherlands (Universitätsverlag Osnabrück 2007), vol. 2 presents the administrative law of France, Poland and the Czech Republic (Universitätsverlag Osnabrück 2008).

113 Karl-Peter Sommermann and Bert Schaffarzik (eds), *Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa*, 3 vols (Springer 2019). The work contains, i.a., studies on the German territories since the beginning of the 19th century as well as on 18 European countries, the United States and Latin America.

in the European legal orders and 'in particular their formative historical experiences, their stages of development, their systematic understanding and the juridical and jurisprudential styles'.[114] Three volumes of the manual are dedicated to administrative law[115] and two more to administrative jurisdiction.[116]

Comparative law is not only present in collective volumes of this kind, but also in many monographs. Apart from dissertations on foreign public law, doctoral theses and habilitation treatises[117] often use comparative methods to classify German law or to question traditional dogmatic approaches. Generally speaking, the perspective is becoming more and more European and transnational.[118] As far as the jurisprudence of the administrative courts is concerned, there are hardly any explicit comparative studies.[119] However, in the context of refugee and migration law, the Federal Administrative Court (which is the supreme court in public law disputes) has in some cases made reference to decisions of French courts when interpreting international or EU law.[120] The Federal Constitutional Court, by contrast, has

114 Preface to Armin von Bogdandy, Pedro Cruz Villalón and Peter Michael Huber (eds), *Handbuch Ius Europaeum*, vol. 1 (C.F. Müller 2007), V f.

115 Armin von Bogdandy, Sabino Cassese and Peter Michael Huber (eds), *Handbuch Ius Europaeum*, vol. 3: *Verwaltungsrecht in Europa: Grundlagen* (C.F. Müller 2010), vol. 4: *Verwaltungsrecht in Europa: Wissenschaft* (C.F. Müller 2011) and Armin von Bogdandy and Peter Michael Huber (eds), *Handbuch Ius Europaeum*, vol. 5: *Verwaltungsrecht in Europa: Gru*ndzüge (C.F. Müller 2014).

116 Armin von Bogdandy, Peter Michael Huber and Lena Marcusson (eds), *Handbuch Ius Europaeum*, vol. 8: *Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren* (C.F. Müller 2019); vol. 9: *Verwaltungsgerichtsbarkeit in Europa: Gemeineuropäische Perspektiven und supranationaler Rechtsschutz* (C.F. Müller 2021).

117 For an explanation of the 'habilitation' (n. 29).

118 To give a recent example: Mattias Wendel's habilitation treatise '*Verwaltungsermessen als Mehrebenenproblem. Zur Verbundstruktur administrativer Entscheidungsspielräume am Beispiel des Migrations- und Regulierungsrechts*' (Administrative discretion as a problem of multi-level-governance: on the compound structure of administrative scopes of decision-making), published in 2019, integrates national, European and international law. For an analysis of comparative law as a 'compound' technique see Markus Kotzur, '"Verstehen durch Hinzudenken" und/oder "Ausweitung der Kampfzone"? Vom Wert der Rechtsvergleichung als Verbundtechnik', Jahrbuch des Öffentlichen Rechts 63 (2015), 355 ff.

119 An example is given by Carl-David von Busse, *Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht* (Nomos 2015), 559 ff.

120 Recent examples are the judgement of 25 April 2019 – BVerwG 1 C 28.18 – para. 20, and of the order for reference to the ECJ of 9 May 2019 – BVerwG 1 C 14.19 – para. 41.

shown more openness to comparative law.[121] Given the transnational relevance of fundamental (constitutional) rights questions[122], not least against the common legal background in the European Convention on Human Rights, this is not surprising.[123] Likewise, Peter Häberle (born in 1934) developed his influential concept of comparative law as the 'fifth method of legal interpretation' (alongside the four classical methods) primarily in respect to fundamental rights.[124] It is likely that the jurisprudence of the European Court of Human Rights, which deduces more and more standards for administrative procedure from Convention rights, will also generate comparative studies in administrative law. In the field of fundamental rights, it has already been the subject of intense comparative research in recent decades.

121 Jörg M. Mössner, 'Rechtsvergleichung und Verfassungsrechtsprechung', Archiv des öffentlichen Rechts 99 (1974), 193-242; Aura María Cárdenas Paulsen, *Über die Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts: Analyse der Heranziehung ausländischer Judikatur* (Kovač 2009).

122 Cf. Peter Häberle, 'Wechselwirkungen zwischen deutschen und ausländischen Verfassungen' in: Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol. 1 (C.F. Müller 2004), 313, 315; Sommermann (n. 83), 636 ff.

123 Although fundamental rights comparison dominates in the practice of comparative constitutional law, the comparison of state organization is increasingly gaining attention, cf. e.g., Albrecht Weber, *Europäische Verfassungsvergleichung* (Beck 2010); Claus Dieter Classen, *Nationales Verfassungsrecht in der Europäischen Union – Eine intergrierte Darstellung von 27 Verfassungsordnungen* (Nomos 2013); likewise, the book *Französisches und Deutsches Verfassungsrecht - Ein Rechtsvergleich* (French and German Constitutional Law – A Comparison), edited by Nikolaus Marsch, Yoan Vilain and Mattias Wendel and published in 2015, dedicates substantial parts to state organization. It applies, similar to Classen's study, an 'integrative approach' for the comparison of both systems, a 'continuous change of perspective', 4. A French version of the book has been published by Aurore Gaillet, Thomas Hochmann, Nikolaus Marsch, Yoan Vilain and Matthias Wendel under the title *Droits constitutionnels français et allemand* (LGDJ 2019).

124 Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat — Zugleich zur Rechtsvergleichung als " fünfter" Auslegungsmethode', Juristenzeitung 44 (1989), 913 ff.; reproduced also in Häberle, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (Duncker & Humblot, 1992), 27 ff.

2. The Need for Comparative Knowledge for Administrative Cooperation and the Creation of Inter-operational Structures

Within the expanding range of comparative law objectives, the search for administrative structures and procedures that will enable national administrations to effectively cooperate will become even more important. Again, it is the law of the European Union that has generated new obligations of national administrations to cooperate. This is the case, for example, in the law of product authorization. In terms of sensitive products, such as genetically modified food, all Member States participate in most authorization procedures by mediation of the European Commission or of a European agency to such an extent that no central authorization procedure is provided for.[125] A further example of a matter where cooperation has been institutionalized is food safety. In this case, however, the creation of isomorphic administrative structures at national level and a corresponding establishment of authorities at EU level were finally triggered by the BSE crisis and the creation of the European Food Safety Authority.[126] In the field of services, it was the directive of 2006 which imposed substantial duties of cooperation[127] and which led, in Germany, to the insertion of a special chapter on European administrative cooperation into the Law of Administrative Procedure.[128] Quite apart from linguistic difficulties in transnational communication, the competences and procedures of the national authorities need to be coordinated and adjusted.

125 For an analysis of the respective authorisation procedures cf. Gernot Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr 2004), 168 ff.; Thorsten Siegel, *Entscheidungsfindung im Verwaltungsverbund* (Mohr 2009), 232 ff.

126 Established by Regulation (EC) No 178/2002 of 28 January 2002, *Official Journal* L 31, 1.2.2002, 1, which led to the creation of corresponding national authorities, thus ensuring a high degree of interoperability between the Member States and the EU. Among the early national authorities created are the *Agencia Española de Seguridad Alimentaria y Nutrición* in Spain (2001), the *Bundesamt für Verbraucherschutz und Lebensmittelsicherheit* in Germany (2002) and the *Autorità nazionale per la sicurezza alimentare* (subsequently renamed *Agenzia nazionale per la sicurezza alimentare*) in Italy. In the UK, the Foods Standards Agency had already been created in 2001 on the basis of the Food Standards Act 1999, chapter 28.

127 See Art. 28 of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services Directive), L 376, *Official Journal* 27.12.2006, 36.

128 See Part I Chapter 3 (§§ 8a-8e) of the Administrative Procedure Act, inserted by Law of 17.7.2009, *Bun-desgesetzblatt (Federal Law Gazette)* 2009 I, 2091.

The need to improve the inter-operability of various administrative systems promotes their convergence and presupposes a mutual understanding of the existing national administrative laws and cultures. Comparative studies are also urgently needed with regard to the impact of EU law on national legislation.[129]

3. The Emergence of a Transnational Science of Administrative Law

With the interdependency and interaction between national, European, and international law becoming the focus of legal analysis, exchange between lawyers of different countries has been and will be more and more perceived as work on common legal problems and principles.[130] This changes the concept of legal research and lessens the limitation of national boundaries, which (long ago) Rudolf von Ihering (1818-92) considered parochial and even 'humiliating'.[131] The emerging transnational field of administrative law could pursue three main objectives: first, systematic studies of and taking part in trans- and international discourse about the concepts and methods of administrative law; second, analysis and conceptualization of the inter-operability of various legal orders; and third, making contributions to the systemic development of European and international administrative law.[132] In this last respect, the Model Rules

129 A comparative view on the Europeanization of national legislation can already be seen in: Jürgen Schwarze (ed.), *Bestand und Perspektiven des Europäischen Verwaltungsrechts - Rechtsvergleichende Analysen* (Nomos 2009); cf. from further publications Attila Vincze, 'Europäisierung des nationalen Verwaltungsrechts – eine rechtsvergleichende Annäherung', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 77 (2017), 235 ff; Cristina Fraenkel-Haeberle, Diana-Urania Galetta and Karl-Peter Sommermann (eds), *Europäisierung und Internationalisierung der nationalen Verwaltungen im Vergleich – Deutsch-italienische Analysen* (Duncker & Humblot 2017); Cristina Fraenkel-Haeberle, Johannes Socher and Karl-Peter Sommermann, Praxis der Richtlinienumsetzung im Europäischen Verwaltungsverbund (Duncker & Humblot 2020).

130 See Jean-Bernard Auby, *La globalization, le droit et l`État*, 2nd edn (Librairie générale de Droit et de Jurisprudence 2010).

131 Rudolf von Ihering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 1st part, 6th edn (Breitkopf und Härtel 1907), 14 f.

132 Karl-Peter Sommermann, 'Objectives and Methods of a Transnational Science of Administrative Law' in: Hermann-Josef Blanke, Pedro Cruz Villalón, Tonio Klein and Jacques Ziller (eds), *Common European Legal Thinking. Essays in Honour of Albrecht Weber* (Springer 2016), 543, 551 ff. For the transnationalization of juridical

on EU Administrative Procedure, elaborated by the Research Network on EU Administrative Law, was a highly successful cooperation of scholars and researchers from various European countries.[133] Other projects are not limited to European discourse[134] and yet others are dedicated to study of other regions of the world.[135] Thus, comparative administrative law has increasingly become part of a worldwide discourse. It has been several decades now since it became no longer appropriate to speak of a specifically 'Germanic' tradition.

E. Perspectives for the Further Development of Comparative Administrative Law in Germany

Comparative administrative law is nowadays recognized as an established field of legal study.[136] The lively debate on methodological questions is in no way a disadvantage, but rather encourages reflection on the right way to

methodology see Antonis Chanos, 'Transnationalisierung juristischer Methodik in Europa' in: Giorgios Dimitropoulos, Athanasios Gromitsaris and Martin Schulte (eds), *Staatsreform für ein besseres Europa* (Duncker & Humblot 2016), 75 ff.

133 See Paul Craig, Herwig C.H. Hofmann, Jens-Peter Schneider and Jacques Ziller (eds), *ReNEUAL Model Rules on EU Administrative Procedure* (Oxford University Press 2017). The text of the model rules and the explanations are available online at http://reneual.eu/index.php/projects-and-publications/reneual-1-0 (last accessed on 24 January 2023). See also Jens-Peter Schneider, Herwig C.H. Hofmann and Jacques Ziller (eds), *ReNEUAL – Musterentwurf für ein EU-Verwaltungsverfahrensrecht* (Beck 2015), and the contributions to a conference held in the Federal Administrative Court in Jens-Peter Schneider, Klaus Rennert and Nikolaus Marsch (eds), *ReNEUAL – Musterentwurf für ein EU-Verwaltungsverfahrensrecht – Tagungsband* (Beck 2016).

134 An example is the elaboration of a model code of administrative jurisdiction by European and Latin American scholars and practitioners in sessions in Germany and Brazil, see Ricardo Perlingeiro and Karl-Peter Sommermann (eds), *Euro-American Model Code of Administrative Jurisdiction - in English, French, German, Italian, Portuguese and Spanish Versions* (Editora UFF,2014).

135 Cf. in particular Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan and Ximena Soley (eds), *Transformative Constitutionalism in Latin America – The Emergence of a New Ius Commune* (Oxford University Press 2017). The book is part of the results of a project carried out by the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

136 Eberhard Schmidt-Aßmann, 'Zum Standort der Rechtsvergleichung im Verwaltungsrecht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 78 (2018), 807, 808: 'eine gefestigte Disziplin'.

deal with the often complex tasks of comparative analysis. With regard to challenges brought about by rapid political and institutional changes, which particularly affect administrative law, it has even been said that comparative administrative law has taken the 'lead of reflection' (*Reflexionsvorsprung*) over comparative private law.[137] This might be an idle question. However, one can no longer assert that legal comparison in public law stands in the shadow of comparative private law. Given the generally greater need to contextualize the objects of comparison, comparative administrative law will often require trans- or interdisciplinary approaches which may, when necessary, be pursued in cooperation with colleagues from other academic disciplines, in particular empirical, social, or political scientists.

The growing interaction between legal and administrative systems and the intensification of international cooperation between scholars in constitutional and administrative law will contribute to a further development of a transnational discipline of administrative law. Irrespective of whether national administrative law will soon be conceived and developed as part of an overarching new *ius publicum europaeum*[138] or whether it will not, the curricula of law faculties should be revised. In the curricula of traditional German law studies, legal comparison is still insufficiently represented. There are specialized Masters programmes in comparative law, but these programmes are not part of the legal studies that lead – after university – to a state examination;[139] and so they hardly reach law students at large. In order to enable young lawyers to deal competently with different legal systems, foreign language training is indispensable. International student exchanges are helpful as they convey legal cultures in their own contexts.

Future reforms of legal education are likely to be linked to the ideal of a 'European lawyer'. Andreas Voßkuhle, the former President of the German Federal Constitutional Court, characterized the European lawyer as someone who is able not only to apply the law, but also to participate in shaping law on the basis of a broad knowledge of legal structures and methodology and a deeper understanding of the interdependence between

137 Schönberger (n. 35), 505 ff.

138 In this sense Armin von Bogdandy, 'Verwaltungsrecht im europäischen Rechtsraum – Perspektiven einer Disziplin' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum*, vol. IV, (C.F. Müller 2011), 3, 32 ff.

139 In order to practise as a lawyer in Germany, one has to pass a two-year clerkship and a second state examination.

legal systems and their cultural backgrounds.[140] Regardless of whether this ideal comes to fruition or not, it is evident that comparative administrative law will play a major role, in Germany as in other European countries, in meeting the practical needs of European cooperation and integration.

140 Andreas Voßkuhle, 'Das Leitbild des "europäischen Juristen" – Gedanken zur Juristenausbildung und zur Rechtskultur in Deutschland', BDVR-Rundschreiben 2/2010, 46, 48 ff. On comparative law as a 'methodological element' of legistics cf. Marsch (n. 96), 164, 184 f.

The Rationale of Constitutions from a Cultural Science Viewpoint

Peter Häberle[*]

Keywords: Basic Law, constitutional dialogue, partial constitutions, European constitutional law, cultural constitutional law, law comparison as mean of legal interpretation

A. Introduction

'The rationale of constitutions from the perspective of cultural sciences' is a 'grand', perhaps too grand a subject. It almost seems more suited for the later years of an academic, a 'senior's-project', if you will. This experience, however, does not necessarily guarantee an adequate treatment of the subject. In retrospect and in anticipation of future developments, the subject could hardly be more enticing. With hindsight, there are many great names we can associate in form or content with our subject matter: F. von Lassalle (1862) for instance, or K. Hesse's '*Normative Kraft der Verfassung*' (1959), before him authors that we may justly label 'Weimar Giants' (R. Smend, H. Heller, H. Kelsen and C. Schmitt), and from abroad perhaps Swiss national W. Kägi who described the constitution as the 'legal foundational order of the State' ('*rechtliche Grundordnung des Staates*') (1945). In the present, and with a view to the future, one may rightly speak of a 'new age of constitutionalism'. Ever since the '*annus mirabilis*' of 1989, Eastern Europe has forged a multitude of good constitutional texts. These constitutional texts, along with those from other world regions such as South Africa (1997), or Switzerland with its new *Bundesverfassung* (1999) – as well as excellent cantonal constitutions – have given the idea of constitutions new 'wings', while also lending it substance. Certainly, constitutional *texts* alone

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do not suffice for a good constitution. The possible discrepancy between constitutional *law* and constitutional *reality* is a much debated, classic subject amongst constitutional scholars. Yet, the idea of a constitution reaches much further: there is talk of 'constitutionalism' in International Law, and the idea wanders even further, namely into European Law: from the European constitutional treaties sprang the constitutional law of the European Union, and spread beyond to the pan-European concept of the 'common European constitutional law' of 1991. With regard to South Africa, Afghanistan or Cambodia, the UN and international law 'induce', accompany and guide the 'constitutional development' (D. Thürer, 2005).[1]

In Italy, the subject is particularly up-to-date and enjoys enduring appeal for a wide variety of reasons: the term '*constitutio*' is itself, of course, inconceivable without Italy. The Constitution of 1946 remains exemplary (for instance in Article 3 Sentence 2), in spite of, or indeed because of, the on-going constitutional amendments (as in the matter of 'new regionalism'), and great constitutional scholars such as C. Mortati, V. Crisafulli[2] or C. Esposito, to name only the departed, who have contributed much to this – our – subject decades ago. This, along with the special '*genius loci*' of Rome and Amalfi, will do its part towards enriching our convention.

B. 'Constitution' (a Legal Positivist Inventory)

Let us approach this thing, 'constitution', through an inventory, so that we may then ascertain its purpose, its 'function'. Written constitutions (which also serve legal certainty) have over time developed certain structural components: they typically open with preambles (partially with references to God, *invocatio dei* or *nominatio dei*) written in celebratory style, akin to cultural science overtures and preludes, seeking to set the tone of the work and establish[3] crucial principles in order to assert an identity (i.e. symbolic articles). Typically, this is followed by two sections – one on fundamental rights guarantees and one on state organisation –, while a colourful, but no less important assortment of concluding and transitional provisions

1 Daniel Thürer, *Kosmopolitisches Staatsrecht*, vol. 1, (2005), 8.

2 On him, see Damiano Nocilla, 'Crisafulli – ein Staatsrechtslehrerleben in Italien', Jahrbuch des öffentlichen Rechts 44 (1996), 255.

3 Peter Häberle, 'Präambeln im Text und Kontext von Verfassungen' in: Johannes Broermann, Joseph Listl and Herbert Schambeck (eds), *Demokratie in Anfechtung und Bewährung, Festschrift für Johannes Broermann*, (1982), 211.

makes the constitution whole. Commonly, the constitution is centred on the state, also referred to as a 'constitutional state', as established through its Constitution. Only recently has the term constitution been expanded to European or even International Law, as indicated above. Sticking to the formal aspects: within the section on state organisation, where the state entities such as parliament, government, the administrative bodies and the courts are constituted (organisational function of the constitution), one may also find the procedures for constitutional amendments (in a rich array of variants) and seldom (exemplary in Switzerland) procedures for drawing up an entirely new constitution (with or without participation of the people) – altogether nuanced attempts by constitutions to accommodate the passage of 'time'.

Let us move on to substance: the 'genus constitutional state' is the cultural achievement of many centuries and of a collection of classical texts[4] from Aristotle via Montesquieu and Rousseau, to the Federalist Papers (1787) and H. Jonas's 'Principle of Responsibility' ('*Das Prinzip Verantwortung*') in environmental law. The constitutional state, while often encountered in several (domestic) variants, can nonetheless be presented in an idealised version of its foundations and individual elements: a human rights regime, growing ever more nuanced in scope and subject matter, a (pluralistic) party democracy, separation of powers, an identity (as in the articles on state symbols, such as national anthems), mission statements, such as the rule of law ('*Rechtsstaat*'), the social state, the cultural state and more recently the environmental state, and often a vertical separation of powers (federalism and regionalism). For a modern constitutional state, constitutional entities such as constitutional courts are common. They have their origins in the USA in 1803, were later established in Europe by Austria (1920) and have gone on to an unprecedented, near global triumph in the decades after 1945 and 1989 respectively. Over time, new subject matters (protection of minorities, ombudsmen, subsidiarity clauses and pluralism articles) have been added: so called 'Europe-Articles' (such as Article 23 of the German Basic Law and Article 7 Section 5 of the Portuguese Constitution, which codify a piece of 'national European constitutional law') or manifestations of the 'cooperative constitutional state' (Article 24 German Basic Law: Openness towards International Law ['friendliness' towards International Law], for instance in support of human rights, international security, conflict resolution and justice; see also Article 7 of the Portuguese

4 Peter Häberle, *Klassikertexte im Verfassungsleben* (1981).

Constitution of 1976, and the earlier example of Article 11 of the Italian Constitution).

C. The German Understanding of Constitution

I. Domestic

Even though the debate over constitutional reform in Italy has thus far not yielded a political result, the dividends of the academic discussion will remain influential in the future and should be observed closely throughout Europe.[5] For now, however, let us turn (only) to the German responses to the question of how the constitutions of constitutional states are to be understood. A priori assumptions and methodology are strikingly varied in Germany on this subject, particularly so during the Weimar Republic (*editor's note: hereinafter referred to as 'Weimar'*). There is an abundance of theories on the 'correct' understanding of written constitutions, their functions and characteristics in contrast to other areas of law, such as traditional Private Law or International Law. The following passage can only provide a cursory overview. A truly complete picture would require inclusion of the specific achievements of the Italian constitutional scholarship, such as C. Mortati's doctrine of the substantive constitution (1946)[6] or G. Zagrebelsky's paper on the '*diritto mite*' (1st edition 1992), as well as A. Paces '*La causa della rigidità constituzionale*' (2nd edition 1996) or P. Ridola's work on pluralism[7] and A. D'Atenas publications on regionalism or the principle of subsidiarity.[8] Equally, the constitutional debates in the USA, as well as in France,[9] would have to be integrated; the same goes

5 See for instance: Associatione Italiana die constituzionalisti, La Riforma Constituzionale, Atti del Convegno Roma, 6-7 Nov. (1998, 1999); Sergio P. Panunzio (a cura di), *I Constituzionalisti e le Riforme* (1998); Sergio P. Panunzio (*a cura di*), *Constituzionaliste e L'Europa* (2002); Giuseppe de Vergottini, *Diritto Constituzionale Comparato* (6th edn, 2004).

6 On this, see Fulco Lanchester (ed.), *Constantion Mortati, Constituzionalista calabrese* (1989).

7 Paolo Ridola, *Democrazia pluralistica e libertà associative* (1987).

8 Antonio D'Atena (*a cura di*), *Federalismo e regionalismo in Europa* (1994). Most recently, *L'Italia verso il 'federalism'* (2003).

9 On this, see Constance Grewe and Hélène Ruiz Fabri, *Droits constitutionnels européens* (1995).

for the lively discussions in Switzerland[10] or in Portugal (G. Canotilho).[11] Spain's constitutional scholarship is also currently 'in bloom'.[12]

Germany is characterised by a particularly intense struggle over the question of what a 'constitution' is and the following keywords will hopefully allow for an initial orientation: while for F. von Lasalle (1862) the nature of a constitution lies in the 'actual distribution of power' ('*tatsächlichen Machtverhältnissen*'), G. Jellinek, in his grand work '*Allgemeine Staatslehre*' (1900), describes the constitution as a mere 'statute with enhanced formal binding force' ('*Gesetz mit erhöhter formeller Geltungskraft*'). From this alone, we can ascertain that individual attempts to describe this genus 'constitution' have often only succeeded in formulating half-truths: a constitution is certainly *also* a statute with enhanced formal binding force, in so far as it may only be amended with a qualified majority through a formalised procedure of constitutional amendment (as in Article 79 paragraph 1 and paragraph 2 German Basic Law, Article 138 of the Italian Constitution),[13] but this mere formal perspective does not suffice: With a view to subject matter and function, a 'constitution' has considerably more to offer.[14]

'Dwarfs upon the shoulders of giants'– this famous prable is, in my view, particularly suited to describe the relationship of German constitutional

10 On this: Kurt Eichenberger and Jean-François Aubert, *La Constitution son contenue, son usage* (1991); Beat Sitter-Liver (ed.), *Herausgeforderte Verfassung* (Universitätsverlag Freiburg 1999); Peter Saladin, *Die Kunst der Verfassungserneuerung* (1998); Daniel Thürer (n. 1).

11 See José J. Gomes Canotilho, *Direito Constitucional* (5th edn, 1991).

12 See only Francisco Balaguer-Callejon, Gregorio Cámara et al. (eds), *Derecho Constitucional*, 2 vols, (1999) (2nd edn, 2005); Pedro Cruz Villalón, *La curiosidad del jurist persa, y otros studios sobre la Constitucion* (1999). From the impressive ibero-american constitutional world: Garcia Belaunde and Fernández Segado (eds), *La Jurisdiccion Constitucional en Iberoamerica* (1997); César Landa Arroyo, *Tribunal Constitucional y Estado Democratico* (1999) (2nd edn, 2004); Paulo Bonavides (see the publication *Direito Constitucional Contemporaneo* (2005), dedicated to him); Diego Valadés, *Constitución y democracia* (2000); Valadés, *El control del Poder* (1998); Eduardo Ferrer Mac-Gregor, *Interpretación Constitucional*, 2 vols (2005); Gilmar F. Mendes, *Direitos Fundamentailis e Controle de Constitutionalidad*, 3rd edition (2004); Gilberto Bercovici 'Die dirigierende Kraft der Verfassung und die Krise der Verfassungslehre am Beispiel Brasiliens', VRÜ 37 (2004), 286 ff.; Hector Fix-Zamudio and Salvador Valencia Carmona, *Derecho Constitucional Mexicana y Comparata* (2001).

13 On this: Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (2nd edn, 1998), 267.

14 On the term constitution, see Häberle (n. 13), 342 ff. and passim; in contrast, Josef Isensee, 'Staat und Verfassung' in: *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 5 (2nd edn, 1995), 591, assuming a pre-constitutional concept of the state.

scholarship from the German Basic Law (1949) up until the present day with 'Weimar'. As the roaring 1920's in Berlin brought about a blossom of art and science, so have the controversies of the Weimar constitutional scholars raised questions and provided answers which are, even today, 'classics' that have led the younger generations to appear as mere 'dwarfs on the shoulders of giants.' This, of course, does not preclude that by standing on their shoulders, we can at times see further than even the giants could!

With this limitation in mind, let us consider a few positions of the '*Weimarer Richtungsstreit*', so intently followed in Italy (for instance by F. Lanchester).[15] R. Smend's work '*Verfassung und Verfassungsrecht*' (1928) grew influential in its time; it is well known in Italy as 'integration theory' ('*Integrationslehre*') and was even translated. Smend views the state as a process of on-going integration in which flags, coats of arms and national anthems play a part. In retrospect, this view should also be seen as an attempt to combat the regrettable polarization of the political powers in Weimar. C. Schmitt, however, chose an entirely different approach. His work '*Verfassungslehre*' (1928) remains a remarkable achievement, although he develops keywords in other papers that are entirely detrimental to the idea of a constitutional state: his 'decisionistic doctrine' ('*dezisionistische Lehre*') should be mentioned here. It claims that political decisions arise from a 'normative nothing' ('*normativ aus dem Nichts*'), a concept refuted by consultation of comparative law materials alone: one need only recall the pluralism of ideas and interests that, for instance, laid the foundation for the exemplary Constitution of Spain (1978). Additionally, one must mention the dreadful suggestion that politics are defined through a 'friend/foe' paradigm. There are, in my view, under a constitution of pluralism, in an open society, 'rivals' and 'opponents', but in principle, no 'enemies'.

The nationally orientated *Integrationslehre* of R. Smend, which in light of the current state of Europe would certainly have to be recast, reminds us of indispensable community forging, the pacifist function of constitutions, the (to use the modern term) fundamental consensus of a society, which includes all citizens and, for instance, is required to facilitate a majority rule with gradual protection of minorities. H. Heller (1934) reminds us of the importance of 'consciously planned and organised cooperation'

15 Fulco Lanchester, *Momenti e Figure nel Diritto Costituzionale in Italia e in Germania* (1997). From the German scholarship: Manfred Friedrich, *Geschichte der deutschen Staatsrechtswissenschaft* (1997), 320.; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3, 1914-1945 (1999), especially 153.

('*bewussten, planmäßig organisierten Zusammenwirkens*'). However, he decidedly has the nation-state, rather than – as it is necessary these days – the constitution in mind throughout his era-defining work, '*Staatslehre*'. Yet, in a constitutional state, there can only be so much state as the constitution constitutes (R. Smend/A. Arndt).

With regard to the German Basic law, an additional 'constitutional dialogue' ('*Verfassungsgespräch*') developed, with prominent participants. Swiss national W. Kägi (1945) coined the phrase of a constitution being 'a legal fundamental order of a state'. He thus hinted towards a path further pursued at later stage: noteworthy are H. Ehmke (the constitution as 'limitation and rationalisation of power and ensuring a free political life' – '*Beschränkung und Rationalisierung der Macht und Gewährleistung eines freien politischen Lebensprozessess*')[16] and K. Hesse ('the constitution as a legal fundamental order of the polity' – '*Verfassung als Grundordnung des Gemeinwesens*')[17]. In my view, a differentiated understanding of constitutions is necessary which accounts for all their diverse functions. For instance, a constitution is, with regard to mission statements and separation of powers, 'encouragement and limitation' ('*Anregung und Schranke*') (R. Smend), and 'norm and assignment' ('*Norm und Aufgabe*') (U. Scheuner) in relation to the *Rechsstaatsprinzip* and the commitment to other basic values. A constitution has very specific functions: it not only limits and controls the exercise of power (through the judiciary), but also establishes and legitimizes power (through elections). It constitutes procedures for the resolution of disputes (for instance through Parliament), it divides areas of competence and organises institutions charged with determining and specifying particular tasks (along the three state functions). Constitutions establish a (cosmopolitan) liberal state as a 'constitutional state of cooperation' (*kooperativen Verfassungsstaat*) (Article 24 German Basic law, Article 11 Italian Constitution, Art. 49 bis Luxembourg Constitution) as well as a 'constituted society', for example with regard to the so-called third-party effect (*Drittwirkung*) of basic rights and the social state principle. It further allows citizens and groups to identify with the state in keeping with their duty to adhere to the law, through the national anthem and state colours (emotional and rational sources of consensus). In cultural constitutional law ('*Kulturverfassungsrecht*') constitutions (for

16 Horst Ehmke, *Grenzen der Verfassungsänderung* (1953).

17 Konrad Hesse, *Grundzüge des Verfassungsrechts in der Bundesrepublik Deutschland* (20th edn, 1995) (reprint 1999), 10.

instance with regard to educational goals in schools) similarly promote values that culturally ground an open society (such as tolerance, respect for human dignity, sincerity, democratic convictions and environmental consciousness). When viewed on a timeline, a constitution is (also) a public process, in the sense that we can distinguish the following 'sphere triad of the republic' ('*republikanische Berreichstrias*'): the state organisational sphere ('*Staatlich-Organisatorisches*') (of state entities, for example through public hearings), the societal-public sphere ('*Gesellschaftlich-Öffentliches*') (such as trade unions, churches and the media) and the deeply private sphere ('*Höchstpersönlich-Privates*') (such as the freedom of conscience).

The public area is a 'breeding ground for democracy' ('*Quellgebiet der Demokratie*') (*Martin Walser*), although, ever since Hegel, we know that in the court of public opinion everything is concurrently 'true and false' ('*alles Wahre und Falsche*'). First and foremost, however, a constitution is the embodiment of culture. I shall return to this point momentarily.

2. A Constitutional Outlook for Europe – Elements of European Legal Culture

The constitutional controversies mentioned above have reached a point of dramatic urgency in the context of the European integration process, in spite of the dual 'no' from France and the Netherlands respectively (2005). The fundamental question remains: Does Europe have a constitution or does Europe require a constitution? Let us begin with a clarification: one should distinguish between European law in the narrow sense of European Union Law and in the broader sense, which includes the Council of Europe with its current 46 members and the OSCE with its 55 members. This exercise alone demonstrates that we must, on the one hand, ask ourselves what our image of Europe contains in a geographic sense: does Europe include Turkey or those parts of Russia on the Asian continent? On the other hand, a Europe of flexible, open borders must nonetheless be conceived of as a complete whole in a substantive, cultural and legal-cultural sense. Europe was in the past, is in the present and will continue in the future to be literally crafted through specific legal principles, fundamental values and cultural substance.

But let us return to the question on the constitution:[18] In my view, Europe has, when taken in the narrow sense of the European Union, through the Treaties of Rome (1957), the Treaties of Maastricht (1992) and Amsterdam (1997), as well as the Treaty of Nizza (2000), established an ensemble of partial constitutions ('*Ensemble von Teilverfassungen*'), albeit not a complete constitution ('*Vollverfassung*') in the classic sense of a constitutional state, as Europe is indeed not a state. The term constitution, however, must be severed from its traditional, state-centric focus. To that end, the German debate utilizes the concept of the EU as an 'association of states' ('*Staatenverbund*') (German Federal Constitutional Court, BVerfGE 89, 155). My own suggestion draws on the wording and image of a 'developing constitutional community of its own kind' ('*werdenden Verfassungsgemeinschaft eigener Art*'), thereby incorporating W. Hallstein's fortunate concept of a 'community' of Europe. When considering the entirety of substantial and functional development, one finds so much has been achieved in the way of constitutional elements and structures that the EU, or to be precise its 25 Member States, can rightly be referred to as a constitutional community '*sui generis*'. We have a European citizenship, which overlaps the domestic nationality. The Schengen Agreement (1993/95) qualifies the notions of state territory and state sovereignty to a point where the 25 EU member states can no longer refer to each other as 'foreign countries', but rather literally 'friendly countries' ('*Freundesland*'), which is to say, as domestic countries ('*Inland*'). Many subject matters and functions of traditional, national constitutions have been wholly or partially transferred to the 'constitutional community of the European Union': fundamental rights guarantees, which are treated as general principles of community law, alongside the fundamental freedoms of EU law as well as religious freedom and the principle of equal treatment; we recall the *Rechtsstaatsprinzip*, which was heavily expanded through the European

18 Dieter Grimm, *Braucht Europa eine Verfassung?* (1994); Peter Häberle, *Europäische Verfassungslehre in Einzelstudien* (1999); see also the interview with Paolo Ridola, Diritto romano attuale 2 (1999), 185. In general: Gil C. Iglesias, 'Zur "Verfassung" der europäischen Gemeinschaft', Europäische Grundrechtezeitschrift 23 (1996) 125 ff.; Iglesias, 'Gedanken zum Entstehen einer europäischen Rechtsordnung', Neue Juristische Wochenschrift (1999), 1; Wolfram Hertel, *Supranationalität als Verfassungsprinzip* (1999); Ingolf Pernice, 'Der europäische Verfassungsverbund auf dem Weg der Konsolidierung', Jahrbuch des öffentlichen Rechts 48 (2000), 205. Additional references in: Peter Häberle, *Europäische Verfassungslehre* (4th edn, 2006), 37, 76 and so on.

Court of Justice in Luxembourg (Principle of Proportionality, a state duty to protect fundamental rights, state liability, etc.); we recall the democratic structures, even though the 'European public' ('*europäische Öffentlichkeit*') is only slowly developing from a public of the arts and culture towards a European public of politics (overthrow of the Santer-Commission 1999, public scandals in the BSE and Bangemann cases); we further continue to observe public relations deficits (such as the lack of specific European issues during the European Elections 1999 and 2004, the low voter turnout and the widespread ignorance of the critical report by the European Court of Auditors 1999[19]). Moreover, the Separation of Powers, as well as pre-federal and regional elements, require further strengthening within the ensemble of partial European constitutions. If one adds the European Convention on Human Rights,[20] which radiates into the EU, and if one considers the tentative steps towards a social and environmental union, one can immediately grasp a 'constitutional fabric' ('*konstitutionelles Gewebe*') in the EU. The individual elements of a 'constitution' would correspond with the different norm ensembles ('*Normenensembles*') of the EU, such as the fundamental order function ('*Grundordnungsfunktion*') (see the Preamble of Maastricht and Amsterdam), the limitation of power function (through EU parliamentary control and the European Court of Justice), the legitimising function (elections through European citizens) and the consensus-focused, programmatic integration function. Particularly the latter, however, requires a novel approach: R. Smend's integration theory (1928), which is traditionally fixated on the nation state, cannot simply be transferred to 'Europe'. Moreover, the national, state constitutions can no longer achieve 'integration' as they have in the past; in a sense, they only make up partial constitutions, their subject matters and functions having 'shrunk' in a European context. The 'European Germany' of Thomas Mann gains a part of its legitimacy (including that of its 16 states) from and by means of the EU. This equally applies, by way of analogy, to the 25 current EU countries. How the EU can be expected to constitutionally accomplish its indispensable integration program with 28 national (partial) constitutions in the future, is an open question. The Ensemble of 28 national and many supranational partial constitutions may prove too lightly connected.

19 On this, Peter Häberle, *Gibt es eine europäische Öffentlichkeit?* (2000); Häberle (n. 18), 163.

20 On this from the German scholarship: Jochen Abr. Frowein and Wolfgang Peukert, *EMRK-Kommentar* (2nd edn, 1996); Christoph Grabenwarter, *Die Europäische Menschenrechtskonvention* (2003).

'Flexibility' and 'core Europe' are the relevant and problematic key words in this regard.

One should recall that Europe, both in a narrow and partially in a wider sense, already displays six elements of European legal culture ('*europäischer Rechtskultur*') that form the basis of its identity, regardless of written constitutional norms: a mindfulness of more than 2500 years of historical, legal development, which finds its philosophical foundation in ancient Greece, as well as the unsurpassed, detailed legal understanding of the Romans (particularly in Private Law: *Papinian*, *Ulpian*, *Paulus*); along with the contributions of Judaism and Christianity. One is reminded of Cicero, or rather his dialogue '*De oratore*' on the five benefits of history: '*Historia vero testis temporum, lux veritatis, vita memoriae, magistra vitae, nuntia vetustatis.*' The second element of European legal culture is scholarship, the legal doctrine. Whereas it grew from pragmatic, at times ingenious, accomplishments such as the '*condictio*' in the great era of Rome, the reception of Roman law in the Middle Ages saw an increase in efforts towards scholarship.[21] In modern times, this move towards scholarship has grown ever more refined: from I. Kant to M. Weber, it has been promoted and likewise observed. The third element is judicial independence, bound solely by statues and the law, as an expression of the separation of powers, to which were added, in the service of truth and justice, the right to a fair hearing, the principles of effective legal protection and due process. The fourth element is religious and ideological neutrality of the state, in the sense of religious freedom, although certainly individual nations still have very diverse constitutional provisions on religion in place (strictly separated in the Swiss Canton of Neuenburg, while a strong cooperative relationship between church and state still exists in Germany). The fifth element of European legal culture is its diversity and unity. The plurality of national legal systems is a part of the identity of Europe. One need only consider the great differences between the Romanic countries on the one hand and Great Britain on the other, as well as, albeit to a lesser extent, Germany. The particularity and universality of European legal culture shall be named as the sixth element. Some principles lay claim to 'universality', such as human rights, particularly under a Kantian understanding, with the possible addition of the *Rechtsstaatsprinzip*. Everything else, I suggest, is but a part of a regional, European community of responsibility ('*Verant-*

21 Foundational: Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (2nd edn, 1967).

wortungsgemeinschaft'). Certainly, there are special connections to the USA (the Virginia Bill of Rights, the reception of J. Locke and the invention of federalism alone attest to this). Thanks to Spain[22] there are equally strong connections to South America (right up to Colombia, Constitution of 1991). But one should not overlook the vast differences to US legal culture, particularly in criminal law. Possibly eastern Europe must, in the long term, develop the particularities of its own legal culture, without denying its close affiliation to Europe. However, the legal culture must nonetheless be praised for its innovations (such as the protection of minorities).

In the light of the development of a 'common European constitutional law' ('*Gemeineuropäischem Verfassungsrecht*')[23] and the work of the European Constitutional Courts in Luxemburg and Strasbourg, the need arises to specifically Europeanise methods and principles of constitutional interpretation. For instance, the need to develop fundamental rights in a 'common European hermeneutic' ('*Gemeineuropäischer Hermeneutik*') and to incorporate specific European concepts such as the '*effet utile*' or the 'interpretation in conformity with EU law', etc. into a constitutional interpretation process[24] that is currently fixated on the domestic constitution (Europeanisation of the methods of constitutional interpretation – '*Europäisierung der Methoden der Verfassungsinterpretation*').

The general domestic openness towards European law (see BVerfGE 73, 339 ff.) must be resolutely integrated into the European principles and methodologies, even that currently developing in the form of the so-called 'national European constitutional law' ('*nationalem Europaverfassungsrecht*'), such as the amended Europe-Article 23 of the German Basic Law, which still eludes Italy and is expressed in the words of Article 7 paragraph 5 of the Portuguese Constitution:

22 From the Spanish scholarschip: Enrique Bacigalupo, *Principios constitucionales de derecho penal* (1999); Francisco Balaguer, 'Der Beitrag Spaniens zur europäischen Rechtskultur', Jahrbuch des öffentlichen Rechts 52 (2004), 11.

23 Peter Häberle, 'Gemeineuropäisches Verfassungsrecht', Europäische Grundrechtezeitschrift (1991), 261.

24 On methods and principles of constitutional interpretation see my contribution 'Zu Methoden und Prinzipien der Verfassungsinterpretation', Revue Européene de Droit Public 12 (2000), 867 ff.; already a classic: Hesse (n. 17), 20; Horst Ehmke, 'Prinzipien der Verfassungsinterpretation', 20 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 20 (1963), 61; Christian Starck, *Praxis der Verfassungsauslegung* (1994); on the 'effet utile' Rudolf Streinz, *Europarecht* (7th edn, 2006), margin number 444 ff.

> 'Portugal shall make every effort to reinforce the European identity and to strengthen the European states' actions in favour of democracy, peace, economic progress and justice in the relations between peoples.'

This constitutional mission statement anticipated the attempts of the EU to introduce 'Stability Pacts' on the Balkans since 1999. Even Article 54 paragraph 1 of the Constitution of the Canton of Bern is notable in this regard: 'The Canton shall participate in cooperation among the regions of Europe.'

3. Culture

After this rapprochement to the genus 'constitution' – both national and European – we now turn to the, provisionally separated, development of the associated term 'culture'.

a) Keywords on the Matter of 'Culture'

The keywords on this thing, 'culture', must, in the present context all the more happily, begin with Cicero, who was arguably the greatest jurist of roman antiquity.[25] Not all historic-terminological effects of this grand beginning can be further elaborated on here, that would constitute a topic in itself. Nonetheless, we should recall works, such as that of Swiss-born J. Burckhardt's 'Culture of the Renaissance' ('*Kultur der Renaissance*') (1919), as well as those of the likes of cultural sociologist A. Gehlen. There are many classical texts on the term culture, likely throughout all the disciplines of the humanities. We are also reminded of the open controversy whether Mathematics is a natural or a cultural science. In Germany, one train of thought on culture leads to M. Weber. In constitutional scholarship in particular, one again arrives at the Weimar classics, with its 'Giants' R. Smend and H. Heller (1934). The latter coined the keyword of 'fundamental rights as a cultural system' ('*Grundrechte als Kultursystem*' – 1928). To him,

25 From the scholarship: Joseph Niedermann, *Kultur, Werden und Wandlungen des Begriffs und seiner Ersatzbegriffe von Cicero bis Herder* (1941).

we owe the proposition of political science ('*Staatslehre*') constituting a cultural science.[26]

It was only with the advent of the 1970s, and more intensely during the 1980s, that this pioneering work was rediscovered.[27] Today, the term culture appears almost abundant: it is utilized for next to anything ('food culture', 'culture of economics', boxing as 'culture', even in the negative sense of a 'culture of death' as coined by Pope John Paul II.). Culture has turned into an *en vogue*, almost ordinary term, whose scientific value is threatened. This may only be remedied through a restructuring and clarification process, a task particularly suited to jurists.

b) Initial Distinctions

A first rough approximation may be achieved through antonyms. Culture stands against 'nature'. The latter is creation, or rather, the result of evolution. Culture is that which is created by man, *sit venia verbo*: a 'second creation', although there are certainly problems in fringe cases. A jurist of cultural goods is confronted with the following question: are religiously 'occupied' parts of nature, such as trees, in fact cultural simply because certain indigenous peoples attach religious beliefs to them ('spirit of a tree')? I would answer affirmatively, as we similarly speak of 'natural monuments' (see Article 40 paragraph 4 sentence 3 of the Constitution of Brandenburg 1992). We should however retain the principle distinction between nature and culture, even though we are mindful of Goethe's marvellous dictum: 'Nature and Art, they go their separate ways, it seems; yet all at once they find each other.'

Thanks to the so-called 'open culture concept' ('*offene[s] Kulturkonzept[]*'), the genus constitutional state and the scholarship that is continuously developing it, may provide some assistance here, in part due to positive constitutional texts in Europe. Thus, presents itself the aspect of

26 Hermann Heller, *Staatslehre* (1934), 32. From secondary literature: Albrecht Dehnhardt, *Dimensionen staatlichen Handelns* (1996). From other disciplines, see for instance the project *Kulturthema Toleranz. Zur Grundlegung einer interdisziplinären und interkulturellen Toleranzforschung*, Alios Wierlacher (ed.), (1996).

27 Peter Häberle, *Kulturpolitik in der Stadt – ein Verfassungsauftrag* (1979); Häberle, *Kulturverfassungsrecht im Bundesstaat* (1980); Häberle, *Verfassungslehre als Kulturwissenschaft* (1982) (2nd edn, 1998); Udo Steiner and Dieter Grimm, 'Kulturauftrag im staatlichen Gemeinwesen', Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 42 (1984), 7 and 46.

'high culture', in the sense of 'truth, goodness and beauty' in the antique tradition, the Italian humanism and the German idealism, as found in some educational goals of constitutions of the German states (see Article 131 paragraph 2 of the Bavarian Constitution of 1946). The 'folk culture', safeguarded in developing countries as the 'indigenous culture' (see Article 66 of the Constitution of Guatemala of 1985), is a second category. The constitutional state does well not to marginalize them: democracy also thrives on this kind of culture, one need only think of the federalism and regionalism that seek to protect the small, the local home. Alternative and subcultures are a third category. They can provide nourishment for high culture: the Beatles have, after all, turned into classics. We should further mention 'counter cultures' ('*Gegenkulturen*'), such as the former labour movement and today that of the unemployed. Expanding the term 'art' and thus the scope of the freedom of Art ('*Freiheit der Kunst*') (see the open art term – '*offener Kunstbegriff*'),[28] underscores that alternative culture, right up to the boundaries of pornography, must be afforded a chance. In a 'constitution of pluralism' ('*Verfassung des Pluralismus*') an open, pluralistic concept of culture is only consistent. Jurists have often enough, and not solely in criminal law, embarrassed themselves when they rashly rejected the label of 'art' or 'culture' for newer works.

c) Culture in the Constitution: Cultural Constitutional Law

There is a further, particularly dense connection between constitutional law and culture: in the so-called cultural constitutional law. On a plane of internal, regional and global character, a host of examples may be unearthed. One need only think of the international protection of cultural goods, for instance through the UNESCO treaty,[29] and of the European Cultural Convention of 1954. We shall only sketch the national constitutional law in keynote form. We can distinguish between: general cultural state clauses ('*Allgemeine Kulturstaatsklauseln*') as for instance in Bavaria in Article 3 paragraph 1: 'Bavaria is a legal, cultural and social state.' (1946); furthermore, it is worth mentioning the beautiful phrase in Article 40 paragraph 1 of the draft Swiss Constitution by Kölz/Müller (1984): 'Culture serves

28 See with further references Ingolf Pernice in: Horst Dreier (ed.), *Grundgesetz-Kommentar*, vol. 1, (1996), Article 5 III, margin number 16 ff. (2nd edn, 2004).

29 See Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (2nd edn, 1998), 1106 ff.

to remind man of his relationship with his fellow man, the environment and history.' ('*Die Kultur trägt dazu bei, dem Menschen seine Beziehung zu Mitmenschen, Umwelt und Geschichte bewusst zu machen*'),[30] and the more particular cultural state clauses, such as the cultural federalism of Switzerland and Germany, as well as the right to adult education (Article 35 of the Constitution of Bremen of 1947, Article 33 of the Constitution of Brandenburg of 1992). Article 10 of the Constitution of Benin (1990) affords anyone a 'right to culture'. On the plane of fundamental rights, religious freedom, the freedom of art and science may be considered cultural freedoms, as profoundly connected by Goethe: 'He who has science and art, has religion; he who has neither, let him have religion.' ('*Wer Wissenschaft und Kunst hat, hat Religion; wer diese beiden nicht besitzt, habe Religion.*'). The trinity of religion, science and art grounds an open society, creates anew the resources for the development of the constitutional state and renders comprehensible to man and citizens alike the proposition of constitutions as culture. Further tried and tested fields of cultural constitutional law are federalism, thriving especially in Switzerland and in Germany ('cultural federalism' – '*Kulturföderalismus*'), as well as regionalism ('cultural regionalism' – '*Kulturregionalismus*'), the 'little brother' of federalism – which is strongly represented in Spain with its autonomous regions and, sadly, significantly weaker in Italy. Nonetheless, the *Corte* in Rome did cast its vote in favour of Italy's cultural diversity in 1998, through a landmark ruling on the protection of the Ladin language minority. While federalism and regionalism concern themselves with the state 'enclosure' for the cultural diversity of a people, the protection of cultural goods safeguards the creation of culture itself (see the traditional preservation of monuments, for instance in Article 62 of the Hessian Constitution of 1946). Some constitutions offer contributions through creative text passages, as successfully demonstrated, for instance, by the Constitution of Guatemala with its right to 'cultural identity' (Article 58) or Article 6 paragraph 1 of the Constitution of Poland of 1997: 'The Republic of Poland shall provide conditions for the people's equal access to the products of culture which are the source of the Nation's identity, continuity and development.'

In Germany, the so-called 'state-church law' ('*Staatskirchenrecht*') is a special breed of cultural constitutional law (Article 140 German Basic

30 Cited from Jahrbuch des öffentlichen Rechts 47 (1999), 333 (Documents of the Swiss Constitution and draft constitutions). See also earlier documents in Jahrbuch des öffentlichen Rechts 34 (1985), 424.

Law). In my view, this term is, however, particularly questionable: Article 137 paragraph 1 of the Weimar Constitution in conjunction with Article 140 German Basic Law states: 'There is no state church'. This means, in my opinion, that there cannot exist any 'state-church law'. However, both Italy and Germany have indeed developed nuanced constitutional law on religions, which is currently particularly challenged on a European level (keyword: Islam). This leads us to:

d) Cultural Constitutional Law in the EU

The idea of a 'European cultural constitutional law perspective' was first raised in jurisprudence in 1983[31] and from the very beginning referred to the entirety of Europe, including the ECHR and the European Social Charter. The legal positivist keywords of all existent norms in constitutional theory at the time were, among others, the 'cultural public of Europe' ('*kulturelle Öffentlichkeit Europas*'), the 'developing cultural constitution' ('*werdende Kulturverfassung*') of Europe, 'Europe between cultural heritage and cultural assignment' ('*Europa zwischen kulturellem Erbe und kulturellem Auftrag*') (Europe as a cultural process – '*Europa als kultureller Prozess*'), 'cultural fundamental rights as part of the freedom of culture' ('*kulturelle Grundrechte als ein Stück Freiheit der Kultur*'), 'the way towards a multicultural society in Europe as a whole and in its individual states' as well as 'decentralised organisational structures' – the essence of a cultural constitutional law in Europe. To be clear, in 1983 there was no Treaty of Maastricht (1992), nor of Amsterdam (1997) nor Nizza (2000). Nonetheless, these treaties underlined the existence of cultural constitutional law in the EU in a legal positivist sense. A small detour ('*Inkurs*') shall prepare us for the theoretical framework of the upcoming fourth section entitled: 'Constitutions as culture' and at the same time serve to refute the misconception that Europe can be reduced to a mere economic region sustained by the EURO, a Europe without a soul. As much as a European history book, authored at a round table of academics from all European nations, remains a *desideratum* of educators (which, however, exists on a bilateral basis between Germany and Poland), so must the cultural constitutional law of the EU, as well as that of Europe in a wider sense, be unravelled dogmatically in the future.

31 See my contribution 'Europa in kulturverfassungsrechtlicher Perspektive', Jahrbuch des öffentlichen Rechts 32 (1983), 9 ff.

At this point, a few keywords must suffice.[32] Characteristically, the preamble of the Treaty of Maastricht (1992) already hinted at deep cultural layers: for instance, in the words 'solidarity between their peoples while respecting their history, their culture and their traditions' and 'thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world.' (Remark: the term of 'European identity' is already *prima facie* a term from cultural sciences!). Maastricht also pioneered the creation of a cultural constitutional law of the EU, which we shall return to in the discussion of the Treaty of Amsterdam. The *sedes materiae* is formed by Article 151 TEC. Its first paragraph reads:

> 'The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.'

The plurality of national and regional cultures is referenced jointly with the 'cultural heritage'. Such cultural heritage clauses have also found their way into newer, national constitutions and their references to Europe 'as a whole' leave us to unravel this fortunate term in earnest. The term perceives Europe from the perspective of its historical development, but certainly does not exclude an acknowledgment of the extent to which Europe in particular continues to draw from its non-European roots and contributors: one need only think of Arabian culture, which merged into Andalusia and Palermo. Among the cultural action of the Community mentioned in Article 151 paragraph 2 TEC, only the improvements to the 'knowledge and dissemination of the culture and history of the European peoples', the 'conservation and safeguarding of European cultural heritage' and the 'non-commercial cultural exchanges' shall be pointed out here. Those who would forget that Europe developed from and will advance from its culture should recall the cultural diversity clause in paragraph 4: 'The Union shall take cultural aspects into account in its action under other provisions of

32 The scholarship appears to be suddenly abundant: see for instance Georg Ress and Jörg Ukrow, *Kommentar zur Europäischen Union* (1998), Article 128 EGV; Hermann-Josef Blanke, *Europa auf dem Weg zu einer Bildungs- und Kulturgemeinschaft* (1994); Stefanie Schmahl, *Die Kulturkompetenz der Europäischen Gemeinschaft* (1996); Jürgen Schwarze, 'Die Kompetenz der Europäischen Gemeinschaft auf dem Gebiet der Kultur' in: id. (ed.), *Geistiges Eigentum und Kultur im Spannungsfeld von nationaler Regelungskompetenz und europäischem Wirtschafts- und Wettbewerbsrecht* (1998), 125 ff. Additional references in Häberle 2006 (n. 18), 489.

the Treaties, in particular in order to respect and to promote the diversity of its cultures.' – which refers to the often-stressed principle of subsidiarity (see Article 5 TEC). The particular culture clauses of the TEC, for instance regarding general and vocational education, as well as those regarding the youth (Article 149) with the beautiful phrase of the 'the European dimension in education', or those concerning research (Articles 163 et seq. TEC) shall only be briefly acknowledged here.

In closing, let us examine the TEU for statements relevant to cultural science: we read of the 'Union's objectives', for instance its claim to identity on the international plane (Article 2 paragraph 1 TEU), a similar identity clause is also found in Article 6 paragraph 3, requiring the Union to respect the 'national identities' of the Member States. Similarly, invoking the ECHR as part of the 'constitutional traditions common to the Member States' which 'shall constitute general principles of the Community's law', is in itself a mere cultural science fundamental values clause, as much as Article 11 paragraph 1 TEU is a mission statement clause: 'to safeguard the common values, fundamental interests' etc. Paragraph 2 urges the member states to act 'in a spirit of loyalty and mutual solidarity.' These 'spirit-clauses' ('*Geistes-Klauseln*') are themselves a classic element of many constitutional state constitutions and regional constitutional documents.[33]

Certainly, 'the spirit goes, where it will' ('*der Geist weht, wo er will*'), but jurists can still occasionally pin it down and thus, perhaps over the course of a century, along with the necessary humility in the face of Montesquieu's 'Spirit of the law', develop an addendum entitled 'Spirit of the European constitution as culture'.

The much talked of Europeanization of individual fields of law, European Private Law and European Criminal Law, should be mentioned here, along with the 'Europeanization of administrative law'[34], which sadly has still not been connected to 'European Constitutional Law', although it remains imperative. Ever since R. Prodi, at the latest, the demand for a new 'administrative culture'[35] in the Europe of the EU/EC has been deafening,

33 See only the preamble to the ECHR (1950): 'common heritage'. From the literature with additional references see Häberle (n. 13), 10 ff., 98 ff., 376 ff., 604 ff. and passim.

34 On this from the literature: Jürgen Schwarze (ed.), *Europäisches Verwaltungsrecht*, 2 vols (1988) (2nd edn, 2005); Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (1998), 307.

35 On the term 'administrative culture' for the national sphere: Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (1982), 20, recital 25; from the more recent litera-

including, for instance, the personal responsibility of the members of the Commission, more transparency of administrative actions, etc.

D. Constitutions as Culture

I. Initial Propositions

In light of the above, the proposition of a 'constitution as culture' is proven consistent. No longer is it a question of constitutions *and* culture, but rather, constitutions *as* culture. Mere legal outlines, texts, institutions or procedures will not suffice. Constitutions are not solely a legal order for jurists to interpret according to the old and new rules of their trade; they are also an important guideline for those not versed in legal matters: the citizens. Constitutions are not mere legal texts or normative rule-books, but an expression of cultural development, the means to cultural self-presentation of a people, a mirror of their cultural heritage and foundation for renewed hope. Living constitutions are the joint product of all the constitutional interpreters of an open society. They are far more in their form and substance than mere expressions and conveyance of culture; they are a framework for cultural (re-)production and reception and at once a memory of overcome 'cultural' norms, experiences, at times even wisdoms. Thus, their cultural relevance gains all the more depth. This is perhaps nowhere more beautifully expressed than in the words of H. Heller, who, in channelling Goethe, declares the constitution to be a: 'cast form, alive and developing.' ('*geprägte Form, die lebend sich entwickelt*').

The stages of the developmental history of this 'constitutional state', with the ever changing facets of its classic constitutional texts from Aristotle to H. Jonas – albeit under a wide understanding, although some nonetheless, over time, often transform into constitutional texts in a narrow sense (as for instance with Montesquieu's Separation of Powers) –, but also the 'counter classics', provoke questions such as that posed by B. Brecht: 'All state power emanates from the people, but where does it go?' ('*Alle Staatsgewalt geht vom Volke aus, aber wo geht sie hin?*'). All these elements – the struggle for an approximate 'correct' understanding of constitutions and finally laying bare the general and particular cultural constitutional law – demonstrate,

ture: Detlef Czybulka, *Verwaltungsreform und Verwaltungskultur, Festschrift Knöpfle* (1996), 79.

in conjunction with the opening of constitutional theory to comparative and cultural scientific aspects: constitutions *are* culture, with many layers and distinctions. Constitutions absorb the cultural experiences of peoples and from their fertile ground are nourished cultural hopes right up to specific utopias, as for instance in the case of German reunification. Individual constitutional principles draw on the deeper cultural layers, as for instance with the (differing) understanding of regionalism, which is now experiencing its breakthrough in the United Kingdom (Scotland, Wales, Northern Ireland), or with federalism ('cultural federalism' in Germany). Even and especially Europe, which is currently bringing itself into constitutional shape, ultimately founds itself on the six evolved elements of its legal culture, as described above. Europe's identity is rendered accessible through a cultural science approach; the protection of the national identity of the Member States in the treaties of Maastricht (1992) and Amsterdam (1997), as well as Nizza (2000), is an expression of Europe's plurality, which is itself in the end a cultural plurality. The same applies to the preliminarily failed EU Constitution of 2004.

2. Insights

The insights gained from a paradigm of 'constitutions as culture' shall now be sketched: constitutional theory is (re-)introduced to the circle of the other cultural sciences, such as literature and music. Similarly, to the cultural sciences, constitutional theory works both on and with texts (constitutional theory as a 'legal text and cultural science'), moreover, there is a certain familiarity between written constitutions and three major world religions, in the sense that they constitute 'book religions'. Thus, even theology moves into view, as far as it operates in a hermeneutic sense (since Schleiermacher), although texts are oftentimes only a reference to their underlying cultural context. This close connection between constitutional texts and literature or music, respectively, is best studied (besides, of course, through national anthems) in the preambles. Their celebratory and exalted tone is literally intended to 'set the mood' of the following work: similar to prologues, overtures or preludes. Switzerland, for instance, enlisted the help of a poet (A. Muschg) in 1977, the 'round table' of East Berlin in 1989 called upon Christa Wolf. Equally, one should mention the often defined 'national anthem' (as, for instance, in Article 28 paragraph 3 of the Polish Constitution of 1997). National anthems belong to the category of

'emotional sources of consensus', the cultural identity elements of a polity. They are often mired in controversy and from this negative perspective they demonstrate how lowly or highly they are regarded in an anthropological sense. The established power of Verdi's 'Nabucco' (Chorus of the Hebrew Slaves), the 'secret national anthem' of Italy, in dispelling the secessionism of U. Bossis 'Pandaria' ('*Vorfall in Mailand*') (1995) need not be recalled.

The concept of a constitution as culture can also better account for the phenomenon of an evolution in the meaning of constitutional norms without formal textual amendments. R. Smend's classic work from the 1950s states: 'When two fundamental laws state the same thing, they do not mean the same thing' ('*Wenn zwei Grundgesetze dasselbe sagen, meinen sie nicht dasselbe*'). This still rings true today, in spite of the globalized production and reception process in which a wide variety of national species of the genus constitutional state develop. Moreover, terms such as 'fundamental rights culture' ('*Grundrechtskultur*') and 'constitutional culture' ('*Verfassungskultur*'), as suggested in Germany in 1979 and 1982 respectively,[36] are only conceivable in the framework of the above sketched cultural science understanding of constitutions.

Finally, two additional insights should be noted: In Germany, the term constitution traditionally refers to the state, which, ever since G. Jellinek, presents itself in the shape of the three elements theory ('People, Territory and Sovereignty'),[37] ignoring culture. Today, culture must be incorporated, if not as the 'first', then as the fourth element of a constitutional state.[38] Moreover, the term constitution should be freed from its fixation on the state. International Law scholarship, or rather A. Verdross, proposed exactly this in 1926 ('The constitution of the International Community' – '*Die Verfassung der Völkergemeinschaft*'). Today, in light of the constitutional perspective of the EU/EC, a state reference no longer appears workable.[39]

The other insight likely lies in the fact that constitutional scholarship, understood as a cultural science, better expresses the 'vertical', 'idealistic'

36 Peter Häberle, *Kommentierte Verfassungsrechtsprechung* (1979), 88, 90; Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (1982), 20.

37 On the term constitution, see Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. 1 (2nd edn, 1984), 19.

38 An earlier, albeit not further pursued suggestion by Günter Dürig, 'Der deutsche Staat im Jahre 1945 und seither', Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 13 (1955), 27, 37 ff.

39 On this, see Peter Häberle, *Europäische Verfassungslehre in Einzelstudien* (n. 18) passim, especially 15 ff. for additional references, as well as *Europäische Verfassungslehre* (n. 18), 349.

and if you will 'platonic' dimension, than when understood as a social science. Human dignity is a cultural, anthropologic premise that was earned through countless cultural socialisation processes – it allows the citizens to 'walk tall' and explains why Hegel vividly refers to education as the 'second birth' of a human being, why A. Gehlen demands a 'return to culture' and further explains why culture is the 'second creation.' Democracy then is the organisational consequence of human dignity, which we understand in the sense of I. Kant. The normative claim which constitutional principles make, the limitations they place on (power) politics and economic domination, their 'directing power', as made tangible in state mission statements ('*Staatsziele*'), and their postulates of justice, which are often left unfulfilled – all these can only be conceptualised through social sciences, which take the normative seriously. Jurisprudence is therefore most certainly not a 'social science', as propagated by the German student movement of 1968. A constitution is equally not identical to the 'true balance of power' (though F. von Lassalle, 1862, claims this). The governing power and the governing will, the 'normative power of a constitution' (K. Hesse) works through culture: guiding principles, educational goals, but also the legal protection of citizens through fundamental rights and an independent judiciary.

3. Reservations and Limits

Nonetheless, certain reservations and some limitation of this approach must be acknowledged. The specific normativity of a constitutional state's constitution should be recalled. It differs from the validity of the Torah, of Biblical texts or of Quran verses, as the hallmark of a constitutional state is an open society (K. Popper) and the 'constitution of pluralism'. One should further recall the specific 'tools of the trade' of jurists, they are not entirely formalised rules of art, with which they interpret a constitution or other norms. F. C. von Savigny (1840) canonised the four methods of interpretation (textual, historical, systematical and telos, already tentatively practiced in ancient Rome, for instance by Celsus), which are these days supplemented by a 'fifth', the comparative legal method,[40] as received by the Constitutional Court of Liechtenstein. As flexible as the interplay of

40 Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat', Juristenzeitung 44 (1989), 913. On methodical consequences of a comparative approach in general, see: Ernst Kramer, *Juristische Methodenlehre* (1998), 190

the four, or rather five, interpretation methods may be in individual cases and as intently as this pluralism must be directed towards a specific goal by reference to postulates of justice: these rules of art are indispensable. Even and especially a 'European Jurist', thus gains 'autonomy' from other sciences, but likewise within the framework of the cultural sciences. The relative autonomy of jurisprudential treatment of legal texts and cultural contexts prevails even in the face of all hermeneutic analogies or interpretational considerations (as with the appreciation of an image by Rembrandt) and all reception theory commonalities (as, for instance, in the sense of H. R. Jaus's Constance School in Literature). Naturally, jurists are no strangers to pre-conceptions and paradigms (such as the 'round table' as a new social contract), are mindful of change and transition (for instance with regard to time sensitive projects like the inter-generational contract ['*Generationenvertrag*']) and occasionally experience the 'overthrow' of paradigms (for example the abolition of the death penalty as a form of 'compensatory' ('*wiederherstellende*') retribution in criminal law); but their paradigms resonate in the medium of 'their' science, even if it happens to be a cultural science.

4. The Limitations of Constitutions

As much as the 'normative power of constitutions', along with their authorization for the (controlled) exercise of power, have been placed front and centre, as much praise as has been voiced for the new constitutions that emerged in this 'era of constitutions' since 1989 ('*Verfassungszeitalter*') and as much as the author has permitted himself to profile and give contours to his cultural understanding of constitutions: as academics we must pause to critically assess our work – keeping a professional distance, and cautioning ourselves is necessary with every draft. Specifically: Neither constitutional texts, nor a constitutional state should be overestimated in terms of scope and 'competence'. There are limits to what they both can bring about.

On this subject, a few key points: Even though constitutions are sensible as a means of curtailing and rationalising the exercise of power, humans are, after all, involved and there will consequently be errors and deficits along with abuses of power. Politics and power will continue to test the

(2nd edn, 2005); on the European dimension, see Helmut Coing, 'Europäisierung der Rechtswissenschaft', Neue Juristische Wochenschrift (1990), 937.

constitutional state, and it may not always prevail. In Germany, the manipulated, pre-mature dissolution of the *Bundestag* (*editor's note: the German Parliament*) by the Federal Chancellor in the summer of 2005 is such an example. Neither the Federal President, nor the Federal Constitutional Court (BVerfGE 114, 121, Judgment of 25.8.2005)[41] were able withstand the momentum of an, in my opinion, unconstitutional, process put in motion by former Federal Chancellor G. Schröder. A further example from Italy is the, from the perspective of constitutional theory, intolerable, but evidently legal accumulation of political, economic and media power in the hands of Prime Minister S. Berlusconi. On an international level there are additional examples, especially as the 'constitutionalisation' of International Law is still ongoing, and it remains questionable to what extent it can and should succeed. This refers to the violations of International Law such as the Iraq War of the USA, possibly also to the intervention and attacks by NATO in Serbia and Kosovo that are defended as 'humanitarian intervention'. Finally, we should remind ourselves of the 'internal' limitations of constitutions: morals and ethics. Constitutional law and morality must remain separated as a consequence of the long developmental history of the constitutional state. Where they meet, as in Islamic states or other forms of totalitarian regimes, individual freedom inevitably falls by the wayside.

Apart from this, we should recall the general limits placed on all human thoughts and endeavours. Even constitutional states remain mere human constructions, although they do well to recall God through references in their preambles ('responsibility before God' – '*Verantwortung vor Gott*' [*editor's note: this is a direct quote from the Preamble of the German Basic Law*]), as in South Africa and Switzerland. Even the constitutional state can, at best, legitimise itself by reference to a 'cautiously optimistic' conception of humanity.[42] Especially the constitutional state understands that humans, by their nature, tend to abuse power: the wisdom of Montesquieu. Even constitutional law scholarship is, after all, the business of fallible, mistaken human beings: an 'eternal *search* for truth'. Nonetheless, constitutional scholarship must bind itself to the 'principle of responsibility' ('*Prinzip*

41 On this, Wolf-Rüdiger Schenke, 'Das "gefühlte" Misstrauen', Zeitschrift für Politik 53 (2006), 26; Tonio Gas, 'Die Auflösung des Bundestages nach Art. 68 GG mittels unechter (auflösungsgerichteter) Vertrauensfrage', Bayerische Verwaltungsblätter 137 (2006), 65; Hans-Peter Schneider, 'Der Kotau von Karlsruhe', Zeitschrift für Politik 53 (2006), 123.

42 On this, Peter Häberle, *Das Menschenbild im Verfassungsstaat* (3rd edn, 2005).

Verantwortung' – H. Jonas) and must endeavour to walk tall ('*aufrechter Gang*' – E. Bloch).

E. Outlook: the 'Future' of the National Constitution in a Globalised World

While the preceding passage may have sounded somewhat bleak, the concluding outlook will dare to strike a more optimistic tune. The constitution – all the more if supported by law comparison as mode of its interpreration ('*Rechtsvergleichung als fünfte Auslegungsmethode*'[43]) has a future,[44] albeit in an ever-changing world. A national constitutional state makes sufficient sense, especially in a European context and in a globalised world, particularly so when intensified through a cultural science approach. Some of its functions and subject matters may fade and shrink in the face of the Europe of the EU, in which many classical constitutional states are overshadowed by European Constitutional Law (as, for instance, with the three classic elements of the state: a people, a territory and sovereignty; 'Schengen', EU citizenship, the constitutional court that is the European Court of Justice), but new ones are also added (as with regard to the protection of minorities and new fundamental rights, for instance to cultural identity). The idea of a constitution finds new purpose through a process described as the constitutionalisation of International Law: human rights and human dignity are, after all, typical subject matters of national constitutions, which have grown into International Law and are now returning back to the domestic realm. International-Law-friendly constitutional law and constitutional state-focused International Law are merging to form two sides of the same coin, albeit this is currently only noticeable in rough outlines. In other words: the future of (nation state) constitutions lies in International Law. This could lead to a 'new school of Salamanca', to which 'Amalfi' has perhaps today contributed some valuable insights. Not only must a living constitution flow from human dignity, with time, even International Law could find in human dignity, seen as a cultural-anthropological premise, its ultimate point of accountability.

43 Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als "fünfter" Auslegungsmethode', Juristenzeitung 1989, S. 913 ff.

44 On this, see Gustavo Zagrebelsky and Pier Paolo Portinaro (eds), *Il Futuro della Constituzione* (1996).

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

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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-

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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'.

Comparative Law Beyond Post-Modernism

Anne Peters and Heiner Schwenke[*]

Keywords: post-modernist critique, cultural relativism, hegemony, functionalism, reflexivity, interdisciplinary, intercultural hermeneutics

A. Introduction

The legal version of post-modernism has not failed to challenge comparative law. It points out that, traditionally, comparatists have participated in a project of objectivity, universalism and neutrality of law, of which the 'new' approach to comparative law is altogether sceptical.[1] In the era of globalisation, both the discipline and its critique have gained relevance. What the transition of post-socialist countries and the unification of Europe have affected regionally, globalisation now accomplishes on a global scale: it creates desires for harmonisation and, as a pre-requisite, legal comparison. However, not only the technical function of comparative law is needed, but also its critical potential. In the process of globalisation, different legal systems and different cultures are confronted with each other and must interact. This provokes new questions about the options and limits of comparative law and legal unification, regarding, for instance, the applicability of specific moral and legal standards to other cultures by comparatists and law-makers. These questions are all the more pressing as we begin to realise that governing globalisation, in particular economic globalisation, with the

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1 David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance', Utah Law Review (1997), 545, 548.

help of global law perhaps requires a concept of a global legal order which is based on a 'global legal pluralism'.[2]

Challengers of the allegedly 'ideological, methodologically flawed, and theoretically vacuous'[3] traditional comparative law call their approach a critical one,[4] a 'new approach',[5] a 'cultural immersion approach'[6] or 'engaged comparativism',[7] while others have named those scholars, 'discourse analysts',[8] or – after a seminal conference at the University of Utah in October 1996 – the 'Utah' group'.[9] The alternative new approaches have brought to comparative scholarship the tools of critical theory, feminism, literary theory, and postcolonial theory. Our article concentrates on specific features of those approaches and tools which we will gather under the label 'post-modernist'. This is of course a simplification which probably does not do justice to all facets and strands of new scholarship. Some of

2 Francis Snyder, 'Governing Economic Globalisation: Global Legal Pluralism and European Law', European Law Journal 5 (1999), 334-374.

3 Günter Frankenberg, 'Stranger than Paradise: Identity & Politics in Comparative Law', Utah Law Review (1997), 259 (265); see also Jonathan Hill, 'Comparative Law, Law Reform, and Legal Theory', Oxford Journal of Legal Studies 9 (1989), 101 (113): '[C]omparative law in its 'applied version' ... is faced by very serious, if not insoluble theoretical problems'.

4 Seminal, Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law', Harvard International Law Journal 26 (1985), 411-455; see also Nathaniel Berman, 'Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion', Utah Law Review (1997), 281 (281).

5 See the Symposium 'New Approaches to Comparative Law', held at the Utah Law School in October 1996, papers published in Utah Law Review (1997), 259.

6 Vivian Grosswald Curran, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law', American Journal of Comparative Law 46 (1998), 43 (esp. 50-54).

7 Berman (n. 4), 283: 'there is no safe anchor, only engagement' (*idem*).

8 Annelise Riles, 'Wigmore's Treasure Box: Comparative Law in the Era of Information', Harvard International Law Review 40 (1999), 221 (246-250). Riles paints a picture of currently three communities of comparative law ('traditional' comparative lawyers, 'new approaches', and specialists in particular bodies of non-western law), arguing that the three approaches are not so divergent as their proponents imagine because all scholars share the same passion for looking beyond and understanding differences. *Idem* at 221-283.

9 Nora Demleitner, 'Challenge, Opportunity and Risk: An Era of Change in Comparative Law', American Journal of Comparative Law 46 (1998), 647 (648). Demleitner identifies three groups in the US-American academy: the establishment, the comparative law and economics group, and the critical 'Utah' group.

the authors we quote would perhaps not call themselves post-modernists.[10] Also, we shall speak of *the* post-modernist argument, although there are many variations, which may be more nuanced than the aggressive version we are depicting here. However, we consider that simplification justified for the sake of clarity of the argument, which addresses only basic assumptions, and not their refined derivations.

Post-modernism is a highly ambiguous term, whose meaning depends on the discipline (literary theory, architecture, philosophy etc.) in which it is used, and on the prior notions of 'modernism' and 'modernity'. Roughly speaking, post-modernist thought considers as basic the experience of plurality and difference. It points out that there are highly diverse forms of knowledge, systems of morality, personal plans of life and behavioural patterns. Post-modernist theory welcomes these heterogeneous positions and finds their discordance absolute. It protests against the totalising monopolisation of certain types of rationality and against universalist concepts that raise false allegations of absoluteness.[11]

Correspondingly, post-modernist criticism of traditional comparative law starts from the premise that reasoning, language and judgement are determined by inescapable and incommensurable epistemic, linguistic, cultural and moral frameworks. According to this theory, which we shall refer to as 'framework-theory',[12] legal comparison is trapped in cultural frameworks.

Comparative law is particularly vulnerable to the post-modernist critique. On a surface level, some favourite themes of post-modernists relate very obviously to our discipline. For instance, the post-modernists' focus on the Other is acute because comparative law, by definition, deals with the Other, being concerned with the differences between east and west, between common and civil law, between 'us' and 'them'; the 'comparative enterprise is thus permeated by the other'.[13]

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10 Explicitly post-modernist however, Janet E. Ainsworth, 'Categories and Culture: On the 'Rectification of Names' in Comparative Law', Cornell Law Review 82 (1996), 19 (24-25).

11 Wolfgang Welsch, *Unsere postmoderne Moderne* (4th edn, 1993), 4-7; see also Elizabeth Deed Ermarth, 'Postmodernism' in: Edward Craig (ed.), *Routledge Encyclopedia of Philosophy*, vol. 7 (1998), 587-590 with further references.

12 We borrow this term from Karl Popper. See Karl Popper, *The Myth of the Framework: In defence of Science and Rationality* (1994).

13 Grosswald Curran (n. 6), 45.

But the challenge goes deeper. The backbone to *topoi* such as the 'Other', 'difference', 'categories' and 'power', the framework-theory, actually calls into question the very essence of comparative legal scholarship. Until now, comparative study was all about exploring and *transcending* frameworks. Comparative law has been considered the specific tool to overcome parochialism, to become exposed, to enable distancing, to ultimately free observers from the narrow confines of their cultural disposition. To say that the comparatist is trapped in her framework casts fundamental doubts on this tool. The alleged incommensurability of frameworks means nothing else but *total incomparability* across history and culture. Because of irreconcilable differences, the comparatist cannot know, let alone compare and adjudicate different legal cultures. In short: incommensurability implies failure of comparison.

Part B of our article gives an overview of universalist strands in the comparative tradition (enlightenment, historicism, unificatory enthusiasm, and functionalism). In Part C, we review the post-modernist critique and respond to it. We refute the framework-theory by demonstrating that the relativism it builds on is not viable (Part C.1). We then discuss four other objections against traditional comparative law, which are – for the most part – closely related to the framework-theory. The first is the assertion that any comparative investigation is unavoidably biased (the bias-argument, Part C.2). Next, we discuss the allegation that traditional comparative law obeys a secret political agenda of hegemony and domination (the hegemony-argument, Part C.3). We then turn to the critique of comparative categories and classifications (contempt of classifications, Part C.4). Then, we discuss the critical assertion that the traditional functionalist approach to comparative law belies deep differences between legal cultures, is inescapably subjective, only seemingly technical/apolitical and betrays a limited vision of the law (contempt of functionalism, Part C.5). To conclude, we suggest a methodology which takes into due consideration the post-modernist criticism and avoids its exaggerations and absurdities (Part D).

B. The Challenged Tradition: Belief in Universal Law and Justice

1. Enlightenment

European comparative legal studies began with universalist aspirations in search of, so to speak, the lost unity of natural law. This was in the first half of the 19th century, when the great codifications in Bavaria, Prussia, France and Austria created diverse positive legal rules for specific territories, when the belief in one universal natural (divine) law was declining, and when even the ideal unity of the *ius commune Europaeum* had vanished.[14] Comparison of the existing bodies of positive law had primarily idealist, rational, liberal, and enlightened motives. Comparatists tended to believe in the common nature of man as a rational being, they were mostly liberals (in the European sense) who favoured modern parliamentary legislation and studied foreign examples in search of material for codification, including projected constitutions.[15]

2. Historicism

The second strand of universalism in comparative studies was historicism, which in the 19th century became the leading paradigm of almost all sciences.[16] Legal comparison (including historical comparison) was undertaken in order to construe a necessary progress of legal evolution. A good example is Eduard Gans' 'Law of Succession in Universal-Historical Evolution: A Treatise of Universal History'. Under this programmatic heading, Gans treated Roman, Indian, Chinese, Mosaic, Muslim and Attic law of heritage, explicitly relying on Hegel's philosophy of history as a theoretical foundation.[17] Another leading comparatist of that period, Josef Kohler,

14 Michael Stolleis, *Nationalität und Internationalität: Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts* (1998), 7-8.

15 *Idem*, 10.

16 The historicist drive of 19th century comparative scholarship was so pervasive that even in 1903 Frederick Pollock wrote: 'It makes no great difference whether we speak of historical jurisprudence or of comparative jurisprudence, or, as the Germans seem inclined to do, of the general history of law.' Frederick Pollock, 'The History of Comparative Jurisprudence', Journal of the Society of Comparative Legislation 5 (1903), 74 (76).

17 Eduard Gans, *Das Erbrecht in weltgeschichtlicher Entwicklung: Eine Abhandlung der Universalrechtsgeschichte* (1824), XXXIX. See within the same – Hegelian – paradigm

wrote in his 'Introduction to Comparative Law': '[W]e see how the immanent aspiration to development in the organism called mankind unconsciously sprouts and bears fruit, we see how above all individual reason the higher reasonableness pervades mankind and directs history'.[18] Kohler's world-view has been rightly characterised as 'historical optimism';[19] and such optimism was shared by others, such as John Stuart Mill, who observed in 1848: 'It is hardly possible to overstate the value ... of placing human beings in contact with persons dissimilar from themselves, and with modes of thought and action unlike those with which they are familiar. ... Such communication has always been ... one of the primary sources of progress.'[20]

The idea of organic evolution of the law led jurists to look for basic structures of the law, for a 'morphology' of the law, of the State, etc.[21] Lawyers searched and constructed such evolutionary patterns in order to find the 'right law'.[22] Thus in the first volume (1878) of the newly founded journal *Zeitschrift für vergleichende Rechtswissenschaft*, one of the editors formulated the objectives of comparative legal studies entirely within the evolutionary paradigm: '[C]omparative law wants to teach how peoples of common heritage elaborate the inherited legal notions for themselves, how one people receives institutions from another one and modifies them according to its own views, and finally how legal systems of different nations evolve even without any factual interconnection according to the common

Joseph Unger, *Die Ehe in ihrer welthistorischen Entwicklung: Ein Beitrag zur Philosophie der Geschichte* (1850). Translation, here and in following references to German sources by Anne Peters.

18 Joseph Kohler, *Einleitung in die vergleichende Rechtswissenschaft* (1885).

19 Wolfgang Gast, 'Historischer Optimismus: Die juristische Weltsicht Josef Kohlers', Zeitschrift für vergleichende Rechtswissenschaft 85 (1985), 1.

20 John Stuart Mill, *Principles of Political Economy*, vol. III (1848), chap. XVII, § 5.

21 The famous German political economist Wilhelm Roscher published in 1892 a book called *Politik: Geschichtliche Naturlehre der Monarchie, Aristokratie und Demokratie*. He considered three typical forms of government as three stages of evolution of political life, which until today and for all times shape government. The primary form of government is the monarchy, followed by the aristocracy, then democracy, declining as a plutocracy, finally the circle is completed by a new monarchy (caesarism) (12-13). He deemed these forms to be universal and 'rooted in terrain inexterminable human conditions' (8).

22 Erich Rothacker, 'Die vergleichende Methode in den Geisteswissenschaften', Zeitschrift für vergleichende Rechtswissenschaft 60 (1957), 13 (17).

laws of evolution. It searches, in a nutshell, within the systems of law, the idea of law.'[23]

A related stream of comparative scholarship was the so-called comparative anthropology *(Rechtsethnologie)*.[24] One of its founders, Albert Hermann Post, assumed that 'there are general forms of organisation lying in human nature as such, which are not linked to specific peoples'. He sought to explain the causes of these generalities empirically, through comparison.[25] '[F]rom the forms of the ethical and legal conscience of mankind manifested in the customs of all peoples of the world, I seek to find out what is good and just ... I take the legal customs of all peoples of the earth as the manifestations of the living legal conscience of mankind as a starting-point of my legal research and then ask, on this basis, what the law is.'[26] So, despite their lost faith in natural law, scholars still believed in a universal truth, hidden under historical and national variations, which could be uncovered through legal comparison. As the important German philosopher Wilhelm Dilthey put it: 'As historicism rejected the deduction of general truths in the humanities by means of abstract constructions, the comparative method became the only strategy to reach general truths.'[27]

In a way antagonistic to historicist universalism was the old theme of the dependency of law on the local conditions, which had already been brought to the fore by Montesquieu.[28] A hundred years later, the influential German historical school of law considered law to be the product of the

23 Franz Bernhöft, 'Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft', Zeitschrift für vergleichende Rechtswissenschaft 1 (1878), 1 (36-37).

24 Critics observe that the background of this type of research was colonialism and imperialism, which needed comparative anthropology, not in order to learn from foreign nations, but rather in order to justify the expansion of European interests across the globe.

25 '[C]omparative-ethnological research seeks to acquire knowledge of the causes of the facts of the life of peoples by assembling identical or similar phenomena, wherever they appear on earth and by drawing conclusions about identical or similar causes.' Albert Hermann Post, *Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis* (1880), Vorrede, citations at 12-13. Other important works of this school are *idem*, *Einleitung in das Studium der ethnologischen Jurisprudenz* (1866); Henry Maine, *Ancient Law* (3 edn, 1866).

26 Albert Hermann Post, *Die Grundlagen des Rechts und die Grundzüge seiner Entwicklungsgeschichte: Leitgedanken für den Aufbau einer allgemeinen Rechtswissenschaft auf sociologischer Basis* (1884), XI.

27 Wilhelm Dilthey, 'Der Aufbau der geschichtlichen Welt in den Geisteswissenschaften' in *idem*, *Gesammelte Schriften*, vol. VII (4 edn, 1965) (orig. 1910), 77 (99).

28 Charles de Secondat Montesqieu, *De l'Esprit des lois*, vol. I (1748), chap. 3.

Volksgeist, and thus particular to every nation.[29] Especially the Romanist branch of this school, with its fixation on Roman law and on legal notions (*Begriffsjurisprudenz*), was ambivalent towards the comparative study of living legal systems.[30]

Moreover, the rise of nationalism and legal positivism favoured concentration of scholars on their own nations and on the printed legal texts. This change of climate had a stunting effect on comparative legal studies.[31] In 1852, Rudolf von Ihering deplored the degradation of legal science to 'national jurisprudence', which he considered a 'humiliating and unworthy form of science'. He called for comparative legal studies, which would restore the discipline's 'character of universality'.[32]

29 See Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1840), 8: 'Where we first find documented history, the civil law has already a determinate character, peculiar to the people, just as have their language, manners, constitution.' Or elsewhere: 'If we ask further for the subject in which and for which positive law has its existence, we find this is the people. Positive law lives in the common consciousness of the people, and we therefore have to call it people's law (*Volksrecht*) … [I]t is the spirit of the people (*Volksgeist*), living and working in all the individuals together, which creates the positive law ...' (*idem, System des heutigen römischen Rechts*, vol. 1 (1840), 14).

30 In retrospect, one of the pioneers of comparative law, Felix Meyer, said that in 1894, mainstream scholarship 'bemoaned [the comparative discipline] as dilettantism and as Utopian project, looked pitifully down on it from the heights of Roman law as the beatific ratio scripta.' His address is reproduced in Karl von Lewinski, 'Die Feier des zwanzigjährigen Bestehens der Internationalen Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre', Blätter für vergleichende Rechtwissenschaftslehre und Volkswirtschaftslehre 9 (1914), 2-3. See on the relationship of the historical school to comparative law: Stolleis (n. 14), 24; Konrad Zweigert and Heinz Kötz, *Introduction to Comparative Law–The Framework* (1969), (Tony Weir, trans., 3rd edn, 1998), § 4 I; Elmar Wadle, *Einhundert Jahre Rechtsvergleichende Gesellschaften in Deutschland* (1994), 17.

31 Walther Hug, 'The History of Comparative Law', Harvard International Law Review 45 (1931/1932), 1027 (1069-7); Zweigert and Kötz *supra* at § 4 III 3; Stolleis (n. 14), 12, 24.

32 Rudolph von Ihering, *Der Geist des Römischen Rechts auf zwei verschiedenen Stufen seiner Entwicklung*, vol. I (9th edn, 1955) (1st edn, 1852), 15. Ihering's complaint was justified to the extent that German lawyers in particular were preoccupied with their own country, because German unification was, to say the least, one of the most pressing subjects of the time. But this did not quite do justice to the discipline as a whole.

3. Intra- and Transnational Unification

The universalist character of legal science reclaimed by Ihering was soon brought about by industrialisation and the internationalisation of the economy, the third promoter of universalism in comparative law. Beginning already in the 1840s, technical and economic developments had spurred extraordinary legislative activity in order to modernise the State and regulate new fields. The drafting of the new codes was based on extensive legislative comparison, undertaken or mandated by the legislators themselves. These practical endeavours, together with the increase of transnational economic activities, led to a new heyday of legal comparison as a scholarly discipline in Europe, mostly related to technical and commercial law.[33] The predominant motives of legal comparison appeared to be, first, stock-taking for national legislation and intranational harmonisation, and later, when codification was basically completed in most European countries, international harmonisation. At the first international conference on comparative law, the famous Paris Congress of 1900, the French comparatist Raymond Saleilles described the object of comparative law as the discovery of concepts and principles common to all 'civilised' systems of law, that is to say universal concepts and principles which constitute a relatively ideal law: '[L]e droit comparé n'est que l'idéal relatif résultant de la comparaison des legislations'.[34] The same seminal Congress established the principle that the ultimate goal of any legal comparison should be legal unification.[35] And at the 20th anniversary of the German 'International Association for

33 See for the comparatist mood Felix Meyer, speaking in 1914: '... today, when the internationalisation of the law has made enormous progress, when no Act is passed without legal comparison and the global economic tendency is manifest in ever newly emerging societies and institutes.' (Lewinski (n. 30), 3). Seminal works were Josef Kohler, *Deutsches Patentrecht, Systematisch bearbeitet unter vergleichender Berücksichtigung des französischen Patentrechts* (1878); *idem* (ed.), *Das Recht des Markenschutzes mit Berücksichtigung ausländischer Gesetzgebungen und mit besonderer Rücksicht auf die englische, anglo-amerikanische, französische, belgische und italienische Jurisprudenz* (1884/85).

34 Raymond Saleilles, 'Conception et objet de la science juridique du droit comparé' in: *Procès verbaux et documents du Congrès international de droit comparé 1900*, vol. 1 (1905-1907), 167 (173). He continues: 'Le droit comparé cherche à définir le type idéal tout relatif qui se dégage de la comparaison des législations, de leur fonctionnement et de leurs résultats'.

35 See Pan. J. Zepos, 'Die Bewegung zur Rechtsvereinheitlichung und das Schicksal der geltenden Zivilgesetzbücher', Revue héllenique de droit international 19 (1966), 14 (17-18).

Comparative Law and National Economics', celebrated at the eve of World War I in Berlin, its founder, Felix Meyer, repeated that the association, remaining 'true to the principle "Through legal comparison towards legal unification", seeks to develop and harmonise the law'.[36] Unification as the necessary consequence of legal comparison and as its ultimate accomplishment clearly reflected the broad universalising hopes of the early comparatists.[37]

In addition, the plans for unification, mostly in the field of private law, mirrored the general legal methods of the time in their favourable attitude towards grand projects of systematisation. One hidden promoter of that trend was probably the German *Begriffsjurisprudenz*[38] with an approach which placed high emphasis on definitions and classifications to create a systematic, stringent body of positive law. Although *Begriffsjurisprudenz* and legal positivism generally tended to disdain comparative legal studies,[39] comparatists themselves were arguably influenced by this approach, and became eager to classify and categorise, concentrating on formal rules, institutions, and procedures, and ignoring the rules' full social and economic context.[40] On the other hand, the new wave of comparative law was in line with jurisprudential trends that were emerging as a counter-reaction to legal positivism in all forms, such as *Zweckjurisprudenz*,[41] *Interessenjuris-*

36 Lewinski (n. 30), 3. Karl von Lewinski concluded his report on the celebration with the words: 'May we succeed jointly to contribute continuously to our part of the proud edifice of science that links nations, in which in the future all nations shall reside peacefully next to each other.' (*idem*, 9).

37 'The spirit of universalism, which was perceptible already before, but especially in the last century, is the foundation of all ideas of a unification of the law.' (Zepos (n. 35), 16).

38 Georg Friedrich Puchta, *Cursus der Institutionen*, vol. I (1841), esp. 95–108; Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (3 volumes), (7th edn, 1891) (1st edn, 1862), esp. vol. I, § 24 (59-60); von Ihering (n. 32), with the notorious phrase at 40: 'Notions are productive, they mate and generate new ones'.

39 See Ernst Rudolf Bierling, *Juristische Prinzipienlehre*, vol. 1 (1894, repr. 1961), 33 (expecting 'little or no use' of comparative law).

40 Mary Ann Glendon, *Abortion and Divorce in Western Laws* (1987), 3-4.

41 Rudolph von Ihering, *Der Zweck im Recht,* 2 vols (1877).

prudenz,[42] precursors of legal realism,[43] and sociological jurisprudence.[44] These new approaches were, *inter alia*, seedbeds of functionalism in comparative law.

4. Functionalism

The functional approach may be considered as the fourth strand of (implicit) universalism in comparative scholarship. It was suggested in the 1920s in order to overcome previous formalism.[45] The novelty of the functional approach was that comparative analysis now set off from a concrete social problem. In other words, the starting point is not considered the law, or the structure of legal institutions, but the facts.[46] The founder of functionalism, Ernst Rabel, described as a common denominator for every comparison 'the social purpose of the rules and the service of the concepts to this purpose. This is now aptly called the functional approach.'[47] Functionalists consciously broke with the goals and methods of the nineteenth century scholars. They disqualified traditional comparative law as a mere 'synoptic description of legal rules and institutions'.[48] They eschewed rigid adherence to any taxonomy of legal systems and arid classifications, although in real research, the old classification schemes still played a role. The functionalist program, as formulated by Max Rheinstein, is that comparative law must 'go beyond the taxonomic or analytical description or technical application of one or more systems of positive law. [E]very rule and institution has to justify its existence under two inquiries: First, What function does it

42 Philipp Heck, 'Gesetzesauslegung und Interessenjurisprudenz', Archiv für die civilistische Praxis 112 (1914), 1-318.

43 Oliver Wendell Holmes, Jr., *The Common Law* (1881), 1: 'The life of the law has not been logic: it has been experience.' *Idem*, 'The Path of the Law', Harvard Law Review 10 (1897), 457-478.

44 Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence', Harvard Law Review 24 (1911), 591-619; Harvard Law Review 25 (1911/12), 140-168, 489-516.

45 Ernst Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung* (1925), 4.

46 See, e.g., Max Rheinstein, *Einführung in die Rechtsvergleichung* (2nd edn, 1987), 33.

47 Ernst Rabel, 'Some Major Problems of Applied Comparative Law, especially in the Conflict of Law (summary)' in: Association of American Law Schools (ed.), *Summarized Proceedings of the Institute in the Teaching of International and Comparative Law* (1948), 111.

48 Max Rheinstein, 'Teaching Comparative Law', University of Chicago Law Review 5 (1938), 615 (618).

serve in present society? Second: Does it serve this function well or would another rule serve better?'[49] W. J. Kamba put the guiding question like this: '[W]hat legal norms, concepts or institutions in one system perform the equivalent functions performed by certain legal norms, concepts or institutions of another system?'[50] The functional approach spread from Europe to the United States (where the leading post World War II comparatists were émigrés from Europe) and has dominated comparative legal studies until today.[51]

The more recent comparative law and economics approach[52] may be regarded as a narrowed and specified version of functionalism, looking not broadly at social functions, but exclusively at one particular function, namely the rule's or institution's efficiency, in purely economic terms.

Today, quite a few comparatists are openly universalists, either through their description of the laws or by suggesting how a uniform legal order ought to be.[53] The best-known descriptive version is probably Rudolf Schlesinger's common-core-theory, according to which '– even in the absence of organised unification efforts – there exists a common core of legal concepts and precepts shared by some, or even by a multitude, of the world's legal system.'[54]

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49 *Idem*, 617-618.

50 Walter J. Kamba, 'Comparative Law: A Theoretical Framework', International and Comparative Law Quarterly 23 (1974), 485 (517).

51 See Zweigert and Kötz (n. 30), 32-47.

52 Ugo Mattei, *Comparative Law and Economics* (1997).

53 See only René David and John E. C. Brierley, *Major Legal Systems in the World Today* (3rd edn, 1985), 4-6. For Myres McDougal, the goal of legal unification is to expand a democratic world order: 'Most broadly conceived, that central, overriding purpose [of comparative law] is ... the clarification for all our communities – from local through national and regional to global – of the perspectives, the conditions, and the alternatives that are today necessary for securing, maintaining, and enhancing basis democratic values in a peaceful world.' (Myres S. McDougal, 'The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order' in: William Elliot Butler (ed.), *International Law in Comparative Perspective* (1980), 191 (196)). Joseph H. Kaiser, 'Vergleichung im Öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 391 (399). Kaiser speaks of framing a 'general theory of democratic-liberal constitutional law'. Zweigert and Kötz (n. 30), § 4 I, admit that comparative legal studies with the objective of finding better solutions have an affinity to natural law speculations.

54 'At least in terms of actual results–as distinguished from the semantics used in reaching and stating such results–the areas of agreement among legal systems are larger than those of disagreement.' '[T]he existence and vast extent of this common core of legal systems cannot be doubted.' Rudolf B. Schlesinger, Hans W. Baade, Mirjan

Besides, there is a concealed universalism inherent to the functionalist approach. It applies objectivity and universality of the law, because it rests on the assumption that 'the legal system of *every* society faces essentially *the same problems*, and solves these problems by quite different means though very often with similar results.'[55] The underlying theory is that law is an answer to the needs of society and a body of 'specialized instruments of social control'.[56]

As a matter of fact, regional integration and globalisation are nowadays levelling economic, political and moral standards, as well as lifestyles in different countries. On the before-mentioned premise that legal rules primarily react to social needs, they must naturally converge as well. National characteristics of legal rules will gradually disappear with the emergence of a global society, the theory runs.[57] So the strict socio-functional view of the law almost inevitably leads to a theory of the gradual convergence of legal systems.[58] The question is, however, whether or not natural convergence is merely a euphemism for North-American, and to a lesser extent, European 'legal imperialism'.[59]

R. Damaska and Peter E. Herzog, *Comparative Law: Cases–Text–Materials* (5th edn, 1988), 34-35, 39.

55 Zweigert and Kötz (n. 30), 34; but see much more cautiously Hein Kötz, 'Abschied von der Rechtskreislehre?', Zeitschrift für europäisches Privatrecht 6 (1998), 493-505 (504-505) (limited value of the functional approach). Critically Frankenberg (n. 4), 436: 'The functional approach runs the risk of simplifying complex reality by assuming that similarity of problems produces similarity of results'.

56 Roscoe Pound, 'Comparative Law in Space and Time', American Journal of Comparative Law 4 (1955), 70 (72); similarly Rheinstein (n. 48), 619.

57 See, e.g., Michael King, 'Comparing Legal Cultures in the Quest for Law's Identity' in: David Nelken (ed.), *Comparing Legal Cultures* (1997), 119 (132).

58 Vincenzo Ferrari, 'Socio-legal Concepts and Their Comparison' in: Else Oeyen (ed.), *Comparative Methodology* (1990), 63 (69); Basil Markesinis (ed.), *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (1994); Peter de Cruz, *Comparative Law in a Changing World* (1995), 477-489, Reinhard Zimmermann, '"Common law" und "civil law", Amerika und Europa – zu diesem Band' in: Reinhard Zimmermann (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht* (1995), 1 (2); Kötz (n. 55), 497-504. The critical perspective on this issue is represented by Pierre Legrand, 'European Systems are not Converging', International and Comparative Law Quarterly 45 (1996), 52-81 (arguing that common and civil law systems are irreducibly different).

59 Arthur T. von Mehren, 'An Academic Tradition for Comparative Law?', American Journal of Comparative Law 19 (1971), 624 (625); see also Rolf Knieper, 'Rechtsimperialismus?' Zeitschrift für Rechtspolitik 29 (1996), 64-67 (recommending inter-regional harmonisation and reliance on local traditions in post-communist societies); critical towards the 'ideology of convergence' also Hill (n. 3), 110.

C. Post-Modernist Objections Against Comparative Law and Their Flaws

1. Legal Comparison: Trapped in Irreconcilable Frameworks?

a) Cultural Framework-Relativism

Post-modernists assert that traditional comparisons are only a pretence of empiricism, only a projection of the scholar's own imagination.[60] This is so because there is no external stand-point from which to describe, compare, and assess legal solutions.[61] Comparatists 'need to accept that the others have different truths.'[62]

The base-line and key assumption of this criticism is what we have called the framework-theory. The framework-theory holds that there is no common denominator that guarantees the possibility of neutral and objective meaning and value. No autonomous world of meaning and values exists, but all systems are self-contained, self-referential and relative. Therefore, legal thought, language, and judgement are determined by inescapable epistemic, linguistic, cultural and moral frameworks.[63] Frameworks are institutionalised so that comparatists are dominated 'by a grid of concepts, research techniques, professional ethics, and politics, by which the prevail-

60 David Kennedy thinks of international law 'as establishing itself through an ongoing process of imagination, creating doctrines and institutions as efforts to transcend and bridge what it imagines as differences in a world of cultures it seeks to hold at arm's length ... comparative law shares this imaginative construction from the other side, seeing itself ... as an intellectual project of understanding between cultures whose similarities and differences are foregrounded.' (Kennedy (n. 1), 554).

61 '[T]he comparativist must relinquish the comfortable position of the outside observer: if the Other is internally split and decisively inflected by the West (and vice versa), then *there is no wholly neutral position in which the comparativist can stand.*' (Berman (n. 4), 282 (emphasis added)).

62 Grosswald Curran (n. 6), 91; see in that sense also Pierre Legrand, 'Sur l'analyse différentielle des juriscultures', Revue internationale de droit comparé 51 (1999), 1053 (1062).

63 One of the seminal contributions was Francois Lyotard's *La condition postmoderne: Rapport sur le savoir* (1979). Lyotard identifies as characteristics of the post-modern era the obsoleteness of meta-narratives, which were in modern times used to legitimise institutions, social and political practices, ethics and modes of thought. From the obsoleteness of meta-narratives results the irresolvable incommensurability of language games, which make consensual notions of truth and justice impossible.

ing culture imposes on the individual scholar its canons of how legal scholarship is to be conducted.'[64]

Because of the belief in insurmountable frameworks, the post-modern approach naturally focuses on the '*problems of perspective* as a central and determinative element in the discourse of comparative law'.[65] Correspondingly, the new 'immersion approach implies a multiplicity of standards, each true in its own legal culture.'[66]

Most other new themes relate to the framework-theory: because there is no escape from one's framework, all that can be done is to deconstruct the ambiguities and indeterminacies within the dominant discourse, including the internal contradictions and assumptions about the character of foreign law.[67] Similarly, the post-modern aversion to naive interpretation of foreign texts has to do with that key-assumption. Interpretation should first of all, in this view, seek to detect hidden purposes, meanings, themes in familiar and foreign texts: in short, uncover the respective framework. Because of the importance ascribed to frameworks, the focus of interest shifts from the laws to be compared to the history, epistemology and politics of comparative research itself,[68] always on the watch for tacit assumptions: 'We must change the project of comparative law from a naive epistemological project ("how best can we truly understand the Other"?) to a critical and interventionist project ("what critical resources exist both within one's 'own' frame of reference and within the 'Other's' that can be deployed for emancipatory purposes?")'.[69]

Under the premise that diverging, irreconcilable, cultural frameworks make legal transplants futile, one considers that comparisons are less a practical tool of law reform or legal harmonisation, but either art for art's sake or overt and self-consciously 'political projects of critique'[70] –

64 Frankenberg (n. 3), 270. Note that by saying that the scholar needs 'a deconstructive move – ... breaking down the conceptual repression', the critic himself seems – in somewhat contradictory terms – to imply that this *is* possible.

65 Frankenberg (n. 4), 411 (emphasis added).

66 Grosswald Curran (n. 6), 64.

67 Riles (n. 8), 248.

68 See as an example Jorge L. Esquirol, 'The Fictions of Latin American Law (Part I)', Utah Law Review (1997), 425, analysing René David's comparative work on Latin American Law.

69 Berman (n. 4), 281. See also Günter Frankenberg (n. 3).

70 Kennedy (n. 1), 633. See also, *idem*, 632, and generally 606–637 on the 'Politics' and Governance Projects of Comparative Law.

both seemingly antagonist types of post-modernist comparative endeavours sharing an atechnical, explicitly subjective drive.

The foregoing paragraphs have, hopefully, underscored and illustrated that the premise of the irreconcilable framework is the very bedrock of the post-modernist approach to comparative law: 'The full meaning of laws can be understood only by viewing laws through the prism of the intellectual framework in which they exist.'[71] Note that the gist lies not in the hardly deniable proposition that throughout history and geography we have a plurality of epistemic, normative, and cultural frameworks. The problem lies in the assertion that these frameworks are *incommensurable*, and this assertion will be discussed here.

b) Refutation

The post-modernist claim that comparative studies are basically a projection, an outgrowth of our specific cultural framework, a futile attempt to compare the incomparable, implies a type of relativism which we shall call framework-relativism. We are aware that quite a few of the critics explicitly try not to fall into relativism, while still holding on to the dogma of the inescapable framework.[72] However, the assertion that there is some 'in-between space' represents an attempt to wash the fur without wetting it. We will therefore refute cultural framework-relativism and thereby hit the hard core of the post-modernist critique.

71 Catherine Rogers, 'Gulliver's Troubled Travels or The Conundrum of Comparative Law', George Washington Law Review 67 (1998), 149 (161-162). See also Grosswald Curran (n. 6), 67 on 'underlying, sometimes irreconcilable, differences among legal systems'; also Legrand (n. 62), 1056.

72 See, e.g., Brenda Crossman, 'Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project', Utah Law Review (1997), 525 (526-527 and 537); Hartmut Rosa, 'Lebensformen vergleichen und verstehen. Eine Theorie der dimensionalen Kommensurabilität von Kontexten und Kulturen', Handlung, Kultur, Interpretation: Zeitschrift für Sozial- und Kulturwissenschaften 1 (1999), 10 (24). With regard to international law, David Kennedy likewise asserts that new approaches are on their way to overcoming the 'routine conflict between defenses of its overt accultural posture and assertions of cultural relativism'. (Kennedy (n. 1), 659).

Relativism Defined

Relativism is the position that neither universal knowledge exists (epistemic relativism), nor universally valid norms (moral relativism), because insights and values always depend on the standpoint of the epistemic or moral subject. Epistemic relativism is concerned with the relativity of the existence of facts, while moral relativism relates to the relativity of the validity of values.[73] Framework-relativism may refer both to epistemics and to morals and is the assertion that all thinking and/or judging takes place within insurmountable frameworks.[74] The framework-relativism underlying the post-modern critique of traditional comparative law is a group-based relativism,[75] more specifically a cultural relativism, because the boundaries of the frameworks run along the boundaries of cultures.

Objections against Cultural Relativism

We will first look at cultural relativism in general. It can be attacked through a number of arguments, some of which are simple and forceful. We will make two here. In a cross-cultural discourse one cannot consistently

73 Our distinction of two basic types of relativism presupposes a fact-value-distinction. This runs counter to the post-modernist tendency, which denies that facts and morals are two separable spheres. Not surprisingly, the post-modernist conflation of fact and morals goes very well with the negation of the existence of truth: Theories do not aim at the truth, but instead they seek to veil practical or moral attitudes, especially aspirations to power. However, facts and norms are two distinct categories. Norms guide and improve the conduct of humans, theories explain and predict, *inter alia*, the conduct of humans (Gerhard Schurz, *The Is-Ought Problem: An Investigation in Philosophical Logic* (1997), 279). Normative expressions can never replace ontological expressions *salva veritate*, and norms are not derivable from facts, as Gerhard Schurz has recently explained in detail. There is no logical bridge between norms and facts (*idem*, especially 278–285). We can therefore uphold the distinction between epistemic and moral relativism. The distinction does not preclude a psychological interrelatedness in practice. Assumptions about what is 'good' and 'evil' may psychologically influence what we hold to be true. For instance, we may be reluctant to recognise our own personal properties that we find morally undesirable.

74 See in detail on framework-relativism *infra* text with footnotes 80-86.

75 Historically, philosophers mostly thought of relativism (epistemic or moral) as individually-based, as a relativism of the 'I' (beginning in Western philosophy with the sophists). Today, it is virtually always a group-based relativism that is discussed. In the 'I'-relativism, all insights and values are valid only for one person, in group-based relativism they are shared by the members of a group, e.g., a culture.

hold that cultural relativism is true not only for their own culture but also for other cultures: Asserting that two persons from two cultures can never have commensurable theories and trying to convince a person from another culture of the truth of cultural relativism at the same time is self-contradictory.

Another simple argument against cultural relativism is that cultures are not hermetic, closed, immutable entities.[76] Cultures, in contrast to individuals, do not have readily determinable boundaries. And if boundaries between cultures are blurry, the boundaries of the epistemic and moral furniture of different cultures are blurry as well. Radical difference or incommensurability cannot exist here. Examples of blurriness and overlaps are easy to point out. Individuals can participate in several cultures, for instance, simply by spending half of the year in Norway and the other half in Spain. Also, there are those born into two frameworks. Mass media and travelling spread elements of specific cultures around the globe. It is well-known that the U.S.-American culture has been and is continuing to infiltrate many other cultures of the world. Also, differences within one culture may be greater than differences between cultures. Within a formation which is perceived as one culture, there may be a dissent even about central elements of this culture. For instance, some may consider the culture of the New World as necessarily hybrid. Within 'one' culture, we may find sub-cultures (for example, a youth-culture). Some of these sub-cultures, such as the various sub-cultures of scientists around the globe, may have more in common with each other than with other members of their national culture. For instance, the attitudes, interests, and style of living of a German entomologist probably resemble more that of a Canadian entomologist than those of a German blue-collar worker.

The haziness of boundaries becomes most apparent as soon as we look at a culture through time. Is the culture of Germany still the same as it was 500 years ago? At which point do we have to recognise a different culture? In any case, an average contemporary German would most likely have less problems to get around, make his living, participate in leisure-time activities in the Great Britain or Sweden of our days than in Germany of 500 years ago.[77]

76 Elmar Holenstein, *Menschliches Selbstverständnis, Ichbewußtsein, Intersubjektive Verantwortung, Interkulturelle Verständigung* (1985), 104-180.

77 See also Thierry Lenain, 'Understanding the Past: History as an Intercultural Process' in: Notker Schneider, Ram A. Mall and Dieter Lohmar (eds), *Einheit und Vielfalt:*

With regard to the relevance of cultural relativism for comparative law, one should note that a single legal system can comprise various cultures (think of the EU legal system) or one culture different legal systems (think of Germany in the middle of the 19th century).

Objections against Cultural Framework-Relativism

Having made these two arguments against cultural relativism in general, we shall now turn to cultural relativism in the form of framework-relativism. Karl Popper defines framework-relativism as 'the doctrine that truth is relative to our intellectual background, which is supposed to determine somehow the framework within which we are able to think: that truth may change from one framework to another'.[78] Popper maintains that behind this practice of operating in frameworks, which he calls 'myth of the framework', lurks the occidental dogmatic fundamentalism, the old axiomatic-deductive mode of reasoning, in which principles or axioms cannot be questioned and determine all further thought.[79] This axiomatic-deductive

Das Verstehen der Kulturen (1998), 145-154, esp. 145: 'But this concept [of interculturality] can and should be extended to the question of historicity, for when we face past periods of our own culture on a critical mode, we are dealing with cultural systems which prove as different from ours as any present-day "exotic" culture would be'.

78 Popper (n. 12), 33. In fact, Popper identifies relativism in general with framework-relativism. This is not correct, because relativism can also have a non-cognitive foundation, i.e. must not be due to a special mode of thinking (e.g. axiomatic thinking), but may for instance be due to psychological states.

79 *Idem*, 59-60: 'The myth of the framework is clearly the same as the doctrine that one cannot rationally discuss anything that is fundamental, or that a rational discussion of principles is impossible. This doctrine is, logically, an outcome of the mistaken view that all rational discussion must start from some principles or, as they are often called, axioms, which in their turn must be accepted dogmatically if we wish to avoid an infinite regress - a regress due to the alleged fact that when rationally discussing the validity of our principles or axioms we must again appeal to principles or axioms. Usually those who have seen this situation either insist dogmatically upon the truth of a framework of principle or axioms, or they become relativists; they say that there are different frameworks and that there is no rational discussion between them, and thus no rational choice. But all this is mistaken. For behind it there is the tacit assumption that a rational discussion must have the character of a justification, or of a proof, or of a demonstration, or of a logical derivation from admitted premises. But the kind of discussion which is going on in the natural sciences might have taught our philosophers that there is also another kind of rational discussion: a critical discussion which does not seek to prove or justify or establish a theory, least

structure of the frameworks is the reason why they are insurmountable: if principles can never be questioned on the basis of new experience, but – on the contrary – any experience must be interpreted in the light of the principles (the theory-loadedness of observation), then we are never capable of achieving new knowledge or accept new values which contradict our own principles.[80]

Of course, such an axiomatic deductivism is conceivable, we say, but the question is whether it is an appropriate model for real human thinking. Our argument against it, and thereby against framework-relativism, is that it contradicts the indispensable and not really contestable everyday-life view that one can – as every child does – experience something fundamentally and surprisingly new. The concept of the closed framework represents a kind of solipsism or subjective idealism, in which reality does not play any role. Such a theory which does not allow the acquisition of genuinely new knowledge is not acceptable, even if we still have no generally acknowledged philosophical answer to the question of how knowledge is obtained. Such an answer would surely have to make the point that people do not only reason from the top down (deductively), but also from the bottom up (inductively) and are capable of modifying they principles due to new experiences. And we think that, in particular, little children do this on a daily basis, and are constantly inventing new principles and categories. We don't see why mentally flexible adults shouldn't be able to do the same.

A glance at the intellectual sources of framework-relativism reveals that it – *inter alia* – defies on a partial reading of Thomas Kuhn[81] and on

of all by deriving it from some higher premises, but which tries to test the theory under discussion by finding out whether its logical consequences are all acceptable, or whether it has, perhaps, some undesirable consequences'.

80 The theory of the theory-loadedness of observation is contradicted by evidence of theory-resistance of observation in the psychology of perception. For instance, even if we know that the moon at the horizon is not bigger than the moon at its zenith we still perceive it as bigger. Moreover, this theory often goes together with a false notion of science, namely that the theories on the functioning of an experimental apparatus and the side-conditions of an experiment are so closely connected to the theories which are tested by that experiment, that there results an inescapable circle. Normally, however, both theories are miles apart. This is very obvious in biology and medicine. The experimental apparatuses are built on the basis of physics and computer science, but the theories tested in the experiments are biological, and no one would say that the results of biological research were determined by physics or computer science.

81 See, e.g., references to Kuhn in Ainsworth (n. 10), 30, or in Rosa (n. 72), 12-17.

some sloppy scholarship of Benjamin Whorf. The framework-theory holds that there is no real communication among people arguing on the basis of incommensurable frameworks. And where there is no communication, no rational assessment of the position of the Other can be made. Precisely this was the conclusion drawn by many philosophers from Thomas Kuhn's seminal essay 'The Structure of Scientific Revolutions' of 1962. However, Kuhn explicitly rejected this reading of his work in the 1969 postscript to the second edition. Kuhn thought that paradigms (i.e. frameworks in our sense) are able to be transgressed and that the problems of translation between paradigms can be resolved in principle.[82] The belief that categories contained in language constitute an insurmountable framework is inspired by linguist relativism. Generally, linguistics plays a big role in post-modernist thought. A key post-modernist assumption is that all human systems operate like language and that there is nothing prior to language.[83] Law (like language) is viewed as a complex, coded system of signs, which is powerful but finite and which constructs and maintains meaning and value. Consequently, the chosen complementary science of post-modern legal comparison is no longer (as for the traditionalists) social science, but rather literary theory.[84] The most prominent protagonist of linguist relativism in the 20th century has been Benjamin Whorf. Whorf told us about the language of the Hopi Indians, a Native American tribe in Arizona: 'After long and careful study and analysis, the Hopi language is seen to contain no words, grammatical forms, constructions or expressions that refer directly to what we call "time", or to past, present and future, or to enduring or lasting ... [T]he Hopi language contains no reference to "time", either explicit or implicit'.[85] Whorf's conclusion was that the Hopi lived in a universe totally different from ours, because they lacked the concept of time. The Whorf theory received widespread attention. Less known is Ekkehart

82 Thomas S. Kuhn, *The Structure of Scientific Revolutions* (3rd edn, 1996), 198-204.

83 Ermarth (n. 11), 588.

84 A paradigmatic example is Mitchel de S.-O.-l'E. Lasser, 'Comparative Law and Comparative Literature: A Project in Progress', Utah Law Review (1997), 472-524, constructing and deploying a 'literary theory' methodology in order to analyze the complex significations produced by the French and American judicial discourses' (*idem*, 471); see also the extensive footnote in Grosswald Curran (n. 6), 49 n. 12 and 54-59 ('Comparative Law as a Phenomenon of Translation').

85 Benjamin Lee Whorf, 'An American Indian Model of the Universe', Manuscript approx. 1936, in: John B. Carroll (ed.), *Language, Thought, and Reality: Selected Writings of Benjamin Lee Whorf* (1956), 57 (57-58).

Malotki's meticulous study of the Hopi language, which unearthed a lot of words, grammatical forms, constructions and expressions referring to time, as indicated in the following translation of a Hopi utterance: 'Then indeed, the following day, quite early in the morning at the hour when people pray to the sun, around that time he woke up the girl again.'[86]

Here we are tempted to ask: couldn't this classic case of scientific error have occurred in comparative law as well? It teaches us that seemingly incommensurable differences may be merely a scientific artefact due to lack of a more complete knowledge and understanding of a foreign legal order and its culture.

Objections against Moral Relativism

Up to now, we have spoken of knowledge and values together, but have concentrated on epistemic relativism. We now want to discuss moral relativism in particular. According to moral relativism, principles of justice, fairness or equity are merely a function of moral practices, which in turn are entirely contingent (for example to culture, history or society). Any type of morality is as justified as any other. Therefore, no external standard of justice can be applied to a given legal instrument. It is impossible to pass a judgment on the morality of legal practices of others who have adopted moralities different from one's own.[87]

Culture-based moderate moral relativism appears to be an appropriate attitude *vis-à-vis* our pluralist, divided, multi-cultural world. But its strict version is not viable. The simplest reason is the one already mentioned, that cultures have no clear boundaries. Another argument against moral relativism is its tendency to contradict itself. A world-wide discourse on

86 Ekkehart Malotki, *Hopi Field Notes* (1980), quoted in *idem, Hopi time: A Linguistic Analysis of the Temporal Aspects in the Hopi Language* (1983), vi.

87 Interestingly enough, moral relativism is often defended in a philosophical camp which otherwise contrasts with post-modernism in most respects, the communitarian one. Communitarians emphasise that moral intuitions, capacities and reactions are created and determined through upbringing and education in concrete communities. See in particular Alasdair MacIntyre, *After Virtue* (1984); also Charles Taylor, *Sources of the Self* (1989), chapter 1, entitled 'Inescapable Frameworks', 3-24.

moral relativism is perhaps not a contradiction in and of itself,[88] as a discourse on epistemic relativism is. One can, however, quickly entangle oneself in contradictions, namely if one sets up rules for that discourse and does not allow participants to act in a manner which is unfair, libellous, insulting, plagiarious etc. Thereby one asks for some universal set of moral rules and thereby contradicts the relativist stance.

In practice, culture-based moral relativism pays a high price, because it can be made the handmaiden of dictators and stabs human rights activists in the back. Most people assume that some basic human rights apply in the whole world, and dictators increasingly show a bad conscience if they violate them. In defence they can, however, make use of moral relativisms and have often done this, by asserting that certain values are culture-bound values, for example western values, which do not apply in their own culture. Dissidents and human rights proponents in the respective countries have always protested and pointed to the hypocrisy of this reasoning.[89] Here, post-modernism finds itself in the embarrassing role of an intellectual assistant to dictators.

Put the other way round, moral relativism, strictly applied, would forbid all intercultural argument or action against totalitarian and inhuman ideologies. Everyone who is engaged, everyone who takes any political action whatsoever, be it as a human rights activist or otherwise, negates moral relativism through his very actions.[90]

But, if we reject moral relativism, does not the spectre of moral absolutism arise? No. First of all, moral framework-relativism itself is a moral absolutism, for it treats certain values within a given framework as absolute and does not allow for escape. It seems to be less absolutist and more realist to assume that people can make moral experiences which force them to step out of the moral framework they are used to. On the basis of that as-

88 But see Karl-Otto Apel, *Transformation der Philosophie Vol. II*: *Das Apriori der Kommunikationsgemeinschaft* (1973), esp. 400, 420-425; Jürgen Habermas, 'Diskursethik – Notizen zu einem Begründungsprogramm', in *idem*, *Moralbewusstsein und kommunikatives Handeln* (1983), 53 (105); Jürgen Habermas, 'Erläuterungen zur Diskursethik', in *idem*, *Erläuterungen zur Diskursethik* (2nd edn, 1992), 119, at 195 for the assertion that engaging in a discourse necessarily implies recognition of some universal norms.

89 See, e.g., Lung Jingtai, 'Wo Respekt zu Gleichgültigkeit wird', Frankfurter Allgemeine Zeitung 78 (2 April 1998), 39.

90 See for further arguments against moral cultural relativism and for a 'deliberative universalism' Amy Gutmann, 'The Challenge of Multiculturalism', Political Ethics, Philosophy & Public Affairs 22 (1993), 171-206.

sumption, we suggest a strategy that tries to ascertain the validity of norms empirically with a view to actual moral attitudes of people. We expect to find some basic attitudes to be very similar in almost all people. But this finding would not be a moral absolutism based on *a priori* reasoning, but a moral ex post universalism based on empirical data.

Moreover, ultimate moral decisions are not needed in comparative law, because a comparatist normally asks meta-questions on moral issues, which in turn belong to the epistemic, not moral sphere: to determine whether a specific legal tool is fair according to the standards of its own legal culture (or any other standard applied by the scholar) is no moral statement, instead it is an epistemic one which may be true or false. Comparative law is, therefore, ultimately independent of the question of whether or not moral relativism is true.

2. The Comparatist's Bias

a) The Post-modernist Argument

Post-modernists assert that even if we explicitly abstain from evaluating, our whole investigation and presentation will be full of (unconscious) judgements.[91] We are unavoidably biased, so that any attempt at a neutral description is an illusion, merely covering up our own – most Eurocentric (or Western) – views: we are subject to 'the unconscious spell that holds us to see others by the measure of ourselves',[92] we wear 'lenses' that are 'superimposed on foreign legal systems' and 'may cause severe misperceptions and dislocations.'[93] 'Comparatists cannot hope to perceive beyond the limits of their perceptions, nor to divest themselves entirely of the substructural categorisations of their own cultures of origin.'[94] Comparative

91 'The questions comparativists ask will reflect their own perceptual prisms and affect their receptivity to data from observed legal cultures'; Grosswald Curran (n. 6), 58. 'One of the dangers of comparative law is the temptation to mould the data with a view to substantiating a preconceived thesis. This temptation is exacerbated by the fact that the legal material which comparative research provides is extremely diverse and malleable.' (Hill (n. 3), 107).

92 Frankenberg (n. 4), 414.

93 Demleitner (n. 9), 654; Grosswald Curran (n. 6), 48-49 (distortion inevitably prevails in the comparative act).

94 Grosswald Curran (n. 6), 58. The American legal anthropologist Rebecca French reminds the comparatist of 'all the practical and conceptual assumptions that American

law 'is a project that is perhaps inherently ethnocentric – there is no way to escape or transcend the ethnocentric gaze.'[95] In other words, there is always a *Vorverständnis*, which is creative or '(virtually) always and already normative', for 'the context and legal unconscious already perform normative work in selecting, establishing, and organizing the so-called "descriptive" categories deployed in legal thought.'[96]

Bias is already inherent in the choice of what materials deserve comparison (which includes the implicit, foundational comparison which indicates whether the materials are sufficiently similar to be meaningfully compared in depth) and is 'almost always more or less arbitrary one-sided, leaving quite a lot of room for permeation of subjectivism'.[97] '[T]he conceptual constructs that we use determine the way in which we perceive the subject we are studying, and consequently the issues that we imagine to be worth investigating.'[98]

The *Vorverständnis* also determines the choice of the aspect under which we compare. It is derived from observations in the comparatist's own culture – so the critical stance – and then styled as an abstract *tertium comparationis*. Because the *tertium* is basically a cultural projection, comparison under that aspect becomes a 'self-fulfilling prophecy'.[99]

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lawyers already *know* about the world and about the law: the dimensions of space and time, the subtleties of legal myth and narrative, the legal rituals that define how actors act, speak, and move in a legal forum, social hierarchies that influence their decisions, the aspects of authority, power and legitimation they understand. But what if most of or all of these practical and conceptual assumptions were not only different from those that apply in Tibet but arranged in networks or sets or relations that were also entirely different? What if, when one first asked Tibetans about law, they said that no such category existed?' Rebecca Redwood French: *The Golden Yoke: The Legal Cosmology of Buddhist Tibet* (1995), 57. French's marvelous book is a highly impressive attempt to understand a very different legal culture.

95 Crossman (n. 72), 526.

96 Pierre Schlag, 'Normativity and the Politics of Form', University of Pennsylvania Law Review 139 (1991), 801 (808 and 812).

97 Roman Tokarcyk, 'Some Considerations on Comparative Law', Revista Jurídica Universidad de Puerto Rico 59 (1990), 951 (959).

98 Ainsworth (n. 10), 30, see also Legrand (n. 62), 1054, 1057-58.

99 Joachim Matthes, 'The Operation Called "Vergleichen"', in *idem* (ed.), *Zwischen den Kulturen? Die Sozialwissenschaften vor dem Problem des Kulturvergleichs* (1982), 75 (83).

b) Refutation

The bias-argument feeds on the premise that there are closed frameworks. The 'unconscious spell', the 'lenses', 'the ethnocentric gaze' etc. denote frameworks. We have rejected the premise of inescapable frameworks and need not repeat ourselves here. The bias-argument is self-defeating in at least two ways.

First, in order to raise the bias-reproach, post-modernist critique must be able to occupy a position beyond the frameworks. Otherwise it could not recognise the bias. But transcending the framework is what the critique cannot do according to its own theory. Secondly, in order to be consistent, it would have to conceive of itself as bias and projection and self-fulfilling prophecy of its own framework. This, however, would again be self-defeating.

The popular reproach that the scientific community is western-dominated and western-biased[100] deserves special and explicit refutation. Apart from the fact that boundaries between the West and the East or the South are blurry,[101] the argument can be used in all situations to devaluate undesirable results. A consensus among comparatists can be questioned on the ground that it exists among western scholars only. But if non-western scientists agree, it can be suspected that their voices have been, through education and power structures, westernised and not authentic. We here have an argument *ad personam* (not *ad hominem*),[102] which is banned in science. The western-bias argument can be used to refute whatever hypothesis. Its critical potential is, therefore, zero.

The alternative to the bias-argument is an undogmatic case-by-case critique, which allows for the possibility of non-biased research. Projections, unconscious judgements, self-fulfilling prophecies are possible everywhere, but to assert that they are inevitable in comparative law is merely unscientific, critique-immune dogmatism.

100 See, e.g., Frankenberg (n. 3), 263.

101 *Supra* text before footnote 88.

102 See Chaim Perelman and Louise Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (1969), (John Wilkinson and Purcell Weaver transl.) (orig. 1958), 111-112.

3. Comparative Law as a Hegemonial Project

a) The Post-Modernist Argument

The view that knowledge and understanding is framework-dependent is complemented by the post-modernist focus on power[103] and the Other[104]: Because there is no truth, there is also no search for truth, but only ideology. So legal scholarship is, as law in general, basically an ideology, a theoretical construct for the purpose of gaining, cementing, and justifying the exercise of power,[105] which means in particular domination and discrimination of the Other. The entire process of comparative law is not really a comparison of two realities, but an appropriation of the Other according to the familiar standard,[106] a 'power-oriented nostrification of the foreign'.[107] Hence, comparison proceeds along an imagined trajectory of

103 The power theme has been primarily developed by Michel Foucault. See as an overview the interview with Foucault: 'Wahrheit und Macht' (Truth and Power) in: Michel Foucault, *Dispositive der Macht: Über Sexualität, Wissen und Wahrheit* (1978), 21-74.

104 Cf. Jean-François Lyotard, 'Réponse à la question: Qu'est-ce que le postmoderne?', Critique revue générale des publications françaises et étrangères 37 (1982), 357, German transl.: 'Beantwortung der Frage: Was ist postmodern?' in: Peter Engelmann (ed.), *Postmoderne und Dekonstruktion* (1990), 33 (48-49) on unrepresentability and difference; Jean-François Lyotard, *Un enjeu des luttes des femmes* (1976), German translation: 'Ein Einsatz in den Kämpfen der Frauen' in: *idem, Das Patchwork der Minderheiten* (1977), 52-72. Consequently, the new vision of comparative law has its 'focus on difference'; Grosswald Curran (n. 6), 83.

105 See, e.g, Schlag (n. 96), 803-804. Human rights law is, in critical eyes, 'not based on innocent humanitarianism, timeless and universal Truth. Rather, is a situated, contingent, and contested knowledge that is discursively produced by multiple dominating and resistant discourses. In its current form, human rights law naturalises and legitimises the subjugating and disciplinary effect of European, masculinist, heterosexual and capitalist regimes of power.' Dianne Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law,' Australian Yearbook of International Law 18 (1997), 1 (35).
No wonder that traditional comparatists are deemed to share a 'status-quo orientation and a fairly uncritical acceptance of the ideological foundations of the hegemonic legal regimes'; Frankenberg (n. 3), 266. Berman advises critical comparatists to 'refuse the homogenizing and essentializing gestures of the tradition: instead, show how all cultural formations are split, hybrid, and embedded in contexts of power.' (Berman (n. 4), 281).

106 Matthes (n. 99), 84.

107 Jürgen Straub, *Handlung, Interpretation, Kritik: Grundzüge einer textwissenschaftlichen Handlungs- und Kulturpsychologie* (1999), 6.

social or cultural 'development' and is in this regard still influenced by the after-effects of 19th century evolutionism.[108]

This leads to the claim that traditional comparative law is an ideological project, obeying a secret (or unconscious) political agenda which is a 'hegemonic'[109] one. The hegemonic reaction towards the Other is either assimilation ('normalization') or exclusion ('exoticization'),[110] both alternatives ultimately seeking to perpetuate the supremacy of European elites. Critical comparatists find that traditional comparatists will pursue either one of these evil strategies.'[111] Traditional comparative activities are 'political interventions'[112], politics in the guise of comparative science',[113] and 'an invasive political enterprise'.[114] Comparative legal scholarship is not so much an intellectual enterprise as essentially an 'ideological project, developing lenses through which the center will interpret the periphery, developing the alternatives of assimilation and exclusion for particular cultures while solidifying an ideological picture of international governance "above" cultural differences, either absorbing or avoiding them.'[115] Mainstreamers are, first, uncritical towards the legal status quo in their country, and towards the ideological foundations of Western legal systems: '[T]he comparative law agenda is largely conditioned by an uncritical attitude towards fundamental issues of social and economic organization.'[116] Therefore, they 'almost inevitably reach conclusions which are conservative – in the sense of con-

108 Matthes (n. 99), 81-82.

109 See Frankenberg (n. 3), 263 on the mainstreamer as a 'hegemonic self, a representative of legal paternalism'.

110 Berman (n. 4), 282.

111 See *idem*, passim; Kennedy (n. 1), 618; Esquirol (n. 68), 470, on comparatists' 'fiction of Europeanness' of Latin American Law.

112 Frankenberg (n. 3), 261. See similarly HilI (n. 3), 109-110 on the pervasive influence of the political climate of the time on comparative scholarship.

113 Esquirol (n. 68), 437. Esquirol seeks to show that René David's descriptions of Latin American law 'are subordinate to a politico-theoretical project' (*idem*, 438).

114 Frances Olson, 'The Drama of Comparative Law', Utah Law Review (1997) 275 (278). 'Comparativists should recognize the power relations involved' (*idem*).

115 Kennedy (n. 1), 619. According to Kennedy, the comparativist's modest posture as expert or erudite reinforces the internationalist's claim to govern for a space beyond culture. By dividing the assimilable from the exotic, the comparatist stabilises the boundaries between centre and periphery while reinforcing the claim that those boundaries are matters of culture and history rather than political products of an ongoing international regime. 'The comparativist, in this sense, works as an ideologist for the global system of government', *idem*, 636.

116 Hill (n. 3), 106, also 107.

firming and consolidating existing preconceptions about law and society'.[117] Secondly, mainstreamers are 'partial to unity and standardisation under the auspices of the very rule of law [they] like [...] best.' Their vocabulary, goals, method, and discursive practices betray a strong bias for the home law. But they try 'to suppress their subjectivity and hide their peculiar perspective behind the rhetoric of objectivity and neutrality, while camouflaging their politics by pragmatism.'[118] They have a 'paternalistic agenda', 'a totalizing grasp of the subject matter' and work 'to enhance and spread the authority of Anglo/European law'.[119] In short, they pursue a 'project of neo-colonialism'.[120] The traditional methods and techniques of comparison are, therefore, 'strategic'.[121] They serve to justify and confirm the superiority of western law and the necessity to intervene.[122] Legal harmonisation is 'part of a new interventionist political scheme'[123] as well, and the current rush for codification appears as a 'form of conquest executed through legal transplants and harmonization strategies ... dictated by the European Community, the IMF, the World Bank, the Asian Development Bank, and other supranational or international agencies'.[124]

Concentrating on 'Power' and the 'Other', critical analysis seeks to uncover patterns of subjugation and discrimination in legal institutions. Often, critical comparatists study legal cultures which have been or still are dominated and marginalised, such as former colonies, developing countries, or countries of the former socialist bloc, which in their eyes undergo new forms of legal domination exercised by capitalist legal consultants and market forces. Much critical comparative work centres upon the dichotomy between dominant western law and non-western law.

b) Refutation

The hegemony-argument holds that comparatists do not care for truth, but primarily for power. It also implies that we cannot distinguish true

117 '[T]he comparative law agenda is largely conditioned by an uncritical attitude towards fundamental issues of social and economic organization.' (Hill (n. 3), 106).
118 Frankenberg (n. 3), 263.
119 *Idem*, 263-265.
120 Esquirol (n. 68), 437 on René David's writing on Latin America.
121 Frankenberg (n. 4), 421.
122 Frankenberg (n. 3), 265-266.
123 *Idem*, 273.
124 *Idem*, 262.

from false statements. The hegemony-argument is thus based on epistemic relativism, whose viability we have already contested.

Moreover, the argument is self-defeating in a specific way: if there is no truth, but only ideology to camouflage aspirations to power, then even the post-modernist critique cannot claim to be true but can only consider itself as an ideology to camouflage aspirations of power. Thereby it would exclude itself from the scientific discourse.

Certainly, comparative scholarship may be motivated by hegemonial pretensions and may constitute a political intervention cloaked by pseudo-scientific methods, but not inevitably. One must examine every individual piece of scholarship to see whether it is so.

4. Comparatist Categories and Classifications

a) The Post-modernist Argument

Under the premise that logic and science heavily depend on specific epistemic frameworks with relative validity, all types of (scientific) categories, taxonomies, and classifications are suspicious.[125]

A prominent illustration of this suspiciousness is Michel Foucault's citation of a taxonomy from 'a certain Chinese encyclopaedia', reported by Jorge Louis Borges.[126] In it, animals are regrouped as follows: a) animals belonging to the emperor, b) embalmed ones, c) tamed ones, d) sucking pigs, e) sirens, f) mythical ones, g) stray dogs, h) those included in this classification, i) those acting as if mad, j) innumerable ones, k) those drawn with a very fine brush of camel hair, l) and so on, m) those having just broken the flower vase, n) those looking like flies from far. This strange and irritating order has, through Foucault, become a prime example of non-western categorisation, by which Foucault apparently wants to remind us of the relativity and cultural embeddedness of our (western) modes of ordering things, laws, institutions.[127]

125 See, e.g., Grosswald Curran (n. 6), 48.

126 Jorge Louis Borges, 'Die analytische Sprache John Wilkins' in: *idem*, *Das Eine und die Vielen: Essays zur Literatur* (1966), 209 (212) (first published in *Historia de la eternidad*, 1953).

127 Michel Foucault, *Les mots et les choses* (1966) (17 of the German translation, *Die Ordnung der Dinge* (14th edn, 1997)).

The mistrust of classifications is particularly relevant in comparative law, which has traditionally counted classification (for example, in legal families) to its tasks.[128] The critique finds that current comparatist classifications are merely 'formalist ordering and labeling … often randomly gleened [sic!] from limited data'.[129] Classification is Euro-American-centric, banning to a 'residual category such as "other", "immature", "primitive" ... "developing", "in transition"' all non-western laws.[130] Critical comparisons should, rather, unearth 'substructural, often unarticulated, categorisations' in order to 'challenge silent assumptions'.[131] Ultimately, post-modernists are fond of calling into question the category of law.[132]

b) Discussion

The post-modernist claim that categories and classifications are culturally contingent is a direct outgrowth of the theory of inescapable cultural frameworks. Classifications of laws, institutions, and legal orders are doomed to misrepresent the foreign law and are inevitably subjective and arbitrary only under the premise that frameworks are insurmountable, a premise that we have rejected.

Foucault's famous passage does not convince us of anything else. Foucault leaves the reader under the impression that the Chinese taxonomy is authentic, and we do not know whether he himself believed in its authenticity. The Chinese order is, however, purely fictional, an invention of Louis Borges himself, hence a 'western' idea.[133] Some may consider this literary construction as yet another manifestation of preconceived notions of ostensibly 'Asian' logic, which we share when we adopt Borges' artefact as historically correct. Others may, on the contrary, take Borges' ingenious invention as a proof that Borges was able to transgress his (western) con-

128 See for a moderate criticism of the doctrine of legal families Kötz (n. 55), 493-505; for a new taxonomy Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal System', American Journal of Comparative Law 45 (1997), 5-44 (suggesting the division of the world legal systems into the three families of the rule of professional law, the rule of political law and the rule of traditional law).

129 Frankenberg (n. 4), 421.

130 Frankenberg (n. 3), 267.

131 Grosswald Curran (n. 6), 45.

132 See Grosswald Curran (n. 6), 59, whose 'immersion approach' to comparative law 'suggests that law does not have a life of its own'. See also French (n. 93), xiii and 57.

133 See Umberto Eco, *La ricerca della lingua perfetta nella cultura europea* (4th edn, 1993), 222; Jingtai (n. 89).

fines. In any case, being a fiction, the 'emperor's order' cannot authentically illustrate the complete cultural relativity of classifications.

Classification (for example, into legal families or cultures) is the result of a comparison under one or several aspects. Put differently: classification means to highlight some (common) aspects and to leave aside others. The aspects of comparison are pre-selected, but are eventually adjusted in the process of comparison.[134] So in comparative law, classifications are, as elsewhere, no apriorical givens, but attempts of ordering. Again, a moderately critical approach is more helpful than framework-thinking: we must be aware of the fact that categories and classifications may differ in different cultures, at different times, and we must realise the ensuing danger of establishing taxonomies that do not adequately reflect important features of legal systems. Also, we need to question traditional classifications and dig out unarticulated and latent ones. But all this does not mean that an outsider can never understand foreign categories and classifications and translate them (approximately) into his own categories and classifications, nor does it preclude the possibility of discovering or inventing suitable and fitting ones.

5. Functionalism

a) The Post-Modernist Critique

The post-modernist critique of functionalism, coined as 'better-solution-comparativism',[135] is primarily directed against its implied or outspoken universalism, its 'agenda of sameness'.[136] In the critical view, functional resemblances belie deep 'disagreements of instinct and inclination in reasoning about legal problems';[137] there are only 'chimerical universal social

134 For example, a macro-comparison (and classification) can be undertaken with regard to the aspect of valid legal sources. This aspect of classification will furnish two classes: codified (statutory) law and uncodified, judge-made law. Other possible aspects of classifying legal systems may be the systems' concept of law, the legal methods applied, the style of legal thought, or the dominating type of lawyers, the leading theory of interpretation of law, the leading theory of legitimation of law, and so on.

135 Frankenberg (n. 3), 263; see already Hill (n. 3), 106.

136 Grosswald Curran (n. 6), 61.

137 George P. Fletcher, 'The Universal and the Particular in Legal Discourse', Brigham Young University Law Review (1987), 335 (350).

functions'[138] 'The focus on functionalism is suited to yielding results of similarity because it does not stray away from the surface level of functional results to legal problems to societal, historical, and cultural underpinnings' writes Vivian Grosswald Curran, and she argues – not unconvincingly – that the *émigré* generation of comparatists purposely privileged findings of sameness and underestimated the significance of reasons because of their personal experience with the Nazi regime, which had denied human sameness and practised the Shoa.[139]

The critique also rejects the functionalist claim to objectivity and neutrality. It holds that the intellectual process, by which the functions of legal institutions are identified and by which legal institutions are compared and evaluated, is inescapably subjective, personal, and contestable.[140] In this view, functionalism is disguised as apolitical, but in reality 'fundamentally conservative, because its emphasis on points of detail avoids more challenging and radical questions about the role of law in society.'[141]

b) Discussion

As far as the post-modernist approach eschews functionalism on the ground that it is inescapably subjective and only seemingly technical and apolitical, it merely repeats the bias- and the hegemony-arguments in terms of a critique of functionalism. We have already discussed these two arguments.

The assertion that the functional approach underestimates fundamental differences (in legal reasoning, legal culture, societal underpinnings etc.) flows from framework-thinking, according to which legal thought, language and judgement are determined by greatly differing and ultimately irreconcilable frameworks. We have rejected this theory.

The post-modernist claim that functionalism is superficial is justified to the extent that the functional approach (narrowly conceived) tends to

138 Kennedy (n. 1), 590 (n. 76).
139 Grosswald Curran (n. 6), 53, 66-78 and n. 76.
140 Hill (n. 3), 104. See also Kennedy (n. 1), 561 (pointing out that functionalism has claimed to be an objective strategy, a way of avoiding the temptation to subjective judgement and premature closure).
141 Hill (n. 3), 107.

overstate the quality of law as a rational response to social problems.[142] But realising that law serves manifold other purposes does not force us to say that 'function' in its ordinary sense does not matter or that looking at 'functions' is misleading.

Law functions, for instance, as a rhetorical practice that 'tells stories about the culture that helped to shape it and which it in turn helps to shape', and through which 'social data are imaginatively reconstructed as legal facts and concepts.'[143] Law may run counter to specific social needs or interests or may not make a difference.[144] It is, therefore, important to take into account the moral and political aspects of laws that may not function as social problem-solvers but which have completely different, even antagonist functions.

Because of the multiplicity of legal functions, which may be situated on very different levels, and which differ from culture to culture, the so-called functional approach is not as easily applicable as some functionalists like to believe and does not produce simple and unambigous results.[145] The numerous functions of the law (political, technical, social, rhetorical, religious, spiritual, symbolic etc.) may be difficult to detect and must be weighed in importance. In the absence of 'the' function of law, functionality depends on the viewpoint taken. Even if we look only at the technical surface-level, we will find that a rule may be laudable with respect to its technical perfection, its enforceability, its efficacy, its compatibility with other features of the legal system or the legal security it produces. As Myres S. McDougal once pointed out: 'The demand for inquiring into function is, however, but the beginning of insight. Further questions are "functional" for whom, against whom, with respect to what values, determined by what decision-makers under what conditions, how, with what effects.'[146]

142 This objection has been forcefully raised by Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, 1993), esp. 107-118. Watson discovered an extensive and important practice of legal borrowing. If law on a large scale can be borrowed from a very different place and survive to a very different time, then there can be no simple relationship between a society and its law, he concludes.

143 Glendon (n. 40), 8-9. See also Fletcher's critique of functionalism, advocating an approach that takes the legal discourse and its linguistic particularities as the starting point of analysis, not superficial functional resemblances, *supra* (n. 139), 335-351.

144 Frankenberg (n. 4), 437; Dimitra Kokkini-Iatrido, 'Some Methodological Aspects of Comparative Law', Netherlands International Law Review 33 (1986), 143 (160).

145 Watson (n. 142), 4; Hill (n. 3), 198; see Grosswald Curran (n. 6), 71 (n. 93) for an example.

146 McDougal (n. 53), 219.

To compare laws under the aspect of economic efficiency is not more 'objective' than comparing them under the aspect of social function. The difference is that economic efficiency is a narrower criterion, referring to the particular economic function of a law. Comparative assessments under the efficiency-aspect may therefore be quite specific and precise. However, those aspects of an issue which are easiest to measure are not necessarily the most important ones. To focus on economic efficiency as the exclusive criterion under which to evaluate laws (as the strict law and economics approach does), and consequently to compare laws exclusively under that aspect, reveals a quite reductionist view of the law and its role in society.

III. Towards a Post-Post-Modernist Comparative Law

A post-post-modernist approach to comparative law will retain the (self-)critical impetus of the post-modernist critique, reject the post-modernist assertion that objectivity is not attainable in comparative law, and synthesise old and new demands for interdisciplinarity and thoughtful hermeneutics.

1. With Post-modernism: Heightened Reflexivity

The post-modern critique of comparative law correctly asks for highly self-conscious and self-critical methodological guidance and for overall heightened reflexivity.

This first of all suggests the conscious integration of various perspectives and an attentiveness to hidden purposes, meanings, themes, conceptual building blocks and strategies in legal texts pertaining to different cultures.[147]

Secondly, heightened reflexivity comprises an awareness of the relationship between one's research and the *Zeitgeist:* the comparatists' themes, goals and approaches are shaped by broad intellectual or theoretical trends and movements, by societal developments and the political climate. We have mentioned that 19th century historicism and its nationalist outgrowths have influenced comparative law. Subsequently, unificatory enthusiasm of

147 See for a great example of scholarship French (n. 94) (on the methodological aspects mentioned here at 16, 59).

the first half of the 20th century was at least in part a reaction to the atrocities of the First World War and an attempt to contribute to the efforts of the League of Nations. Socio-functionalism in comparative law is only one manifestation of the rise of functionalist approaches in many disciplines, beginning with psychology and sociology. Finally, the current revitalised interest in harmonisation and unification has to do with needs created by globalisation and European Union-building. Awareness of these links helps the comparatist to check his questions and his answers.

Thirdly, the post-modernist critique of comparative law has rightly underlined the critical potential of comparative legal studies and their suitability to uncover the extent to which the form and substance of any legal system result from the implementation of moral and political values.[148] Comparative legal studies are an operator of critique, because they help to create a critical intellectual distance from one's legal system, forcing us into sympathetic yet critical knowledge of law in another context, disrupting our settled understandings, and provoking new judgements.[149] However, this is no new insight, and it has been emphasised in many standard textbooks of comparative law.[150] It is beautifully captured in Mary Ann Glendon's description of "Comparative Law as Shock Treatment".[151]

148 See, e.g., Hill (n. 3), 115.

149 See only Paolo Carozza, 'Continuity and Rupture in New Approaches to Comparative Law', Utah Law Review (1997), 657 (663); Mathias Reimann, 'Stepping out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda', American Journal of Comparative Law 46 (1998), 637 (645). According to Frankenberg (n. 3), 270, comparative law needs '[t]he recognition of the law school as an exotic place, and of comparative legal work as an exotic practice'. Brenda Crossman suggests 'turning the gaze back upon itself' as a comparative methodology to 'make explicit the seemingly inescapable risk of ethnocentrism in the comparative project, while at the same time, deploying the comparison to challenge that ethnocentrism.' (Crossman (n. 72), 537).

150 See only Schlesinger at al. (n. 54), 39: 'To combat an unperceptive and uncritical attitude toward one's own law is indeed one of the main objectives of teaching Comparative Law'.

151 Mary Ann Glendon, 'Comparative Law as Shock Treatment: A Tribute to Jacob W.F. Sundberg' in: Erik Nerep and Wiweka Warnling-Nerep (eds), *Särtryck ur: Festskrift till Jacob W. F. Sundberg* (1993), 69.

2. Against Post-modernism: Objectivity through Mutual Critique and Intercultural Division of Labour

Of course, the entire comparative process is full of explicit or implicit choices. The researcher's choice of materials to compare, and of aspects of comparison/evaluation may depend on political motives, or on other personal preferences. It always depends on the researcher's personal store of knowledge, and on the specific objective of research, such as political intervention, improvement of domestic law, regional harmonisation, mere curiosity etc. Finally, the researcher's choices are likely to be influenced, as just pointed out, by scholarly trends and traditions.

To that extent, comparison and evaluation is tentative, segmented and fragmented. But this is inevitable, because every scholar and every scientist has to make those or similar choices and cannot investigate everything under every aspect.[152]

The necessarily fragmented and 'subjective' comparison may be ill-founded, self-fulfilling, biased, superficial, imprecise, faulty, etc. However, this does not – contrary to the post-modernist belief – damage comparative research as a whole. It is a truism in the philosophy of science that 'science and scientific objectivity do not (and cannot) result from the attempts of an individual scientist to be "objective", but from the co-operation of many scientists.'[153] So scholarship escapes the prejudice of the point of view of those constructing it through testing and mutual criticism.[154] In comparative law, the results will very likely become sound in the long run, if criticism comes from all investigated legal cultures.[155]

152 This is no excuse for comparative projects that are too narrow. In a largely unexplored field, it is critically better to have a great diversity of aspects of comparison and to take them out of different fields instead of restricting oneself to one narrow aspect, e.g. economic efficiency. So, over-specialisation may be counter-productive as well.

153 Karl R. Popper, *The Open Society and its Enemies* (1950), 403. See with regard to comparative law Ernst Rabel, 'Deutsches und amerikanisches Recht', Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 16 (1951), 340 (359). 'What remains of the coloring of the picture by origin and education of the scholar, will be corrected by international co-operation'.

154 Popper calls this 'the idea of mutual rational control by critical discussion.' Karl R. Popper, *The Logic of Scientific Discovery* (1992), 44 n. 1.

155 The post-modernist critics' objection is that discussion and rectification is a lure, because no real communication and collaboration is possible among scholars from different cultures. (Grosswald Curran (n. 6), 66 n. 76: 'a Tower of Babel is the more logical outcome of international collaboration'). But to deny the possibility

A more pragmatic, sociological explanation why discussion and critique of comparative research really works lies in the division of labour within the scientific community, which is perhaps the most important factor of success of modern science and scholarship. It is simply more effective when everybody does not try to discover everything, but instead researches a small field thoroughly. This division of labour will function only if different researchers make use of each others' findings and build on them. When one scholar considers the results of another researcher, she will often realise that his results are incompatible with her own findings, and that the different research results cannot be put together to create a whole picture. In this case the researcher will try to discover the causes of this discrepancy, and she will do so by discussion, critique and scrutiny. The point is: mutual critique and scrutiny naturally flows from the division of labour because it occurs in every attempt to use others' results for own research.[156]

3. Beyond Post-modernism: Interdisciplinarity and Intercultural Hermeneutics

At all stages of comparative research (data acquisition, analysis and interpretation of the data, and actual in-depth comparison and eventual evaluation), the real problems are not moral or cultural blindness, ethnocentricity and legal imperialism, but the lack of full knowledge and understanding of foreign legal rules and cultures. Comparatists have – pure and simple – an incomplete knowledge of many hard facts.[157] They must know something about the historical, social, economic, political, cultural and psychological context which has made a rule or proposition what it is. Because thorough knowledge needs hard and extensive study, excellent language skills, good libraries, long experience, probably knowledge of life and legal practice within the foreign system, it is rarely acquired. In practice, the comparatist almost inevitably knows the legal order better in which she was trained. This asymmetry of knowledge alone may cause systematic mistakes. For

of communication is again mere framework-thinking and a good shield against competition and critique.

156 See on the significance of co-operation in science Henry H. Bauer, *Scientific Literacy and the Myth of the Scientific Method* (1992), 43-62 *et passim*.

157 'Comparative law is superficial ... [It] is hard enough to know in detail one branch of the law of one system, but to know the history of that branch and its relationship with that of some other system (and thus to possess a knowledge of the history of that as well) is well-nigh impossible.' (Watson (n. 142), 10).

instance, it may often be the case that – due to incomplete knowledge of details, of the context – the comparatist over-estimates the possibility of transfer.

Full understanding requires a comprehensive and interdisciplinary approach. Because '[a] legal order simultaneously encompasses systems of political arrangements, social relations, interpersonal interactional practices, economic processes, cultural categorisations, normative beliefs, psychological habits, philosophical perspectives, and ideological values',[158] we must look not only at rules but at legal cultures, traditions, ideals, ideologies, identities, and entire legal discourses. This insight is far from new. Traditional functionalists have called for interdisciplinary research, albeit in different terms.[159] With regard to the dangers of false (U.S.-centred, Eurocentric and hegemonic) universalism, interdisciplinarity and comprehensiveness appear, however, in a new light. They direct our attention to the moral and political, eventually technically dysfunctional, underpinning of rules in a historical, sociological and cultural perspective. So interdisciplinarity and comprehensiveness are a *conditio sine qua non* for avoiding erroneous assumptions on ostensibly 'identical' societal problems and erroneous, de-contextualized evaluations of legal solutions.

158 Ainsworth (n. 10), 28.

159 Already Pierre Lepaulle, 'The Function of Comparative Law', Harvard Law Review 35 (1921-1922), 838 (853): 'First, it must be clear that a comparison restricted to one legal phenomenon in two countries is unscientific and misleading. A legal system is a unity, the whole of which expresses itself in each part; the same blood runs in the whole organism. An identical provision of the law of two countries may have wholly different moral backgrounds, may have been brought about by the interplay of wholly different forces and hence the similarity may be due to the purest coincidence – no force significant than the double meaning of a pun.' Likewise, Rabel wrote in 1925 (n. 45), 5: 'The material of reflection about legal problems must be the law of the entire globe, past and present, the relation of the law to the land, the climate, and race, with historical fates of peoples, — war, revolution, state-building, subjugation —, with religious and moral conceptions; ambitions and creative power of individual; need of goods production and consumption; interests of ranks, parties, classes. Intellectual currents of all kinds are at work ... Everything is conditioned on everything else in social, economic and legal design.' See also Rothacker (n. 22), 31: 'All comparison in a particular field of culture' must be done 'with methodical attention to all other comparative sciences.' 'Hence no constitutional comparison, legal comparison etc. without information by analogous methods, problems, apories, results of comparative history of economics, religious history, history of languages, history of arts etc.'

The program just laid out does not inevitably manoeuvre itself into a 'hermeneutic compulsion', as the critique formulates.[160] This term is meant to explain that comprehensive, understanding comparison constitutes an infinite task because the standards of research and the pre-conditions for true understanding are so high and demanding that they can never be reached.

However, far from being under hermeneutic compulsion, comparative law after post-modernism can refer to the booming field of intercultural hermeneutics.[161] Actually, classic hermeneutics[162] is one of the intellectual roots of post-modernist theory, and modernised versions can usefully be brought back to the fore. Intercultural hermeneutics realises that the cultural Other is in principle not different from the intra-cultural or historical Other. As historical distance can be revealed and described through the interpretation of historical texts, cultural distance can be revealed, described, and conveyed. Intercultural hermeneutics thus presupposes, searches, finds and enlarges the overlaps between different cultures and philosophies. These overlaps make cross-cultural communication and understanding possible.[163] As do languages, legal institutions differ from each other, but they are translatable – not perfectly, but at least approximately.

The quest for scientific rigor, careful study, attention to detail and to context is no compulsion, but a question of good scholarship. Only under the framework-premise is such study infinite because, only under that premise is the Other un-understandable, unrepresentable, incomparable. To scorn

160 Berman (n. 4), 284-285.

161 See already in the eighties Holenstein (n. 76), most recently the focus section 'Interkulturelle Kompetenz und Hermeneutik', Deutsche Zeitschrift für Philosophie 47 (1999), 407-477 with contributions by Hans Julius Schneider, Joachim Matthes, Axel Horstmann, Jürgen Straub and Shingo Shimada; Rosa (n. 72), 10-42. See also Elmar Holenstein, 'Intra- und interkulturelle Hermeneutik' in: *idem*, *Kulturphilosophische Perspektiven* (1998), 257-287; Heinz Kimmerle and Franz M. Wimmer (eds), *Philosophy and Democracy in Intercultural Perspective* (1997); Notker Schneider, Ram A. Mall and Dieter Lohmar (eds), *Einheit und Vielfalt: Das Verstehen der Kulturen* (1998).

162 Friedrich Schleiermacher, 'Hermeneutik' in: *idem*, *Schriften* (1996), 945-991 (orig. 1819); Wilhelm Dilthey, 'Plan der Fortsetzung zum Aufbau der geschichtlichen Welt in den Geisteswissenschaften' in: *idem, Gesammelte Schriften*, vol. VII (4th edn, 1965), 189 (216-220); Martin Heidegger, *Sein und Zeit* (15th edn, 1976), §31-32 (142-153) (orig. 1927); Hans-Georg Gadamer, 'Hermeneutik I: Wahrheit und Methode' in: *idem*, *Gesammelte Werke*, vol. 1 (6th edn, 1990) (orig. 1960).

163 Axel Horstmann, 'Interkulturelle Hermeneutik: Eine neue Theorie des Verstehens?', Deutsche Zeitschrift für Philosophie 47 (1999), 427 (438).

scrupulous scholarship as 'chastened search for true understanding' and to disparage 'all this ego suppression and careful listening'[164] is a good excuse for not even trying.

164 Kennedy (n. 1), 590 n. 76 and 591.

The Southern Turn in Comparative Constitutional Law

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Keywords: Global South, southern turn, Colonial experience, liberalism, transformative constitutionalism, socio-economic transformation, access to justice, epistemic reflexivity, slow comparison, methodological pluralism

A. Introduction and Argument

Comparative constitutional law is not what it used to be. As a field of study, it has globalized geographically, diversified methodologically and pluralized epistemologically. Constitutional orders in Asia, Africa and Latin America have expanded the Euro-American horizon of the discipline. Critical comparatists and social scientists have provided new methodological tools to study constitutional orders across the North-South divide. 'Southern voices' are more present in constitutional conversations, and the 'Global South' is increasingly invoked in comparative debates.[1]

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1 See only William Twining (ed.), *Human rights, southern voices*: *Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi* (Cambridge University Press 2009); Daniel Bonilla Maldonado (ed.), *Constitutionalism of the global South*: *The activist tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013); Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South', American Journal of Comparative Law 65 (2017), 527.

And yet, the Global South still seems to punch under its weight in constitutional conversations. While it represents 'most of the world'[2] in terms of population and constitutions, it remains vastly underrepresented in global constitutional debates, teaching materials, publications, and conferences. Unlike in neighbouring disciplines, the Global South remains undertheorized as a concept, and no equivalent to 'Third World Approaches to International Law' has emerged in comparative constitutional law.[3]

Against this background, this chapter posits that it is high time for a 'Southern turn' in comparative constitutional scholarship. It aims to take stock of existing scholarship on the Global South and comparative constitutional law and to move the debate forward. It brings together authors who all hail from, or are based in, the Global South and who represent a range of regions, perspectives and methodological approaches. The book emerged from a conference on the occasion of 50th anniversary of the journal *Verfassung und Recht in Übersee/World Comparative Law* (VRÜ/WCL), which has been dedicated since 1968 to legal developments outside Euro-America and has become an important platform for and archive of South-North dialogue.[4] Our own scholarly approach is informed by our work as editors of this journal, and by a number of other long-term scholarly projects connecting Southern and Northern constitutionalism.[5]

2 Partha Chatterjee, *The politics of the governed: Reflections on popular politics in most of the world* (Columbia University Press 2006).

3 Zoran Oklopcic, 'The South of Western Constitutionalism: A Map Ahead of a Journey', Third World Quarterly 37 (2016), 2080. On TWAIL see Obiora Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?', International Community Law Review 10 (2008), 371; James Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography', Trade, Law and Development 3 (2011), 26; Luis Eslava and Sundhya Pahuja, 'Beyond the (post)colonial: TWAIL and the everyday life of international law', VRÜ/WCL 45 (2012), 195.

4 For a history of WCL (formerly the 'Law and Politics in Asia, African and Latin America'), see Brun-Otto Bryde, '50 years of "VRÜ/Law and Politics in Asia, Africa and Latin America": History and Challenges', VRÜ/WCL 51 (2018), 3. For a discussion of our role and position as Northern scholars in this context, see below 5.

5 Philipp Dann, 'Federal Democracy in India and the European Union: Towards Transcontinental Comparison of Constitutional Law' *VRÜ/WCL* 44 (2011), 160; Philipp Dann and Felix Hanschmann, 'Post-colonial Theories and Law', VRÜ/WCL 45 (2012), 123; Michael Riegner, 'Access to information as a human right and constitutional guarantee. A comparative perspective', VRÜ/WCL 50 (2017), 332; Michael Riegner and Smarika Kumar, 'Freedom of expression in diverse democracies: Comparing hate speech law in India and the EU' in: Philipp Dann and Arun Thiruvengadam (eds), *Democratic Constitutionalism in Continental Polities: EU and India compared*

In this introductory chapter, we will contextualize, describe and frame this Southern turn in comparative constitutional scholarship. Our argument has three elements: First, we observe that 'Global South' has already become a term used productively in neighbouring disciplines and legal scholarship, even though in very different and sometimes undertheorized ways. From this follows the question of how we could make sense of the notion in comparative constitutional law.

We argue, secondly, that the 'Global South' is a useful concept to capture and understand a distinctive constitutional experience. This experience is shaped by the *distinctive context* that emerges from the history of colonialism and the peripheral position of the South in the geopolitical system, placing Southern constitutionalism in a dialectical relationship with its Northern counterpart. Three *distinctive themes*, so we continue to argue, characterize Southern constitutionalism: constitutionalism as an experience of socio-economic transformation; constitutionalism as a site of struggle about political organization; and constitutionalism as denial of, and access to, justice. Southern constitutionalism is hence a shared experience, shaped by similar macro-dynamics but also profoundly heterogeneous micro-dynamics. It is distinct from, and at the same time deeply entangled with, constitutionalism in the Global North.

From this observation of the South-North entanglement follows the third element of our argument: namely that taking the Global South seriously has implications for comparative constitutional scholarship as a whole. The Southern turn implies an approach to *doing* comparative law that improves our understanding of constitutional law in both North and South. Thinking about and with the 'Global South' denotes a specific epistemic, methodological and institutional sensibility that reinforces the ongoing move towards more epistemic reflexivity, methodological pluralism and institutional diversification in comparative constitutional scholarship generally. In that sense, the Southern turn is also a double turn: After the pivot to the South, it turns back to the North and to the world as a whole.

The remainder of this chapter mirrors this argument and proceeds in three steps: First, we describe the use of the notion of 'Global South' in neighbouring disciplines, in comparative constitutional scholarship his-

(Edward Elgar Publishing 2020), forthcoming; Maxim Bönnemann and Laura Jung, 'Critical Legal Studies and Comparative Constitutional Law' in: Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2017).

torically and today (B). We then sketch what we consider to be distinct about the constitutional experience in the South (C). From this we move on to describe the implications for comparative constitutional scholarship generally, mapping the contours of how to do 'world comparative law' (D). We conclude with a short self-reflection of our own positionality and role in the Southern turn (E).

B. Towards a Southern Turn in Comparative Constitutional Law

If comparative constitutional law wants to remain relevant in a multipolar world, it urgently requires a broader foundation. A discipline whose very *raison d'être* is to transcend individual legal orders but which continues to exclude most of the world, is bound to lose relevance.[6] Less than ever, the comparatist can afford overgeneralizations based on an unrepresentative sample of Western legal orders.[7] But not only the discipline's quest for relevance urges us to turn to the Global South. Recognizing the constitutional experiences of the Global South is also a genuine question of epistemic justice. From colonial times to contemporary rule of law projects, Euro-American law has been exported, imposed and mimicked elsewhere, while other legal traditions have been either ignored or relegated to the sphere of the 'local', 'indigenous' or 'pre-modern'.[8] Taking these legal traditions seriously also highlights the deep entanglements, past and present, that continue to shape constitutional orders in both North and South and that require a transregional dialogue beyond the universalism-particularism

6 On this understanding of comparative law as general jurisprudence, see William Twining, *General jurisprudence. Understanding law from a global perspective* (Cambridge University Press 2009).

7 An exemplary error arising from an unrepresentative comparative sample is pointed out by Upendra Baxi's review of David Dyzenhaus 'The Unity of Public Law', Law and Politics Book Review 14 (2004), 799 (804): 'It is "plainly and surprisingly wrong" to state that the Canadian Supreme Court established in 1999 for the first time in the common law world a general duty for administrative decision-makers to give reasons for their decisions … The Indian Supreme Court has already, and reiteratively, further with multiplier impacts in South public law jurisprudence, performed this feat ever since 1950!'.

8 Teemu Ruskola, *Legal orientalism*: *China, the United States, and Modern Law* (Harvard University Press 2013); Turan Kayaoğlu, *Legal imperialism*: *Sovereignty and extraterritoriality in Japan, the Ottoman Empire, and China* (1. paperback edn, Cambridge University Press 2013).

dichotomy. A final reason for engaging with the Global South in comparative constitutional law is rather simple: it is intellectually productive. It not only adds innovative legal material for comparison, but also offers fresh theoretical perspectives, alternative ways of thinking and necessary irritations of disciplinary orthodoxies. Many of the themes in current global debates have been under discussion in Southern constitutional law for quite some time: the globalization of constitutional law; democratic constitutionalism beyond homogenous nation states; contestations of liberal constitutionalism and non-liberal varieties of constitutional government; the constitutionalization of social rights and welfare guarantees; the relationship between globalized capitalism, inequality and democratic constitutionalism; judicial review and state power; methodological debates between comparative constitutional law and comparative constitutional studies. The Global South speaks to all these debates, and offers a wealth of insights.[9]

Considering these reasons for a Southern turn, we first want to understand better its context – in three steps: We first analyse the history of the term and its productive use in other disciplines (1.). We then turn to legal scholarship and trace the treatment of Southern constitutionalism in comparative (constitutional) law over time (2.). We end with a brief overview of contemporary approaches to constitutional law in the South (3.).

1. The Notion of the Global South and its Use in Neighbouring Disciplines

Using the notion of 'Global South' is an endeavour which requires explanation. Sceptics criticize that the term is too fuzzy to be analytically useful, that it lumps together very different legal orders with little normative common ground, or that there is nothing distinctive about the constitutional experience of the Global South.[10] Indeed, comparatists may rightfully ask whether this vastly heterogeneous array of constitutional orders has something in common that justifies the label Global South, and at the same time

9 Boaventura de Sousa Santos, 'A New Vision of Europe: Learning from the South' in: Gurminder K. Bhambra and John Narayan (eds), *European Cosmopolitanism. Colonial Histories and Postcolonial Societies* (Routledge 2017), 173.

10 Ran Hirschl, *Comparative Matters*: *The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014), 218. Sceptic as to the distinctiveness is Hailbronner (n. 1).

sets it apart from its logical other, the Global North. Are highly aggregated concepts like 'Global South' heuristically valuable at all?

A bit of context is useful here. Commonly, the Global South is considered as the heir to the notion of the 'Third World', which emerged in the early 1950s as the confident self-description of the newly independent and non-aligned states in the South. 'Third World' was a reference to Abbé Sieyès' notion of the 'third estate' during the French revolution, which had formulated the demand of the democratic majority of citizens to end aristocratic rule in the 18th century.[11] In the era of 'decolonization', the notion easily conveyed the idea that now the democratic majority of peoples in the world demanded their voice to be heard on the world stage.[12] It quickly caught on in political and academic language, as it expressed a common agenda based on a shared historical experience. This common agenda, however, fell apart under the dichotomous pressures of the Cold War and the increasingly different paths of the group of countries. In the North, the notion was also routinely mis-interpreted as meaning a hierarchy of the first (capitalist), second (communist) and third or last world of 'developing countries' and hence took on a rather derogative meaning. In the early 1990s, with the end of the Cold War, the notion lost its appeal and resonance.

And yet, there seemed to have been a demand to capture the non-OECD group of states and peoples in one notion. In the 1990s, the notion of the 'Global South' emerged and started a productive intellectual career less in the formalized political arena but in the grass-roots political sphere and especially in the social sciences and humanities. In these disciplines, 'Global South' is a widely established term, while its specific meaning and contours remain subject to debate.

In international political economy and international relations, the 'Global South' is not only associated with the rise of emerging economies, especially by the BRICS, but also with the unequal distribution of wealth

11 Alfred Sauvy, 'Trois mondes, une planète', *L'Observateur* (Paris, 14 August 1952); on the history of the notion: Vijay Prashad, *The darker nations*: *A people's history of the third world* (The New Press 2007), 6-11.

12 Luis Eslava, Michael Fakhri and Vasuki Nesiah, 'The Spirit of Bandung' in: Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, global history, and international law. Critical pasts and pending futures* (Cambridge University Press 2017), 3; Jochen von Bernstorff and Philipp Dann, 'The Battle for International Law in the Decolonization Era: An Introduction' in: Bernstorff and Dann (eds), *The Battle for International Law in the Decolonization Era* (Oxford University Press 2019), 1.

and benefits in a unified globalized economy.[13] This distribution, however, does not necessarily follow the methodological nationalism of GDP figures but also entails massive internal inequalities. In this vein, in area studies, re-energized and to some extent displaced by 'Global Studies', the concept does not primarily emphasize a North/South divide but rather highlights entanglements and uneven developments.[14] Areas of the Global South can be found in racialized urban ghettos of North America, as much as the Global North in gated communities of the rich in Rio, Lagos or Mumbai.

Postcolonial theorists, by contrast, use the term to emphasize that much of our knowledge, categories and methods, which claim to be universal, turn out to be deeply provincial when we take a closer look.[15] In a similar vein, certain strands of anthropology and sociology have developed a rich body of 'Southern theory' which tries to escape the trap of methodological nationalism (and parochialism) and puts subaltern knowledge and experiences centre stage.[16] Thus, the Global South can also be understood as a political concept that gains its critical potential from its geographical imprecision: It allows to negotiate an array of geographic scales from planet to neighbourhood 'to understand how forces that seek to impose exploitative and hegemonic economic and political forms have been and can be resisted.'[17]

13 Bhupinder S. Chimni and Siddharth Mallavarapu (eds), *International Relations*: *Perspectives for the Global South* (Pearson 2012); Amitav Acharya and Barry Buzan, *The making of global international relations*: *Origins and evolution of IR at its centenary* (Cambridge University Press 2019); Siba Grovogui, 'A Revolution Nevertheless: Global South in International Relations', The Global South 5 (2011), 175; Thomas Eriksen, 'What's Wrong with the Global North and the Global South?' in: Andrea Hollington, Tijo Salverda, Tobias Schwarz et al. (eds), *Concepts of the Global South – Voices from Around the World* (Global South Studies Center Cologne 2015), <https://kups.ub.uni-koeln.de/6399/1/voices012015_concepts_of_the_global_south.pdf> accessed 8 March 2020.

14 C.f. Katja Mielke and Anna-Katharina Hornridge (eds), *Area Studies at the Crossroads* (Palgrave 2017).

15 Dipesh Chakrabarty, *Provincializing Europe*: *Postcolonial Thought and Historical Difference* (2nd edn, Princeton University Press 2009); Walter D. Mignolo and Catherine E. Walsh, *On Decoloniality*: *Concepts, Analytics, Praxis* (Duke University Press 2018).

16 Jean Comaroff and John L. Comaroff, *Theory from the south, or, how Euro-America is evolving toward Africa* (Routledge 2012); Julian Go, 'Globalizing Sociology, Turnig South. Perspectival Realism and the Southern Standpoint', Sociologica 2 (2016), 1; Shalini Randeria and Sebastian Conrad (eds), *Jenseits des Eurozentrismus* (Campus Verlag 2014).

17 Leigh Anne Duck, 'The Global South via the US South' in: Andrea Hollington, Tijo Salverda, Tobias Schwarz et al. (eds), *Concepts of the Global South* (Global South

In this light, the Global South is not only, or even primarily, a place, but rather a sensibility and perspective, a way of looking at the world as a whole. This relative flexibility and imaginative resonance may explain its relative popularity over possible contenders, such as the more technical developed/developing distinction, the politically explicit 'most of the world' or centre-periphery opposition, or the geographically more precise 'Asia, Africa and Latin America'.

2. The Global South in Comparative Constitutional Law: A Brief Intellectual History

Law has not been entirely absent from these debates. Anthropologists, sociologists and postcolonial theorists alike have discussed the distinctive features of law and its role in the Global South.[18] Lawyers in the South, of course, have reflected on their respective legal systems. Yet, as a distinctively theoretical perspective, the South has been developed mostly in public international law. Since the 1990s, 'Third World Approaches to International Law' (TWAIL) have brought together scholars from the South and fellow travellers in a shared intellectual project that has gained some internal coherence, theoretical sophistication, and critical traction in global legal discourse.[19]

By contrast, in comparative law, up to date no equivalent to TWAIL has emerged, be it in private, criminal or constitutional law.[20] The reasons for this gap are surely manifold.[21] But of course, this does not mean that there has been no comparative study of constitutional law of the South. In fact, there is a particular history of comparative law engagement with Southern constitutional orders that comparatists should be aware of. Occasions for

Studies Center Cologne 2015), <https://kups.ub.uni-koeln.de/6399/1/voices012015_concepts_of_the_global_south.pdf> accessed 8 March 2020.

18 Jean Comaroff (ed.), *Law and Disorder in the Postcolony* (University of Chicago Press 2006); Chatterjee (n. 2).

19 Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law', VRÜ/WCL 45 (2012), 195.

20 But see Pablo Ciocchini and George Radics (eds), *Criminal Legalities in the Global South* (Routledge 2019).

21 On possible reasons, see Oklopcic (n. 3) (arguing that competing critical projects (such as transnational law or political economy approaches) as well as the much more complex political agenda of critical comparison in domestic law (in contrast to critical international law) have hindered the emergence).

comparative engagement often arose at founding moments.[22] When Latin American constitution-makers first drafted independence constitutions in the 19th century, they looked to other constitutional orders for inspiration – mostly the US and Europe, not necessarily because of their perceived superiority but for a perceived lack of alternative examples of constitutional government.[23] Similarly, constitution-making during the 20th century decolonization era in Asia and Africa was accompanied by comparative studies.[24] Ultimately, however, these processes generated much less scholarly engagement as one would have thought and wished for – and much is still to be discovered.

One reason is that in the second half of the 20th century, comparative legal studies very much remained in the shadow of the Cold War.[25] The 'law and development' movement of the 1960s and 70s, which was a primary place of scholarly legal engagement between South and North, was gripped by modernization theory and the concept of development, thus being more preoccupied with legally remaking developing economies in the image of industrialized nations than with comparing constitutional foundations of

22 Daniel Bonilla Maldonado and Michael Riegner, 'Decolonization' in: Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2020); Mara Malagodi, Luke McDonagh and Thomas Poole, 'New Dominion constitutionalism at the twilight of the British Empire: An Introduction', International Journal of Constitutional Law 17 (2019), 1166.

23 Roberto Gargarella, *Latin American constitutionalism, 1810-2010: The Engine Room of the Constitution* (Oxford University Press 2013), 2.

24 James S. Read, 'Bills of Rights in "The Third World": Some Commonwealth Experiences', VRÜ/WCL 6 (1973), 21; Gordon Woodman, 'British Legislation as a Source of Ghanaian Law: From Colonialism to Technical Aid', VRÜ/WCL 7 (1974), 19; A. S. Fadlalla, 'Fundamental Rights and the Nigerian Draft Constitution', VRÜ/WCL 10 (1977), 543; Ebitimi E. Chikwendu, 'Considerations of the Freedom Value in a Military Regime. A Decade of Military Rule in Nigeria', VRÜ/WCL 10 (1977), 531; Zdenek Červenka, 'Rhodesia Five Years after the Unilateral Declaration of Independence', VRÜ/WCL 4 (1971), 9. In retrospect see, Harshan Kumarasingham (ed.), *Constitution making in Asia*: *Decolonisation and state-building in the aftermath of the British Empire* (Routledge 2016); Charles Parkinson, *Bills of rights and decolonization: The emergence of domestic human rights instruments in Britain's overseas territories* (Oxford University Press 2007); *Kwasi* Prempeh, 'Africa's "constitutionalism revival": False start or new dawn?', International Journal of Constitutional Law 5 (2007) 469; see also Kevin Tan, *Constitutional Foundings in Southeast Asia* (Hart Publishing 2020).

25 Ugo Mattei, 'The Cold War and Comparative Law: A Reflection on the Politics of Intellectual Discipline', American Journal of Comparative Law 65 (2017), 567.

political government.[26] At the same time, there was hardly any engagement with the emerging new constitutions of the South. Even though the new objects of study were plentiful, studies are rare in legal scholarship – and if existent were often shaped by Cold War logics.[27] This dearth of comparative constitutional studies looking at the South was no outlier, however, when looking at the state of comparative constitutional law more generally. While comparative studies in the area of private law blossomed and professionalized, the comparative studies of constitutions even with regard to Northern constitutions was rather dormant during the cold war era.

Notable counterexamples only highlight this point. Most prominent is maybe India, whose constitution has not only been studied intensely from early on[28] but also attracted wider comparative attention soon.[29] But then again, India's constitution is also the unusual example of a postcolonial constitution that had been debated intensely even before independence, was soon defended by a confident Supreme Court and not hollowed out by constant constitutional change or poisonous constitutional politics.[30] Another fascinating exception to the overall rule of Northern ignorance towards Southern constitutionalism is the history of our journal, *VRÜ/WCL*, formerly with the English subtitle 'Law and Politics in Asia, Africa and Latin America'. The journal was founded in 1968 in the spirit of decoloniza-

26 David Trubek and Marc Galanter, 'Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States', Wisconsin Law Review (1974), 1062; David Trubek, 'Toward a social theory of law: An essay on the study of law and development', Yale Law Journal 82 (1972), 1; for a recent day reflection, David Trubek, 'Law and development: Forty years after "Scholars in Self-Estrangement"', University of Toronto Law Journal 66 (2016), 301. For exceptions, see e.g. Kenneth Karst and Keith Rosenn, *Law and development in Latin America*: *A case book*, vol. 28 (University of California Press 1975).

27 For a fascinating exchange on new Southern constitutions and the role of German scholars from East and West, see (the East German communist) Gerhard Brehme and Klaus Hutschenreuter, 'Zur Rolle der westdeutschen Staats- und Rechtswissenschaft im System des Neolkolonialismus', Staat und Recht 19 (1970), 1254; and the replique by (the West German, liberal) Brun-Otto Bryde, 'Überseerecht und Neokolonialismus', VRÜ/WCL 4 (1971), 51.

28 Hormasji M. Seerwai, *Constitutional Law of India* (1st edn, Tripathi 1967).

29 Granville Austin, *The Indian Constitution*: *Cornerstone of a Nation* (Clarendon Press 1966); Marc Galanter, '"Protective Discrimination" for Backward Classes in India', Journal of the Indian Law Institute 3 (1961), 39; Dieter Conrad, 'Limitation of Amendment Procedures and the Constituent Power', Indian Year Book of International Affairs 1966–1967 15-16 (1970), 375.

30 On the Indian constitutional history only Arun K. Thiruvengadam, *The constitution of India*: *A contextual analysis* (Hart Publishing 2017).

tion and a cooperative new beginning and its trajectory is a good indicator of the developments in scholarship. Initially it covered constitutional developments in Asia, Africa and Latin America with a range of authors from all world regions.[31] Up to the late 1970s, it was a global and plural platform for public law reflections. However, with authoritarian regimes increasingly displacing constitutional governments, the journal more and more turned to international law as a better, less ominous site of legal engagement by and with the Third World.[32]

The overall situation changed in the 1990s. Interest in comparative constitutional law resurged after the end of the Cold War, when waves of democratization brought about new constitutions in the former Third World and post-Soviet states. Northern scholars took an interest in the 'rise of world constitutionalism' and the 'inevitable globalization of constitutional law'.[33] At the same time, Southern scholars like Upendra Baxi began to challenge the eurocentrism of purportedly universal categories of comparative constitutional law and argued for a reconceptualization of constitutionalism from a subaltern perspective.[34] In a similar vein, critical legal comparatists turned to the Global South and especially began to use insights from postcolonial theory for the theory and practice of comparative law.[35] The situation and reception of VRÜ/WCL changed, too; a new generation of authors and editors began to realize the opportunities of an

31 See for the opening statement of the journal Herbert Krüger, 'Verfassung und Recht in Übersee', VRÜ/WCL 1 (1968), 3-29; for an example of the early contributions on constitutional developments around the world see only S. C. Sen, 'Constitutional Storm in India', VRÜ/WCL 7 (1974), 33; K. M. de Silva, 'Sri Lanka (Ceylon). The New Republican Constitution', VRÜ/WCL 5 (1972), 239; Hector Fix-Zamudio, 'México: El Organismo Judicial (1950-1975)', VRÜ/WCL 10 (1977), 391; Kwame Opoku, 'African Law: Existence and Unity', VRÜ/WCL 9 (1976), 65.

32 See for a reflection on the role and use of international law in the history of the journal Philip Kunig, 'Völkerrecht und Übersee', VRÜ/WCL 30 (1997), 465.

33 Bruce Ackerman, 'The Rise of World Constitutionalism', Virgina Law Review 83 (1997), 771; Mark Tushnet, 'The Inevitable Globalization of Constitutional Law', Virginia Journal of International Law 50 (2009), 985.

34 Upendra Baxi, 'Constitutionalism as a Site of State Formative Practices', Cardozo Law Review 21 (1999-2000), 1183; Twining (n. 1).

35 Nathaniel Berman, 'Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion', Utah Law Review 2 (1997), 281; Lama Abu-Odeh, 'Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West"', Utah Law Review 2 (1997), 287; Teemu Ruskola, 'Legal Orientalism', Michigan Law Review 101 (2002), 179; Bönnemann and Jung (n. 5); Sherally Munshi, 'Comparative Law and Decolonizing Critique', American Journal of Comparative Law 65 (2017), 207; Judith Schacherreiter, 'Postcolonial Theory and Comparative Law: On the Methodological

already well established journal for reflection of South-North comparative constitutionalism.

Yet, while in public international law TWAILers were busy forging a scholarly movement, constitutionalists did not follow suit for some time. Neither questions of poverty, colonial past and asymmetries, nor the challenge of inequality, marginalization and distributive justice acquired prominence in a discipline, whose epistemic horizon was limited by the idea and experience of liberal democracy. It took until 2013 for a volume to see the light of day in which the Global South explicitly became title and scholarly program in 'The Constitutionalism of the Global South'.[36]

3. Approaches in Contemporary Constitutional Scholarship

Today, Southern constitutions are part of the global comparative conversation, some more (like the Indian, Brazilian, Colombian or South African constitution), some less; academic journals have evolved and provide platforms for global exchange; new voices have emerged.[37] But the approaches to these constitutions vary considerably – and with significant implications. At the risk of oversimplifying, we propose to distinguish three ideal-typical approaches: Comparative constitutional law *for*, *with* and *from* the Global South. Each approach is characterized by a combination of scholarly concerns and has distinct epistemic and political implications. They ultimately differ by the importance they give to the constitutional experience in the South.

a) Comparative Constitutional Law for the Global South

A first approach might be called 'Comparative Constitutional Law for the Global South'. It is concerned with the production of knowledge about constitutional law in the North for consumption in the South, be it in the form of colonial export, law and development initiatives, rule of law

and Epistemological Benefits to Comparative Law through Postcolonial Theory', VRÜ/WCL 49 (2016), 291.

36 Bonilla Maldonado (n. 1).

37 Today, three international English-language journals aim to reflect comparative constitutional law in general (with no regional or particular thematic focus): VRÜ/WCL, International Journal of Constitutional Law (I-CON) and 'Global Constitutionalism'.

projects, constitutional octroi or contemporary projects of constitutional advice and reform that draw on templates of Western liberal constitutionalism.[38] Here, constitutional law and experience of the South does not feature as particularly relevant but more as an object to be reformed and shaped. Such scholarship has been largely driven by European and American actors, international organizations or bilateral aid agencies with little input from the Global South. Its main concern is the transplantation, or diffusion, of Western liberal constitutionalism to new contexts in the Global South.[39] Epistemically and politically, these approaches are highly ambivalent: While studying these processes descriptively may be heuristically valuable, advocating them normatively has been increasingly complex, politically dubious, and practically impossible where transplantation is accompanied by violent imposition or economic coercion.

b) Comparative Constitutional Law with the Global South

The second approach – *with* the Global South – is to include Southern constitutional law and practice and treat it as an equally important object of study. Two varieties of this approach can be distinguished, depending on the further intentions and epistemic awareness connected to them.

In a rather neutral version, authors of this approach simply want to broaden the sample for comparison, or to globalize the 'gene pool' of comparative constitutional law.[40] Reasons for this can be intellectual curiosity but also a methodological concern with representativeness of their case selection.[41] The notion of the Global South (if used at all) describes this geographical and thematic expansion but is not used as an identity marker

38 For analysis and critique of these dynamics, see Philipp Dann and Zaid Al Ali, 'Internationalized Pouvoir constituant', Max Planck Yearbook of United Nations Law 10 (2006), 423; Constance Grewe and Michael Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared', Max Planck Yearbook of United Nations Law 15 (2011), 1; Jedidiah Kroncke, *The futility of law and development*: *China and the dangers of exporting American law* (Oxford University Press 2016).

39 Journals such as 'Global Constitutionalism' or 'The Hague Journal of the Rule of Law'.

40 Cheryl Saunders, 'Towards a Global Constitutional Gene Pool', National Taiwan University Law Review 4 (2009), 1.

41 Hirschl (n. 10); Tom Ginsburg, *Judicial review in new democracies*: *Constitutional courts in Asian cases* (Cambridge University Press 2003); David Law and Tom Ginsburg, 'Constitutional Drafting in Latin America: A Quantitative Perspective' in: Colin

or theoretical concept.[42] Proponents of social-scientific and quantitative comparative studies have argued that quantitative methods have an egalitarian impetus because they treat all observations alike, whether they concern the constitution of the US or Gambia.[43] Overall, however, the epistemic and political implication is that this approach extends the existing framework to new materials: it allows for addition, but not for more.

In a more deliberate variety, Southern constitutionalism is more than an equal object of study and appears as an original producer of legal knowledge, ideas and innovation. Scholars in this camp emphasize the production of comparative constitutional law scholarship by and in the Global South.[44] Methodologically, this variety tends to use qualitative approaches that emphasize the specific contexts of constitutional law in the Global South (as much as in the Global North).[45] Most authors seem comfortable with a global pluralism that allows for a peaceful co-existence of North and South as equals, each with their own distinctive constitutional outlook. The epistemic framework is thus pluralized but remains intact for the North itself.

c) Comparative Constitutional Law from the GS

Finally, in a third and more fundamental approach, some scholars demand to rethink comparative constitutional law *from* the perspective of the Global South and use the South as a tool to critique of constitutional orthodoxy. Here, the notion of the Global South functions as a lens to rethink comparative constitutional law in its entirety. This approach brings together

Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar Publishing 2018), 217.

42 See Hirschl, 207-223.

43 Ibid, 223.

44 Heinz Klug, *Constituting democracy*: *Law, globalism, and South Africa's political reconstruction* (Cambridge University Press 2000); Theunis Roux, *The Politico-Legal Dynamics of Judicial Review* (Cambridge University Press 2018); Gary Jeffrey Jacobsohn, *The wheel of law*: *India's secularism in comparative constitutional context* (Princeton University Press 2003); James Fowkes, 'Texts in a time of imposition: lessons from two imposed constitutions in Africa' in: Richard Albert et al. (eds.), *The Law and Legitimacy of Imposed Constitutions* (Routledge 2018), 243; Michaela Hailbronner, 'Constitutional Legitimacy and the Separation of Powers in Africa: Looking forward' in: Charles Fombad (ed.), *Stellenbosch Handbooks in African Constitutional Law, Volume 1: The Separation of Powers* (Oxford University Press 2016), 385.

45 Klug (n. 44).

authors from both North and South critical of orthodoxies in comparative constitutional discourse. The primary concern of this approach is to revise the epistemic framework of the discipline and to dismantle the hierarchy of legal ideas and scholarship dominated by Northern scholars and institutions.[46] Many scholars here insist on the originality of Southern constitutionalism and distinctive constitutional themes and experiences.[47] Often, this includes recovering constitutional experiences and themes in the South that would not count as 'constitutional' within a Northern framework. Approaches belonging to this modus are often intertwined with critical legal theory and question the Western script of liberal constitutionalism with a distinctively emancipatory agenda in mind.[48] To this end, the notion of the Global South is used as a central theoretical concept, characterized by its ex-centric perspective outside Euro-America. At their most radical, its proponents perceive the Global South as an alternative lens to understand the world.[49] Methodologically, scholars belonging to this approach reject positivism and formalism as tools of legal scholarship and turn to

46 Daniel Bonilla Maldonado, 'The political economy of legal knowledge' in: Colin Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar Publishing 2018), 29; Jorge L. Esquirol, *Ruling the law*: *Legitimacy and failure in Latin American legal systems* (Cambridge University Press 2020); Baxi (n. 34), 1210. Boaventura de Sousa Santos, *The end of the cognitive empire*: *The coming of age of epistemologies of the South* (Duke University Press 2018).

47 Philipp Dann and Arun Thiruvengadam (eds), *Democratic Constitutionalism in Continental Polities: EU and India compared* (Edward Elgar Publishing 2020); Siri Gloppen, Bruce Wilson, Roberto Gagarella et al (eds), *Courts and power in Latin America and Africa* (Palgrave 2010); Armin von Bogdandy et al. (eds), *Transformative constitutionalism in Latin America*: *The emergence of a new Ius Commune* (Oxford University Press 2017).

48 Boaventura de Sousa Santos, 'Plurinationaler Konstitutionalismus und experimenteller Staat in Bolivien und Ecuador: Perspektiven aus einer Epistemologie des Südens', Kritische Justiz 45 (2012), 163; Heiner Fechner, *Emanzipatorischer Rechtsstaat*: *Praxistheoretische Untersuchung soziokultureller Inklusion durch Recht am Beispiel Venezuelas* (Nomos 2016); Upendra Baxi, 'Constitutionalism as a Site of State Formative Practices', Cardozo Law Review 21 (2000), 1183; Upendra Baxi, 'Postcolonial Legality: A Postscript from India', VRÜ/WCL 45 (2012), 178; Roger Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America', Leiden Journal of International Law 31 (2018), 773.

49 Oklopcic (n. 3); Florian Hoffmann, 'Facing South: On the Significance of An/Other Modernity in Comparative Constitutional Law' in: Philipp Dann, Michael Riegner and Maxim Bönnemann, *The Global South and Comparative Constitutional Law* (Oxford University Press 2020), 41-66; Jedidiah J Kroncke, 'Legal Innovation as a Global Public Good: Remaking Comparative Law as Indigenization' in: Dann, Riegner and Bönnemann (n. 49), 110-137.

other sources of knowledge such as anthropology, sociology of knowledge, political economy or post-structuralism.[50] The main epistemic and political implication is a challenge to existing structures of global knowledge production in comparative constitutional law.

C. Southern Constitutionalism as Distinctive Constitutional Experience

The authors of this volume contribute to the Southern turn in comparative constitutional law in a variety of ways and do not follow a unified theory or approach. They can be located in the latter two approaches outlined above (*with* and *from* the Global South) and thus reflect the internal plurality of Southern constitutionalism. From this plurality, however, emerge some recurring patterns and shared experiences that we want to highlight and develop further in this introductory chapter. We do not attempt to summarize each author's contribution here but rather highlight key thoughts at relevant points throughout the text.

Our own argument in this section is that the Global South is a useful concept to capture and understand a distinctive constitutional *experience*. Southern constitutionalism is, first and foremost, a shared experience, shaped by homogenous macro-dynamics and profoundly heterogeneous micro-dynamics. This constitutional experience is distinct from, and at the same time deeply entangled with, constitutionalism in the Global North. This distinctiveness of the Southern constitutional experience results from a combination of contextual and normative, historical and contemporary, global and local factors. It resides as much in the object of analysis as in the perspective of the observer.

We describe and analyse this distinctiveness on two levels: First, we argue that the history of colonialism and the position of the South in the geopolitical system are a *distinctive context* that shapes the experience of Southern constitutionalism in a dialectical relationship with its Northern counterpart (1.). Secondly, we identify three *distinctive themes* that characterize Southern constitutionalism: constitutionalism as an experience of socio-economic transformation; constitutionalism as a site of struggle about

50 See, for instance, the early observation by Baxi (n. 34), 1209: 'As a non-hegemonic epistemic enterprise, comparative constitutionalism needs to transform itself into constitutional ethnography, or the anthropology of power-fields, so memorably developed by Max Gluckman.'; Ruskola (n. 8); Kroncke (n. 38).

political organization; and constitutionalism as denial of, and access to, justice (2.).[51]

We hope that using the concept of the Global South helps not only to capture distinctive features and entanglements, but also to guard against some pitfalls of a global comparison, namely against essentializing, othering and subordinating constitutional experiences from outside Euro-America. The Global South is a polythetic category, i.e. not all its members necessarily share all its distinctive features. Besides, the North-South divide is not a strict dichotomy. The adjective 'Global' highlights that the South is not a strictly geographical notion, and 'distinctiveness' (rather than 'difference') accentuates features that are particularly salient for the (self)description of the South but may be present in the North, too.

I. Context: The Colonial Experience and Geopolitical Asymmetries

As several authors in this volume emphasize, one starting point to grasp the distinct nature of constitutionalism in the South lies in the history of colonialism and the geopolitical asymmetries it entrenched.[52] Most societies in the South share the experience of having been colonized – at least in a wider sense of having been in the periphery of a global order that was centred around the North Atlantic. Conversely, the Northern/Western constitutional experience is shaped by its position at the centre of this global order. Or to put it more bluntly: Historically, the North has been the colonizer, the South the colonized – and both have been bound together in an imperially structured global order.

Surely, the colonial experience is a heterogeneous one, and its impact on constitutionalism is modulated by a range of factors: the identity of the colonizer (Spanish, Portuguese, British, French, German empires etc.),

51 These three themes are not meant as an exclusive and comprehensive list capturing all aspects of Southern constitutionalism, and other themes remain possible. Cultural diversity, for example, could be another important trait of Southern constitutionalism, which we however treat as a cross-cutting dimension that is relevant across all of our three themes.

52 Christine Schwöbel-Patel, '(Global) Constitutionalism and the Geopolitics of Knowledge' in: Dann, Riegner, and Bönnemann (n. 49), 67-85; Heinz Klug, 'Transformative Constitutionalism as a Model for Africa?' in : Dann, Riegner and Bönnemann (n. 49), 141-164; Sujit Choudhry, 'Postcolonial Proportionality: Johar, Transformative Constitutionalism, and Same-Sex Rights in India' in: Dann, Riegner and Bönnemann (n. 49), 190-209.

the nature of colonialism (e.g. settler v. exploitation colonialism), the type of imperial rule (direct v. indirect), the duration and intensity of the colonial encounter and the time of decolonization (Latin America v. Asia and Africa), and the type of transition to independence (negotiated v. liberation war). The constitutional legacy of colonialism in Latin America thus differs in important respects from that in Africa and Asia, and former settler colonies like the USA and Australia are another category unto themselves.[53]

Yet, the colonial experience typically had some recurring features: a substantial period of foreign domination that interrupted autonomous evolution and replaced indigenous ideas, institutions and elites with foreign ones; a colonial state structured by an imperial modality of resource extraction and social administration predicated on European superiority; a legal system imported from or heavily influenced by the metropolis which entrenched structures of political oppression, economic exploitation, racism and physical violence; and the forced integration of colonized societies into a hierarchically structured global order, in which power and wealth was increasingly centred in Europe and North America.[54]

With respect to these experiences, formal 'decolonization' was both a moment of rupture and continuity. Colonial institutions both perished and persisted after independence. On the one hand, independence constitutions symbolized a break with the past and provided a foundation for a new political community with emancipatory possibilities unavailable under imperial rule. On the other hand, colonial institutions and laws persisted in practice, local elites replaced foreign ones, and new states appropriated colonial instruments of domination and exploitation. As importantly, the constitutional imagination and possibilities of postcolonial societies were heavily conditioned by the grammar of modern constitutionalism and the unequal global order in which they remained embedded. Postcolonial

53 Upendra Baxi, 'Postcolonial legality: A postscript from India', VRÜ/WCL 45 (2012), 178; Bonilla Maldonado and Riegner, 'Decolonization' (n. 22); Kevin Bruyneel, 'Review Essay: On Settler Colonialism', Rev Pol 82 (2020), 145.

54 Arudra Barra, 'What is "Colonial" About Colonial Laws?', American University International Law Review 31 (2016), 137; Brenna Bhandar, *Colonial Lives of Property*: *Law, Land, and Racial Regimes of Ownership* (Duke University Press 2018); Upendra Baxi, 'The colonialist heritage' in: Pierre Legrand and Roderick J. C. Munday (eds), *Comparative legal studies: traditions and transitions* (Cambridge University Press 2003), 46; Mahmood Mamdani, *Citizen and subject*: *Contemporary Africa and the legacy of late colonialism* (Princeton University Press 2018).

constitution-making thus has been an uneven process of constitutional mimicry (or 'transplantation' and 'migration'), poesis, and hybridization.[55]

One might object that constitutionalism in the North is equally marked by ruptures and continuities, especially in the French tradition of revolutionary constitutionalism.[56] Nevertheless, there are differences: Revolutionary constitutionalism in the North and its experience of rupture and continuity were predominantly an internal, domestic struggle. In the South, in contrast, external imperial forces (ideas, elites, powers, etc.) played a significant, if not dominant role, degrading and supressing endogenous developments. This co-governance from the outside is distinct and persists often long after formal decolonization.[57]

A second difference relates to the historical evolution of European modernity and its alternatives. Statehood, constitutionalism, secularism, capitalism, industrialization and other features of European modernity developed over centuries and in a particular historical sequence. In contrast, imperialism suppressed similar or alternative processes in the colonies, and decolonization often compressed these processes into much shorter timespans. Many former colonies acquired formal attributes of statehood – territory, people, government, sovereignty, constitutions, a national economy etc. – practically overnight and had to achieve many things at the same time: functioning state institutions, economies, mass democracy, con-

55 Maldonado and Riegner (n. 22); Baxi (n. 48).

56 Constitutional theory has juxtaposed two types of constitutionalism, namely revolutionary and evolutionary constitutionalism, based on their understanding of the connection between law and politics, see in particular Christoph Möllers, 'Pouvoir Constituant – Constitution – Constitutionalism' in: Bogdandy and Bast (eds), *Principles of European Constitutional Law* (Hart Publishing & C.H. Beck 2009), 170; Hannah Arendt, *On Revolution* (Penguin Books 1963). For a global view of revolutionary constitutionalism, see Bruce A. Ackerman, *Revolutionary constitutions*: *Charismatic leadership and the rule of law* (Harvard University Press 2019). The distinction between Northern and Southern revolutionary constitutionalism remains an important subject of further comparative research, especially with regard to the interplay of decolonial and revolutionary dynamics in the South.

57 Surely, foreign European powers also sought to intervene in European revolutions (Prussian monarchists in France, for example) and constitutional ideas and practices were deeply entangled within Europe. But these external influences were of a different quality than imperial rule, although some of the struggles with foreign overbearance especially in areas of former European land empires might display some structural parallels with decolonization, see below 4.a). and James Fowkes and Michaela Hailbronner, 'Decolonizing Eastern Europe: A global perspective on 1989 and the world it made', International Journal of Constitutional Law 17 (2019), 497.

stitutional systems etc. To the extent that decolonization was a rupture, it was thus also a moment of overload. The experience of rupture and continuity in constitutional development was hence profoundly different in many Southern cases.[58]

For the geopolitical system, decolonization was also a moment of rupture and continuity. While formal empires dissolved and colonies acquired independence, most Southern nations continue to occupy a peripheral position in the global order. Economically, many of them remain dependent on commodity exports, capital imports, and asymmetric trade and debt relations. Decolonization-era attempts to reform the international legal system, which pre-existed most postcolonial states, did not fundamentally change its structure.[59] Cold war tensions and US-American or Soviet hegemony limited the space for autonomous Southern politics. Global knowledge production continues to reflect epistemic hierarchies, which subordinate the South as space and subject of knowledge production. This geopolitics of knowledge, as Christine Schwöbel-Patel calls it, affects not least the production of legal knowledge and the discipline of comparative constitutional law.[60]

In sum, taking into account colonial legacies and geopolitical asymmetries is an analytical imperative of the Southern turn in comparative constitutional law. One cannot understand Southern constitutionalism without this context. At the same time, neither colonialism nor geopolitics furnish monocausal and linear explanations of constitutional development, and more often than not ruptures and continuities create distinctly hybrid constitutional assemblages. Moreover, the global context itself is changing in response to the geopolitical rise of some emerging economies, and there is considerable variation in how Southern constitutional orders respond to, reject or vernacularize global influences. The respective local contexts thus remain a crucial factor in understanding the distinct constitutional experience of the Global South.

58 On the relevance of historical sequence in political, economic and constitutional development, see Sudipta Kaviraj, 'An Outline of a Revisionist Theory of Modernity', European Journal of Sociology 46 (2005), 497.

59 Jochen von Bernstorff and Philipp Dann (eds), *The battle for international law: South-North perspectives on the decolonization era* (Oxford University Press 2019).

60 Schwöbel-Patel (n. 52); see also Bonilla Maldonado (n. 46); Esquirol (n. 46).

2. Themes: Socio-Economic Transformation, Political Organization, and Justice

The constitutional experience of the Global South is characterized by three distinctive themes that recur both in the chapters of this volume and in the wider literature. The first theme relates to how constitutions are experienced as vehicles of socio-economic transformation (a). The second theme encompasses experiences of constitutionalism as site of state formative practices and of struggle about political organization between democratic and authoritarian forces (b). The third theme relates to the profoundly ambivalent nature of the state and its law, which leads to contradictory experiences of constitutionalism as both a denial of justice and as means of access to justice (c).

a) Constitutionalism as Socio-Economic Transformation

Southern constitutionalism often encapsulates a distinctive response to experiences of poverty, exclusion, inequality and historical injustice inherited from colonialism and perpetuated by the postcolonial state system. Poverty has been a deeply formative experience for the Global South, frequently associated with practices of exclusion based on gender, ethnicity, race, caste, geography or socioeconomic status. Southern states have been marked by high levels of internal economic inequality, much higher than within the North. And despite the rise of 'emerging economies', the North-South divide still reflects significant economic disparities between states.

This socio-economic context has deeply shaped the nature of statehood and constitutionalism across the Global South. For one, Southern states have largely been developmental states.[61] Beginning with early decolonization in Latin America, postcolonial states emerged with a modernizing impetus and sought to 'catch up' economically, politically and socially with European metropolises. During the high point of decolonization in the 20th century, statehood became the universal vehicle for 'modernization', industrialization and development across the Global South. State-led devel-

61 Meredith Woo-Cummings (ed.), *The Developmental State* (Cornell University Press 1999). The notion of 'developmental state' is sometimes limited to a few economically successful Asian states, but is used much more broadly here. See also, Pinar Bilgin and Adam David Morton, 'Historicising representation of "failed states"', Third World Quarterly 23 (2002), 55.

opment policies (such as import substitution industrialization) sought to accelerate processes of socio-economic transformation that had taken over a century in Europe and North America. Inspired by dependency theorists and ideas for a New International Economic Order, some developmental states sought to achieve this aim and to overcome economic dependency by nationalizing key industries and natural resources.[62] Yet unlike 19th century Europe and North America, developmental states of the 20th century were defined and constrained by Eurocentric notions of development, external influence and internal legacies of colonial administration and social stratification.[63]

In this context, constitutions and constitutional law in the Global South are conceived as symbols and instruments of fundamental social transformation, aimed at dismantling socio-economic hierarchies and inequalities.[64] In contemporary comparative debates, this dynamic dimension is captured in particular by the concept of transformative constitutionalism, but it has a much older and broader lineage. Many independence constitutions of postcolonial states aimed at a decisive break with the past and at the foundation of a new political community. The revolutionary constitutions of Haiti were an early attempt to replace colonial slavery with an emancipatory black citizenship.[65] The Mexican Constitution of 1917 envisaged socio-economic rights and land reform as proto-transformative elements.[66]

62 Marion Mushkat, 'The Needs of the Developing Countries and the Shifting Views of International Law', VRÜ/WCL 4 (1971), 1; Zdenek Červenka, 'Africa and the New International Economic Order', VRÜ/WCL 9 (1976), 187; Emmanuel G. Bello, 'The Pursuit of Rights and Justice in International Law by the Developing Nations', VRÜ/WCL 14 (1981), 171.

63 Luis Eslava, 'The developmental state: Independence, dependency, and history of the South' in: Philipp Dann and Jochen von Bernstorff (eds), *The battle for international law in the decolonization era* (Oxford University Press 2019), 71; Merino (n. 48); Shalini Randeria, 'Cunning States and Unaccountable International Institutions', European Journal of Sociology 44 (2003), 27; Marie von Engelhardt, *International Development Organizations and Fragile States* (Palgrave 2018).

64 'Symbolic' in this context refers to the cultural importance of constitutions in processes of collective identity formation and should not be misunderstood as necessarily implying their ineffectiveness.

65 Adom Getachew, 'Universalism After the Post-colonial Turn: Interpreting the Haitian Revolution', Political Theory 44 (2016), 821.

66 Gargarella (n. 23), 101; Judith Schacherreiter, *Das Landeigentum als Legal Transplant in Mexiko*: *Rechtsvergleichende Analysen unter Einbezug postkolonialer Perspektiven* (Mohr Siebeck 2014); Schacherriater, 'Tierra y libertad. Trasplantes jurídicos y rupturas en el derecho agrario mexicano', Cuadernos de Literatura Jurídica 3 (2009), 188;

Some postcolonial constitutions, especially in Asia and Africa, envisioned a socialist transformation, and many allowed for the nationalization of natural resources, constitutionalizing the idea of permanent sovereignty over natural resources.[67] Beyond socialism, the idea of a 'directive constitution' (*constituição dirigente*), which drives a political, social and economic transformation, was influential especially in Latin America and embraced by Brazil's constitution of 1988.[68] In an exemplary fashion, the Indian constitution of 1950 was envisioned from the outset as an anti-colonial, transformative document. As Sujit Choudhry in this volume reminds us, it conferred on the state and its courts an express mandate to attack social hierarchies and to redistribute economic and political power away from elites toward the hitherto politically powerless and economically deprived majority.[69]

Today, 'transformative constitutionalism' is sometimes conceived as a distinctive feature of constitutional states in the Global south and as a counter-concept to the 'liberal constitutionalism' of the Global North.[70] One reason for this view is genealogical: The concept was initially used to characterize the South African post-apartheid constitution of 1996 (even though initially coined by US-American scholar Karl Klare). Transformative constitutionalism designates 'an enterprise of inducing large-scale social change through nonviolent political processes grounded in law'.[71] This idea trav-

Javier Garciadiego, 'The revolution' in: Pablo Escalante (ed), *A new compact history of Mexico* (El Colegio de México 2013), 229, 255.

67 Julian Go, 'A Globalizing Constitutionalism?', International Sociology 18 (2003), 71.

68 Gilberto Bercovici, 'A problemática da constituição dirigente: algumas considerações sobre o caso brasileiro', Revista de Informação Legislativa 36 (1999), 35; Luis Virgílio Afonso da Silva, *The Constitution of Brazil*: *A contextual analysis* (Hart Publishing 2019).

69 Choudhry (n. 52); Baxi (n. 34), 1205; Rohit De, *A people's constitution*: *The everyday life of law in the indian republic* (Princeton University Press 2018); Gautam Bhatia, *The Transformative Constitution*: *A radical biography in nine acts* (Harper Collins India 2019).

70 Upendra Baxi, 'Preliminary notes on transformative constitutionalism' in: Oscar Vilhena Vieira, Upendra Baxi and Frans Viljoen (eds), *Transformative constitutionalism*. *Comparing the apex courts of Brazil, India and South Africa* (Pretoria University Law Press 2013), 19; David Bilchitz, 'Constitutionalism, the Global South, and economic justice' in: Daniel Bonilla Maldonado (ed.), *Constitutionalism of the global South. The activist tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013), 41.

71 Karl Klare, 'Legal Culture and Transformative Constitutionalism', South African Journal on Human Rights 14 (1998), 146. See also Pius Langa, 'Transformative constitutionalism', Stellenbosch Law Review 17 (2006), 351; James Fowkes, 'Transformative

elled to other Southern constitutional orders with comparable contexts like India, Colombia, Brazil and Bolivia.[72] Since then, comparatists have also identified substantive commonalities that characterize transformative constitutionalism in the Global South: An interventionist state that actively promotes social change; a fundamental rights doctrine that emphasizes social and collective rights, positive state obligations and horizontal effect among private parties; an activist role of constitutional courts, including broad access and innovative remedies; and an anti-formalist interpretive and legal culture geared towards dynamic change.[73]

Taken together, these elements characterize a constitutional type that is distinct from preservative constitutions that emphasize stability, negative rights and a less interventionist state. The US federal constitution is maybe the clearest example of such a preservative, structural-liberal type – but also probably rather exceptional.[74] In fact, transformative elements can be found in various liberal-democratic constitutions in the Global North, especially in continental Europe. Constitutionalism emerging from the French revolution aimed at the transformation of feudal society, replacing old status hierarchies with an egalitarian promise. Across Europe, certain elements of the welfare state, whether social-liberal or social-democratic in origin, have been constitutionalized over time. The German Basic Law not only guided a post-authoritarian transformation, but also envisage a social state actively shaping economy and society in an egalitarian direction.[75] Yet, these individual features remain less dominant in most Northern constitu-

Constitutionalism and the Global South: The View from South Africa' in: Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi et al. (eds), *Transformative constitutionalism in Latin America. The emergence of a new Ius Commune* (Oxford University Press 2017), 97.

72 Vilhena Vieira, Baxi and Viljoen (n. 70); Bonilla Maldonado (n. 1); Boaventura de Sousa Santos, *Refundacíon del Estado en América Latina* (Siglo XXI 2010); von Bogdandy et al. (n. 47).

73 Hailbronner (n. 1), 540f.; Alun Gibbs, 'Theorizing Transformative Constitutional Change and the Experience of Latin American Constitutionalism', Law, Culture & the Humanities 1 (2017), 9f.; Oscar Vilhena Vieira, Upendra Baxi and Frans Viljoen, 'Some concluding thoughts on an ideal, machinery and method' in: Vilhena Vieira, Baxi and Viljoen (n. 70), 617, 620.

74 Michael Dowdle and John Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity' in: Michael W. Dowdle and Michael Wilkinson (eds), *Constitutionalism beyond liberalism* (Cambridge University Press 2017), 17.

75 This argument is forcefully made by Hailbronner (n. 1), 541ff. See generally Michaela Hailbronner, *Traditions and transformations*: *The rise of German constitutionalism* (Oxford University Press 2015).

tional experiences and do not envisage the same kind of deep, constitutionally driven transformation. While constitutional courts play their role, the European welfare state remains, after all, primarily a legislative project. This difference becomes particularly evident in the area of socio-economic rights: Their judicialization is rightfully considered an innovative hallmark of Southern constitutionalism that remains unmatched by the case law of Northern constitutional courts.[76]

But then again, if the activist role of courts is a distinctive feature of transformative constitutionalism in the Global South, it is also a contested one. Recent literature has differentiated the court-centrism of early accounts and highlighted the interplay of all branches of government as feature of transformative constitutionalism. In his contribution to this volume, Diego Werneck Arguelhes echoes this point when he argues that the transformation in Brazil was driven as much by the political branches as by courts. He also cautions against generalizing the framework of transformative constitutionalism too easily: Relatively successful cases like the Colombian Constitutional Court are not necessarily representative, and constitutional texts, courts, lawyers and the political branches may diverge in the extent to which they embrace a transformative vision. What ultimately matters is whether transformative norms and judgements are actually implemented, which is much harder to assess. Heinz Klug develops this thought when he suggests that transformative constitutionalism may be a useful yardstick for sociological analysis of different constitutional orders: is a constitution actually being implemented or floating meaninglessly above society? Is it used to support, challenge or change the status quo? Like Arguelhes, Klug emphasizes that transformative constitutionalism is not limited to rights enforcement but also depends on a progressive interpretation of the structural elements of the constitution that advance democratic participation and transformative politics.

Our authors' reflections point to two open questions that are relevant for both the distinctiveness and the success of 'transformative constitutionalism': For one, one has to ask whether transformative constitutionalism has a distinctive substance beyond court-enforced rights, namely with respect to the economic order it envisages? The constitutional history of the developmental state reminds us that economic constitutionalism can go well beyond the redistribution of (some) *public* resources through social

76 Klug (n. 52).

rights litigation. Does TC with its frequent invocations of 'economic justice' and the 'democratization of the economy', have something distinctive to say about the structure of economic institutions that affect the initial distribution in the first place, such as private property, market economy and corporate capitalism?[77] A second and similar question can be asked with respect to the relationship between TC and the political system it envisages. As Roberto Gargarella argues, rights alone will not counter deeply entrenched inequality as long as the 'engine room' of the constitution, the organization of political power, remains unreformed.[78] This raises constitutional questions about political representation and electoral systems, political parties and campaign finance, legislative process and public scrutiny, and the political economy of transformative constitutionalism – in short: Does transformative constitutionalism have its own, distinctive 'law of democracy' that favours a *transformative politics*?[79]

b) Constitutionalism as Site of Struggle About Political Organization

Constitutionalism in the Global South also reflects the immense challenges of state-building and political organization in postcolonial, heterogenous and hierarchical societies. Constitutionalism is experienced not as stable order tending towards linear progress, but as site of state formative practices and of struggle about political organization between democratic and authoritarian forces.[80]

In most places, these challenges hark back to the moment of decolonization and the political form it took, the nation state. Under the dominant, European vision of international law and modern constitutionalism, nation statehood was the only viable form of political organization to achieve self-

77 On the one hand, TC is not socialism: all constitutions discussed under this label accept, in principle, private property, markets, and corporations. On the other hand, they incorporate a considerable variety of potentially transformative economic elements, ranging from the social function of property to indigenous land rights, public ownership over natural resources, mixed economies and state capitalist structures.

78 Roberto Gargarella, 'Inequality and the Constitution: From Equality to Social Rights' in: Dann, Riegner and Bönnemann (n. 49), 235-249; Gargarella (n. 23), 172 ff.

79 See Samuel Issacharoff, 'Comparative Constitutional Law as a Window on Democratic Institutions' in: Erin F. Delaney and Rosalind Dixon (eds), *Comparative judicial review* (Edward Elgar Publishing 2018), 60; Dann and Thiruvengadam (n. 47); also Dann and Riegner, 'Parliaments' in: De Feyter et al (eds), *Law and Development Encyclopedia* (Edward Elgar Publishing 2020).

80 Baxi (n. 34).

determination.[81] Mimicking the European (nation) state offered colonized peoples a path to decolonization with a well-defined end point, but also implied limitations and difficulties for internal political organization and self-determination. For one, statehood implied the acceptance of colonial borders that imperial powers had imposed without regard to the diversity of groups and identities populating the territory, and it rejected alternative forms of political organization that would have undone colonial spatial ordering, such as pan-national federations based on religious, linguistic or cultural variables.[82] In this context, the idea of a homogenous nation as the subject of self-determination – one state, one nation etc. – clashed violently with the cultural, racial and religious diversity of postcolonial societies, contributing to internal divisions, violent conflict, civil war, secession and partition.

In addition, independent nation states inherited the authoritarian legacy of colonialism: repressive institutions and laws, legalized practices of violence, executive discretion unconstrained by law, permanent states of exception, unaccountable government, as well as practices of racist subordination and economic exploitation. These authoritarian instruments and practices often remained in place after independence, and new elites deployed them to quell dissent and divisions within the heterogenous populace. As Weitseng Chen reminds us, the sedition laws used today in Hong Kong against democratic protestors are of colonial origin.[83] Colonialism had also inhibited the emergence of the democratic culture and institutions thought to enable democracy Euro-America, such as a public sphere, political parties and civil society. Where they did evolve in the South, they took hybrid forms, e.g. political parties sometimes formed not along ideological but ethnic or religious lines.[84] The autonomous development of political

81 Eslava (n. 63); Bonilla Maldonado and Riegner (n. 22).

82 Adom Getachew, *Worldmaking after empire*: *The rise and fall of self-determination* (Princeton University Press 2019); Margaret Kohn and Keally D. McBride, *Political theories of decolonization*: *Postcolonialism and the problem of foundations* (Oxford University Press 2011), 18 ff.

83 Weitseng Chen, 'Same Bed, Different Dreams: Constitutionalism and Legality in Asian Hybrid Regimes' in: Dann, Riegner and Bönnemann (n. 49), 250-269; see also Klug (n. 52); Mara Malagodi, 'Dominion status and the origins of authoritarian constitutionalism in Pakistan', International Journal of Constitutional Law 17 (2019), 1235. For the impact of pre-colonial and post-colonial state structures, see Pierre Englebert, *State Legitimacy and Development in Africa* (Lynne Rienner 2000).

84 Boaventura de Sousa Santos, 'Public Sphere and Epistemologies of the South', African Development 37 (2012), 43.

institutions and culture was further inhibited by the Cold War tensions, foreign intervention, and the economic pressures and interdependencies of a globalized economy.[85]

Under these difficult circumstances, constitutions in the Global South had the task of creating the very conditions considered to be prerequisites of their own existence. Southern constitutionalism has been a site of state formative practices and – often violent – nation-building projects.[86] These practices and projects have evolved over time in democratic or authoritarian directions, with fits and starts, and recurring phases of constitutional crisis and stability. From this unsteady process emerges, on the one hand, a rich practice of innovation and adaptation of democratic institutions. In processes of hybridization, alternatives to the single-nation state emerged, namely the idea of state-nations and of pluri-national states.[87] Institutionally, federalism, territorial autonomies, legal pluralism and/or the recognition of collective linguistic and cultural rights became common strategies to accommodate diversity. At the same time, also in successful constitutional democracies like India, electoral processes, political representation and political parties reflect the diversity of postcolonial societies as much as they continue to struggle with the legacies of colonial subordination and exclusion.[88]

On the other hand, many Southern constitutions pursued the process of state- and nation-building not by limiting public power and protecting individual rights, but by concentrating power in imperial presidencies or unconstrained executives.[89] As Heinz Klug reminds us, 'constitutions without

85 Odd Arne Westad, *The global Cold War*: *Third world interventions and the making of our times* (Cambridge University Press 2005); Prashad (n. 11); Michael Dowdle, *On the regulatory geography of modern capitalism*: *Putting 'rule of law' in its place* <https://www.law.ox.ac.uk/sites/files/oxlaw/dowdle_putting_rule_of_law_in_its_place.pdf> accessed 8 March 2020.

86 Baxi (n. 34).

87 Mostafa Rejai and Cynthia H. Enloe, 'Nation-States and State-Nations', International Studies Quarterly 13 (1969), 140; Boaventura de Sousa Santos, *Refundación del Estado en América Latina*: *Perspectivas desde una epistemología del Sur* (3rd edn, Siglo XXI 2010), 81 ff.; Alfred Stepan, Juan Linz and Yogendra Yadav, *Crafting State-Nations* (Johns Hopkins University Press 2011).

88 Dann and Thiruvengadam (n. 47), in particular Hailbronner and Thayyil therein.

89 Gargarella (n. 23); Jose Cheibub, Zachary Elkins and Tom Ginsburg, 'Still the Land of Presidentialism? Executives and the Latin American Constitution' in: Detlef Nolte and Almut Schilling-Vacaflor (eds), *New constitutionalism in Latin America. Promises and practices* (Ashgate 2012), 73; Prempeh (n. 24).

constitutionalism'[90] or 'thin constitutionalism' have been a long-standing feature of post-colonial statehood in Africa, along with weak administrations, patrimonial forms of governance, coups and authoritarianism. One explanation, according to Klug, lies in the distinctive nature of the postcolonial state and the institutional legacies of colonialism that remain dominant within societies and were not fundamentally transformed by negotiated independence constitutions that primarily facilitated the transfer of power to local elites.

Besides, constitutions have thus also been instruments of authoritarian legality. This aspect has regained prominence in recent comparative debates about constitutions in authoritarian regimes and the resurgence of illiberal governments across North and South.[91] In this literature, 'authoritarian constitutionalism' designates a system of political rule in which constitutions do not effectively constrain the political leadership but nevertheless perform certain governance functions, such as coordinating ruling elites, controlling lower-level agents, incentivizing economic activity and providing political legitimacy.[92] A primary example are the economically successful developmental states in Asia, analysed by Weitseng Chen in his chapter on constitutionalism and legality in Asian hybrid regimes.[93] These constitutional systems have proved relatively stable and functional. Moreover, they have become less authoritarian over time as they incorporate elements of liberal democratic constitutionalism, at least on paper. In practice, however, they remain characterized by a distinct form of authoritarian legality, marked by a pragmatic, instrumental commitment to constitutionalism that promotes governmental performance and economic development. This stabilizes the system and makes a linear transition to liberal democratic

90 H. W. O. Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political Paradox' in: Douglas Greenberg, Stanley Nider Katz, Melanie Beth Oliviero et al. (eds), *Constitutionalism and democracy. Transitions in the contemporary world* (Oxford University Press 1993), 65.

91 Tom Ginsburg and Alberto Simpser (eds), *Constitutions in authoritarian regimes* (Cambridge University Press 2014); Mark A. Graber, Sanford Levinson and Mark V. Tushnet (eds), *Constitutional democracy in crisis?* (Oxford University Press 2018); Helena Alviar García and Günter Frankenberg (eds), *Authoritarian constitutionalism: Comparative analysis and critique* (Edward Elgar Publishing 2019).

92 Tom Ginsburg and Alberto Simpser, 'Introduction: Constitutions in Authoritarian Regimes' in: Tom Ginsburg and Alberto Simpser (eds), *Constitutions in authoritarian regimes* (Cambridge University Press 2014), 1; Mark Tushnet, 'Authoritarian Constitutionalism', Cornell Law Review 100 (2015), 392.

93 See Chen (n. 83).

constitutionalism anything but assured. For Chen, studying these constitutional orders uncovers alternative, sometimes functionally equivalent constitutional concepts and mechanisms that pluralize our understanding of constitutionalism in all its variants.

The dichotomy between liberal and authoritarian constitutionalism is complicated by Roberto Niembro Ortega (in this volume) on the constitutional development of Mexico.[94] According to Niembro, what makes a constitution authoritarian is not necessarily its content but the mentality of those who wield power under it. Even a constitution with power-limiting features on paper, like the Mexican one, can thus become authoritarian in practice. This observation is all the more salient as authoritarian tendencies resurface within liberal constitutional states in Europe and even in the US. This further unsettles the dichotomy between liberal and authoritarian constitutions and opens conceptual space for comparison of other forms of hybrid arrangements and overlaps, for instance the transitional justice approaches to authoritarian legacies in democratic constitutional states, or the 'liberal authoritarianism' seen by some as undemocratic imposition of economic liberalization, austerity and structural adjustment, be it within the EU or the Global South.[95] These debates across the globe question the narrative of linear progress inherent in some accounts of liberal constitutionalism. While Euro-America may not necessarily be evolving towards the South, Southern constitutionalism appears to offer a more complicated, and possibly more realistic, narrative of constitutional development.

c) Constitutionalism as Denial of and Access to Justice

The two earlier elements converge in a third, distinctive theme: namely, the profoundly ambivalent, sometimes even contradictory, nature of the state and its law in the Global South. Like the metaphorical Janus, state and law often have two faces: one looks forward, one backward; one is strong, one weak; one emancipatory, one oppressive. Constitutionalism is thus experienced as both a denial of justice, and as means of access to justice.

States in the Global South are often two-faced in that they are, on the one hand, strong states: as 'developmental states' they organize economic activi-

94 Roberto Niembro Ortega, 'The Challenge of Transforming Mexican: Authoritarian Constitutionalism' in: Dann, Riegner and Bönnemann (n. 49), 270-287.

95 Michael A. Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?', European Law Journal 21 (2015), 313; Hermann Heller, 'Authoritarian Liberalism?', European Law Journal 21 (2015), 295.

ty, they keep together extremely heterogeneous societies without a strong unitary identity, and they use the repressive and authoritarian instruments inherited from the colonial state. On the other hand, many Southern states were often 'instant states', created over-night, without functional institutions and local elites, sufficient public resources, and social legitimacy. Many remain dependent on external support and vulnerable to global economic shocks, while waves of liberalization, privatization and structural adjustment have weakened state capacity to provide public services and governance.

As much as there is an ambivalence in the state, there is an ambivalence in the perception of its law. On the one hand, law is an instrument of emancipation and liberation – for the society at large (the right to self-determination) and for the individual and disadvantaged groups (rights, affirmative action etc).[96] Transformative constitutionalism embodies this emancipatory face of law. On the other hand, law is often also perceived as instrument of oppression, subordination and exploitation – for societies, social groups and individuals alike. Constitutionalism is also perceived as entrenching these structures of subordination and exploitation and insulating them from democratic change.

This ambivalence is not exclusive to the South. It is in fact a core of Marxist critique of the state and its law in general.[97] However, it is interesting to realize that in response to these ambivalences and contradictions, the legal and constitutional orders of the South display more pronounced, flexible, and multifaceted reactions to the law of the state. For one, the social legitimacy and normativity of law is more precarious. The Latin American adage – '*obedece mas no cumple*' (one obeys but doesn't comply) – illustrates the fraught relationship of citizens and public officials with state law across many parts of the Global South. Law is enforced and

96 On this ambivalence see Baxi (n. 48); on the historical roots of attitudes towards the law, see Yves Dezalay and Bryan Garth, *Asian Legal Revivals* (University of Chicago Press 2010).

97 At the same time, one has to point out the Northern stereotype about the presumed inefficacy of law in the South, from which many Northern scholars conclude that it is worthless to study them. The question of laws' efficacy strikes us as a gradual question (and many examples of ineffective Northern laws could be gathered). This point is forcefully made by Daniel Bonilla Maldonado, 'Introduction: Toward a Constitutionalism of the Global South' in Bonilla Maldonado (n. 70), 1; Jorge Esquirol, 'The Failed Law of Latin America', American Journal of Comparative Law 56 (2008), 75. It is also implicit in Trubek and Galanter (n. 26).

complied with selectively. Informal rules, institutions and practices gain a distinct importance in understanding how law on the books really works in action. Citizens often turn to non-state collectives and their norms, such as religious or ethnic groups, indigenous peoples, social movements, trade unions or business associations.[98] The result are diverse forms of legal pluralism and non-state justice systems, which are increasingly recognized by constitutions across the South. One example are personal laws in India, another self-governed indigenous territories in Bolivia.[99] Even without formal recognition, such intermediary collectives play an important role in struggles about the interpretation and application of constitutions, as debates about societal constitutionalism or 'constitutionalism from below' attest.[100]

Another distinctive element of Southern constitutionalism is the emergence of alternative and partly collectivized avenues and instruments to use the law but also to resist the law and the state.[101] These avenues can often be found under the notion of 'access to justice'.[102] As David Bilchitz argues in his chapter, access to justice is a core capability citizens need for realizing substantive claims to socio-economic rights. In the context of poverty and inequality, access is facilitated by innovative procedural devices that 'bring justice within the reach of the poor masses'.[103] Examples for such procedures are the '*tutela*'/'*amparo*' in Latin America or 'public

98 Siddharth de Souza, 'Non-State Justice Systems' in: Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (2019, online).

99 Tanja Herklotz, 'Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court', VRÜ/WCL 49 (2016), 148; Merino (n. 48).

100 Schwöbel-Patel (n. 52); Gavin Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below', Indiana Journal of Global Legal Studies 20 (2013), 881; Boaventura de Sousa Santos and Cesar Rodriguez-Garavito (eds), *Law and Globalization from Below*: *Towards a Cosmopolitan Legality* (Cambridge University Press 2005); Bonilla Maldonado (n. 97).

101 Julia Eckert (ed.), *Law against the state*: *Ethnographic forays into law's transformations* (Cambridge University Press 2014); Partha Chatterjee, *Lineages of the Political Society* (Columbia University Press 2011).

102 See only David Mason, 'Access to Justice in South Africa', Windsor Yearbook of Access to Justice 17 (1999), 230; Mauro Cappelletti and Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective* (A. W. Sijthoff 1978).

103 *People's Union for Democratic Rights v. Union of India*, 1982 AIR 1473.

interest litigation' in India.[104] Often, these instruments are used in strategic litigation by civil society organizations or social movements that seek to defend and enforce collective rights of the groups they represent. A similar function is performed by state institutions constitutionally empowered to represent citizens' and collective interests, such as the Ministério Publico in Brazil or the Public Protector in South Africa.[105] But access to justice can also refer to dispute settlement within non-state justice systems, such as religious institutions, indigenous tribunals or the Nyaya Panchayats in India. In these situations, access to justice leads away from the state and may be a way of resisting its law.[106]

Again, it is useful and necessary to juxtapose presumed Southern experiences against those in the North. And yes, Northern legal systems also know instruments like legal aid and clinics. But then again, such devices are hardly at the core of their constitutional identity.[107] It seems that 'access to justice' responds to distinctly Southern experiences with law and constitutionalism. At the same time, it is increasingly recognized in international and comparative discourse, most prominently in Sustainable Development Goal 16 of the UN's Agenda 2030.[108] From a Southern perspective, this globalization is ambivalent. On the one hand, access to justice risks becoming a narrow technical term or a broad superficial label for rule of law promotion projects.[109] On the other hand, it can

104 Anuj Bhuwania, *Courting the People*: *Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2017); Allan Brewer-Carías, 'The Amparo as an Instrument of a Ius Constitutionale Commune' in: von Bogdandy, Ferrer Mac-Gregor, Morales Antoniazzi et al. (n. 71), 171. As early as 1970, an article in VRÜ/WCL discussed the '*amparo*'-remedies in Latin America, see Juan Jose Reyven, 'Der Grundrechtsschutz (Habeas Corpus, Recurso de Amparo) im argentinischen Recht', VRÜ/WCL 3 (1970), 179.

105 Klug (n. 52).

106 Souza (n. 98). As early as 1968, an article in VRUe/WCL discussed the 'Nyaya Panchayats' in India, see Detlef Kantowsky, 'Indische Laiengerichte. Die Nyaya Panchayats in Uttar Pradesh', VRÜ/WCL 1 (1968), 140.

107 But see on the underlying problems Deborah L. Rhode, *Access to justice* (Oxford University Press 2004).

108 SDG 16 reads: 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels …'. See also Michael Trebilcock and Ronald Daniels, *Rule of law reform and development*: *Charting the fragile path of progress* (Edward Elgar Publishing 2008), 236 ff.

109 Critically Günter Frankenberg, *Comparative law as critique* (Edward Elgar Publishing 2016), 205 ff.

also provide an opportunity for what Florian Hoffmann in this volume calls 'meridionalization',[110] in this case of the global rule of law discourse. Access to justice can, and should, be understood as a conceptual space for rethinking key constitutional concepts *from* the South, by rooting them in concrete experiences of injustice *in* the South. These injustices only begin with the lack of access to the legal system; they also relate to the entire enterprise of pursuing justice by legal means. 'Justice' thus acquires multiple meanings – social justice, distributive justice, racial justice, gender justice, environmental justice, climate justice etc. Those who are denied 'access to justice' are excluded from this entire enterprise of pursuing justice through law. Understood in this broader sense, access to justice evokes diverse social struggles for justice and subaltern perspectives on constitutionalism, a 'constitutionalism of the wretched'.[111] At the same time, 'access' to justice emphasizes that constitutionalism is not identical with justice, but can only, and ideally, provide a path towards it. Making access to justice a central constitutional concept thus opens up a critical and emancipatory horizon within comparative constitutional law, all while acknowledging its inherent limitations.

D. Implications for Comparative Constitutional Scholarship

So far, we have argued that the concept of the Global South is useful to understand a distinctive constitutional experience that can pluralize and enrich comparative constitutional law. In the following section, we take this argument further and contend that taking the Global South seriously has implications for comparative constitutional scholarship as a whole: The Southern turn also implies an approach to *doing* comparative law that improves our understanding of constitutional law in both North and South. In other words, the 'Global South' also denotes a specific epistemic, methodological and institutional sensibility of the comparatist. This sensibility reinforces three movements that are already underway in the discipline: towards epistemic reflexivity (1.), methodological pluralism (2.) and institutional diversification (3.).

110 Hoffmann (n. 49).

111 Vidya Kumar, 'Towards a Constitutionalism of the Wretched: Global Constitutionalism, International Law and the Global South', Völkerrechtsblog, 27 July 2017 <https://voelkerrechtsblog.org/towards-a-constitutionalism-of-the-wretched/> accessed 8 March 2020.

The Global South thus acquires a double meaning: It is not only a concept that captures a distinct constitutional *experience*, but also an epistemic, methodological and institutional *approach* to doing comparative law. This double understanding also promises new insights for constitutional law in the Global North. For one, our notion of distinctiveness highlights features that are particularly salient for the (self)description of the South, but may equally be present in the North and deserve closer attention there. Besides, the entangled nature of North and South means that one cannot be understood without the other. Finally, the complementary notion of the Global North may, *mutatis mutandis*, be useful in rethinking the distinctive constitutional experience of Euro-America in a global framework. To achieve a deeper understanding of the distinctiveness and entanglements of both North and South, we thus need an epistemically, methodologically and institutionally sensitive approach to doing comparative constitutional law generally. In that sense, the Southern turn is also a double turn: After the pivot to the South, it turns back to the North and to the world as a whole. We sought to capture this double turn when we gave our journal, formerly the 'Law and Politics in Asia, Africa and Latin America', the new English name in 2018, namely 'World Comparative Law'.[112]

I. Epistemic Reflexivity

The first implication of a Southern turn for comparative constitutional law is the need for epistemic reflexivity. Epistemic reflexivity concerns the way in which the comparatist approaches the foundations of knowledge production – the very grammar of our discipline, the basic concepts and theoretical assumptions, the voices that speak, and the silences this entails. It describes a particular research ethos that does not rush to find 'solutions' to pre-defined 'problems' but rethinks the questions we ask, the categories we use, the perspectives we take. Reflexivity requires us to complete several epistemic moves already under way in the discipline.

The first is the move from epistemic hierarchy to recognizing epistemic injustice and aiming for epistemic equality. It is important to step back first and reflect how constitutional scholarship has so far neglected and

112 For a parallel formulation and partial demonstration of this approach, see Philipp Dann and Arun Thiruvengadam, 'Framing a Comparative Law of Democracy: An Introduction' in: Dann and Thiruvengadam (n. 47), 1.

subordinated Southern forms of knowledge at great cost for individuals, collectives and scholarship at large.[113] A recognition of this injustice and its proactive correction strikes us as an important first step to then reach some kind of epistemic equality. As a global discipline, comparative constitutional law must accord 'equal dignity' to all constitutional discourses in North and South.[114] This implies that Southern and Northern authors, texts, concepts, histories are equally legitimate reference points in constitutional discourse. Noting *distinctive* features or differences does not imply a hierarchization, and the comparatist needs to take into account the 'power effects of history' on both theories and socio-political constellations.[115] Epistemic equality also demands fundamental conceptual openness, requiring us to accept phenomena as 'constitutional' that may not qualify as such from the perspective of Western liberal constitutionalism.[116] This may include, for instance, various forms of societal constitutionalism from below, indigenous approaches to constitutionalism including rights of nature, or a rethinking of the nation state as a vehicle for collective self-determination in plurinational contexts.[117] Such openness includes the willingness of Northern scholars to effectively learn from and import Southern institutions, concepts and theoretical approaches, and transform their own.[118] This point is also forcefully made by Jedidiah Kroncke in his contribution to this

113 Daniel Bonilla Maldonado, 'The political economy of legal knowledge' in: Colin Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar Publishing 2018), 29; Boaventura de Sousa Santos, *The end of the cognitive empire*: *The coming of age of epistemologies of the South* (Duke University Press 2018)

114 Baxi (n. 34), 1210. See also Bonilla Maldonado (n. 97).

115 Ina Kerner, 'Beyond Eurocentrism: Trajectories towards a renewed political and social theory', Philosophy & Social Criticism 44 (2018), 550.

116 Zoran Oklopcic, 'Comparing as (Re-) Imagining: Southern Perspective and the World of Constitutions' in: Dann, Riegner and Bönnemann (n. 49), 86-109; Schwöbel-Patel (n. 52), 17: 'A constitutionalism from below may stretch the term so far that it becomes unrecognizable'.

117 See e.g. Merino (n. 48); conceptualizing India and the EU as continental polities, see contributions in Dann and Thiruvengadam (n. 47).

118 For example, it might be productive to ask what can be learned from post- and decolonial approaches and experiences in the South for understanding contemporary constellations of post-authoritarian constitutionalism and its struggle with foreign overbearance, especially in areas of former European land empires in East and Southeast Europe. See e.g. Fowkes and Hailbronner (n. 57); Bonilla Maldonado and Riegner (n. 22); Jan Komárek, 'Waiting for the existential revolution in Europe', International Journal of Constitutional Law 12 (2014), 190; Ivan Krastev and Stephen Holmes, *The light that failed*: *A reckoning* (Allen Lane 2019).

volume when he argues that the role of the comparatist ought to be that of a 'indigenizer' of foreign legal knowledge, scanning globally for legal innovations and adapting them to one's own legal context.[119] The second move is towards multiperspectivity: There is no one privileged standpoint for comparison, and the comparatist must adopt multiple perspectives. This implies, as Florian Hoffmann argues in this volume, a decentering of Euro-American perspectives – not only by addition of new materials, but by provincializing its theoretical approach with respect to the scope of their claims to validity and applicability; by engaging in inter-contextual dialogue; by decentering thematic focus or agenda setting in order to go beyond constellations of Euro-Atlantic world.[120] This requires 'distancing' and 'differencing' on the part of the Northern comparatist.[121] It may require, for instance, taking a subaltern perspective that 'define[s] the experience of constitutional development from the standpoint of constitutional losers, not winners'.[122] To do so, one might try to develop the idea of access to justice, as we have suggested above.

A third move is towards relationality. Even though we study other jurisdictions as 'foreign', it would be wrong to think of each other as separate entities with fixed identities. (Legal) Culture, as postcolonial legal theory teaches us, is an inherently hybrid thing, marked by conflicts, contradictions, and global entanglements.[123] This puts the comparatist in a somewhat precarious position: on the one hand, the hybrid character of culture requires us to avoid essentialist and fix depictions of legal systems. At the same time, however, it would be equally dangerous to deny differences for the sake of universal problems and experiences. Comparative constitutional law thus might be described as a navigating exercise between those two poles, as an endeavour which uses this tension to understand similarity and difference.[124]

119 Kroncke (n. 49).
120 Hoffmann (n. 49); Kerner (n. 115).
121 Günter Frankenberg, 'Critical Comparisons: Rethinking Comparative Law', Harvard International Law Journal 26 (1985), 411.
122 Baxi (n. 34), 1185.
123 Daniel Bonilla Maldonado, 'The Concept of Culture and the Cultural Study of Law. An Essay', VRÜ/WCL 52 (2019), 297.
124 Judith Schacherreiter, 'Postcolonial Theory and Comparative Law: On the Methodological and Epistemological Benefits to Comparative Law through Postcolonial Theory', VRÜ/WCL 49 (2016), 291.

2. Methodological Pluralism

The second implication is the need for methodological pluralism. This means several things: First, doctrinal and formalist approaches alone are not sufficient to understand the constitutional experiences in either North or South in their multiple contexts. Despite its limitations, an enlightened functionalist approach can still be a useful starting point.[125] As Weitseng Chen demonstrates in his chapter, functional analysis of non-liberal legal orders may uncover functional equivalents to liberal constitutional institutions that help us understanding both the functioning of authoritarian systems and its democratic counterparts.[126] But ultimately this functionalism must be contextualized.

Second, while hardly anyone disputes anymore that a meaningful comparative endeavour requires us to embed the law in its societal contexts, it is far less obvious to which neighbouring disciplines we should talk to when doing comparative legal research.[127] At first glance, the answer to this question seems obvious: the discipline we talk to depends on the questions we ask and the research design we pick. Yet, looking at the distinct constitutional experiences we have mapped in part three of this introduction, some neighbouring disciplines impose themselves for context-sensitive comparison from and with the South more than others. Understanding the impact of colonialism and formal decolonization on the state, for instance, is not possible without reference to various fields of history, be it political history, economic history, or history from below. Likewise, once we have acknowledged the central role of global and domestic inequality for the constitutional systems in the Global South, there is no way around deepening our conversation with political economy. Though political economy has reflected for a long time on many of the questions that are at the heart of the socio-economic dimension of constitutional law (put simply: who gets what), the interaction between law and political economy has only recently

125 See for a convincing reconstruction of functionalist thought, Ralf Michaels, 'The Functional Method of Comparative Law' in: Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 340.

126 Chen (n. 83).

127 For the need of interdisciplinarity in comparative constitutional scholarship see Hirschl (n. 10).

began to intensify.[128] And finally, the need to capture the emic perspective on Southern constitutional *experiences* makes anthropology another important partner for contextual comparison. No matter if we try to understand how injustice is perceived on the ground and battled with legal instruments, whose knowledge and social reality counts in constitution-making, or how 'radically different conceptions of law' evolve – all those elements of world constitutionalism cannot be studied with doctrinal legal methods but rather by engaging in 'thick descriptions' of local legal contexts.[129]

It is important to emphasize that these methodological tools are to be deployed with respect to constitutional experiences in South and North alike: To understand entanglements and interdependencies between Southern and Northern constitutional experiences, we need to understand the *global* history of colonialism and decolonization; the *global* political economy; and the processes of *glocalization* of norms that are ongoing across the North South divide. Given what we have said about epistemic reflexivity, interdisciplinarity should not become a tool of othering the South yet again by means of methodology.

This epistemic concern also leads to a third methodological consideration, namely the equal relevance of formalist and doctrinal comparison with and from the South. While interdisciplinarity is important, we should not dismiss the value of constitutional experiences in the South *as law* by limiting comparison to legal realist or social scientific approaches.[130] Law has a relative autonomy and internal rationality that should be taken seriously across the North-South divide. Comparative *law* ultimately is *also* a hermeneutic exercise of understanding legal meaning. What is required is a layered narrative that takes into account constitutional text, interpreta-

128 David Kennedy, 'Law and the Political Economy of the World', Leiden Journal of International Law 26 (2013), 7; Katharina Pistor, *Code of Capital*: *How the law creates wealth and inequality* (Princeton University Press 2019); David Singh Grewal and Jedediah Purdy, 'Introduction: Law and Neoliberalism', Law and Contemporary Problems 77 (2014), 1; David Singh Grewal, Amy Kapczynski and Jedediah Purdy, 'Law and Political Economy: Toward a Manifesto', Law and Political Economy, 6 November 2017 <https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto/> accessed 8 March 2020.

129 In a similar vein, cultural studies and law and literature may be a promising way to understand processes of othering and collective identity formation that are crucial for legal consciousness, see e.g. Munshi (n. 35).

130 Jorge Esquirol, 'The geopolitics of constitutionalism in Latin America' in: Colin Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar Publishing 2018), 79.

tion, underlying the theoretical and ideological assumptions, as well as the multifaceted contexts beyond the law.[131]

3. Institutional Diversification, Collaboration, Slow Comparison

The third and final implication concerns the institutional and organisational dimension of doing comparative constitutional law research. The epistemic and methodological requirements we describe above make comparison a complex and demanding enterprise that an individual comparatist will struggle to pursue well in a short amount of time. There are thus certain institutional and organisational pre-requisites that are rarely discussed but highly important in practice. What is required are a diversification of the scholarly infrastructure of comparative law, new modes of collaboration and slow comparison.

Up to date, the overall number of prestigious law schools, widely cited journals, or powerful think tanks remain in the Western hemisphere. Southern voices, by contrast, are still facing numerous hurdles both in terms of access and recognition. Targeting those asymmetries thus requires us to think about modes of collaboration and questions of organization.[132] This begins with seemingly technical questions such as setting a conference location or a reimbursement policy, continues with issues of copyright and open access to research publications, and extends to the very question of how we organize comparative research. If the age of the solitary comparatist is over, we must turn to new modes of organisation such as dialogical and collaborative forms of research in which there is time to reflect and understand each other without the pressure to produce easy comparative 'take-aways'. Making such collaborative settings work is not only a question of time and resources, but also of diversity. This includes geographical diversity, but also – and equally important – diversity in terms of gender, race, language or socio-economic backgrounds.[133] All this can be a challeng-

131 Günter Frankenberg, 'Comparing constitutions: Ideas, ideals, and ideology – toward a layered narrative', International Journal of Constitutional Law 4 (2006), 439; Baxi (n. 34), 1188-1189.

132 Dann and Thiruvengadam (n. 47), 1; Annelise Riles, 'From comparison to collaboration: Experiments with a new scholarly and political form', Law and Contemporary Problems 78 (2015), 147.

133 We recognize that the dominance of English in global academic conversations is a major barrier to other voices and traditions. At the same time, we aim to contribute

ing exercise – as is perhaps best demonstrated by this book. While we succeeded to convene authors from diverse geographies across the Global South, the volume does not reflect the diversity of experiences in other dimensions in the same way that our journal has done over the years.[134]

Taken together, the epistemic, methodological and institutional demands and challenges of sophisticated comparative constitutional scholarship require one particularly valuable thing that is in particularly short supply in today's academia: time. This is especially true, once we move into a much larger pool of experiences and formations, where complexity and strangeness risks to lead to superficiality. What is thus needed is an approach that has been termed 'slow comparison'.[135] Like slow food, the notion of 'slow comparison' emphasizes the process, in which comparative knowledge emerges, as a necessarily longer, often difficult and cumbersome process, in which the ingredients need careful selection, flavours emerge slowly and taste is only acquired over time. This might be an anomaly in today's academic system. It requires a profound contextual understanding of one's own constitutional order, a certain level of 'bi-legalism', an ability to deal with 'comparative confusion' and, well, patience. But it (hopefully) generates better and longer lasting results.

E. Conclusion

This volume in general and our introductory chapter in particular call for a plural, 'worldlier' approach to comparative constitutional scholarship. This call starts with a reconsideration of the notion 'Global South' that we consider a useful lens to understand better constitutional experiences around the world; it continues with an attempt to capture what is distinct about the constitutional experience in the South, including its entanglement with the North; and it leads finally beyond the South to a re-focused understanding

to a common and global discussion, not one separated by region and language. In this dilemma, we opted for English – but we try to complement this with funds for the translation of works from other languages for publication in our journal.

134 In particular, female scholars and scholars of color remain underrepresented among our authors in this book. We had invited a higher number of them as contributors to this book and to the conference on which it is based than are now represented in the final volume. There are many reasons for this, which require further efforts to overcome obstacles to diversification.

135 Dann and Thiruvengadam (n. 112), 4-7.

of constitutional scholarship in general, i.e. in the South as much as in the North.

The Southern turn also raises an important question that we have avoided so far: What is the position and role of us as authors of this text and editors of this volume, who happen to be three white male scholars writing from a privileged position in the North? Such a self-reflection triggers questions about the place of sincere and respectful scholars in the North in debates about Southern constitutionalism. A tentative answer to this question should begin by acknowledging the necessity of the question and a reflection about positionality here. Our own views and assumptions are necessarily shaped by the socialisation we have received, the circumstances under which we work and live. Recognizing the particularity of our perspective is a necessary step to engage with other voices in mutual respect.

But in our view, the consequence of our positionality cannot be that we remain on the side lines as bystanders of the Southern turn. We believe that scholars like us can perform four useful roles in global constitutional conversations: As listeners, enablers, contributors and translators. As listeners, we should be receptive to Southern experiences and voices and engage in a conversation with, not about, the South.[136] In this vein, we chose not to speak at the 50th anniversary conference of our journal which formed the basis for this volume, but rather listened first. As enablers, we offer fora for exchange and procure necessary resources, be it as organizers of conferences or editors of our journal or this book. As contributors, we offer the results of our own intellectual engagement with Southern constitutionalism, by authoring this chapter all while reflecting our own positionality as much as we can. Finally, as translators we seek to promote mutual understanding of various scholarly communities hampered by linguistic, national, methodological or ideological barriers. This may include literal translation from and to English, for which our journal will make available some extra resources. But it also includes translation between different scholarly traditions and 'camps' often pitted against each other, be it formalists against crits, liberals against conservatives etc. While many value-based differences of opinion may be irreducible, remaining in a conversation across dividing lines remains a value in itself in times of increasing polarization and 'filter-bubbles'.

136 Michael Dowdle, 'Constitutional Listening', Chicago-Kent Law Review 88 (2012), 115.

We attempt to fulfil these four roles in various individual projects but also and importantly in our common endeavour, which is the editing of the journal VRUe / WCL. The journal has a long tradition in organizing such a plural and respectful exchange about law and politics in the Global South. And it can serve as a major (and perhaps unique) archive of the difficulties and complexities of such conversation. At the same time, we are working to make it a more inclusive, plural organ – on various fronts: while it has always had a plurality of voices, this plurality has increasingly become reflected in the board of editors. In sum, we hope that our journal makes a modest contribution to the research field and agenda we have laid out in this chapter. The renaming of our journal expresses this hope and approach, and we cordially invite you all to contribute to this adventure of World Comparative Law in the future.

Comparative Public Law for European Society

Armin von Bogdandy[*]

Keywords: European law, European comparative public law, bases for comparison, European values, European society, constitutional courts, judicial power, judicial dialogue, legal academia

A. Claim and Program

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

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

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

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

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

B. Theorizing European Comparative Public Law

I. European Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. European Society

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Role of Comparison

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

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

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

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

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

35 Mosler (n. 14).

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

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

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

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

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

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

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

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

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

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

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

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

41 Mosler (n. 14), 489.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. The Bases for Comparison

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. European Public Law, Old and New

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. A Test with Constitutional Adjudication

1. Common Developments and Multiple Modernities

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

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

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

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

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

92 Ibid., 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. On Judicial Power

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

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

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

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

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

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

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

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

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

115 Jouanjan (n. 101), 235.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

128 BVerfG *Lüth* (n. 119).

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

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

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

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

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

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

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

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

132 See ibid., 24.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

143 BVerfGE 12, 205, *Rundfunk*.

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

145 BVerfGE 2, 124, *Normenkontrolle II*.

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

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

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

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

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

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

148 BVerfGE 39, 1, *Schwangerschaftsabbruch I*.

149 Corte costituzionale, sentenza n. 27/1975.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

159 Cruz Villalón (n. 93).

160 Zoller (n. 107).

3. The European Role of National Courts

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

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

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

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

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

162 Cassese (n. 5).

163 Ackerman (n. 5).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

181 BVerfGE 134, 366, *OMT Decision*.

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

183 von Bogdandy and Paris (n. 127).

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

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

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

D. Outlook: The Comparative Setting and Academic Identities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reflecting Methods

Method in Comparative Law – The Contextual Approach

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Keywords: contextual approach, functionalism, social science method, historical method, hermeneutic thinking

While reading some current works on comparative law in general, and on its methodology in particular, one may get the impression that it is extremely difficult, if not impossible, to do comparative law, to work with foreign law and, above all, to understand it. Yet, this impression is difficult to reconcile with the everyday experience of many comparatists: most experts, while recognizing the typical problems of comparative law, still arrive at acceptable results. They will, of course, admit to making mistakes from time to time; but they will also feel that they more or less understand the respective foreign law, and know what they are doing. Indeed, the theoretical efforts of modern comparative methodology, despite their indisputable intellectual merits, would greatly profit from a more practical orientation, from a more intensive application of common sense, and from getting less lost in ideological battles. The contextual approach aims to put this ideal into practice, to provide a practical and pragmatic approach to comparative law method, and to defend this approach on a methodological basis.[1]

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1 The contextual approach is further developed and applied to the different legal systems of the world in Uwe Kischel, *Rechtsvergleichung* (2015), passim, in particular § 3, marginal note 1 ff.; English translation of this book (with identical numbering of paragraphs and marginal notes): Uwe Kischel, *Comparative Law* (Oxford University Press (2019).

A. The Current Methodological Discussion

Discussions about methodology in comparative law are in vogue.[2] This observation, however, is neither surprising nor new. The relevant discussions have been going on for at least thirty years.[3] Already in 1985, Frankenberg proposed what has become characteristic for a large part of methodological literature: a fundamental criticism of the traditional method, i.e. of the functionalist method formulated by Zweigert and Kötz in their seminal book '*Einführung in die Rechtsvergleichung*'.[4] The discussion is as far from being over today as it was in the 1980s. Only one thing is clear: the time when a comparatist could simply juxtapose the words of different codifications and call this effort 'comparative law' is definitely over; it is even difficult to imagine that such a simplistic approach ever existed.[5]

In the literature that focuses on methodology, there is a certain predominance not only of the English language, but also of methodological ideas that can hardly deny their origin in typically American legal thought, that is, in legal realism in a wider sense.[6] There are many calls for a more

2 See e.g. recently Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (2014); Mathias Siems, *Comparative Law* (2014), 13 ff, 95 ff; the contributions in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law - Essays in Honour of Mark Van Hoecke* (2014); for comparative constitutional law Ran Hirschl, *Comparative Matters* (2014), 224 ff.

3 See e.g. Nora V. Demleitner, 'Combating Legal Ethnocentrism – Comparative Law Sets Boundaries', Arizona State Law Journal 31 (1999), 737; Günter Frankenberg, 'Critical Comparisons – Re-thinking comparative law', Harvard International Law Journal 26 (1985), 411; Hiram E. Chodosh, 'Comparing comparisons - In search of methodology', Iowa Law Review 84 (1999), 1025; Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century', American Journal of Comparative Law 50 (2002), 671; Léontin-Jean Constantinesco, *Rechtsvergleichung, vol. III*: *Die rechtsvergleichende Wissenschaft* (1983), 51 ff; Ralf Michaels, 'The functional method of comparative law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), 339; Rodolfo Sacco, 'Legal formants – A dynamic approach to comparative law', American Journal of Comparative Law 39 (1991), installment I, 1-34, installment II, 343-401.

4 Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, 1996), 33 ff.

5 For a description of the outdated approach that regarded comparative law as purely descriptive, and which excluded any question concerning the reasons for differences and the actual effects in society see Ulrich Drobnig, 'Rechtsvergleichung und Rechtssoziologie', RabelsZ 18 (1953), 295, 295 ff.

6 The relationship between the criticism and legal realism is clearly expressed e.g. by David J. Gerber, 'System dynamics – Toward a Language of Comparative Law?', American Journal of Comparative Law 46 (1998), 719, 733; on the characteristics of legal

rigorous theorization, as well as calls for interdisciplinary approaches, for methods that are almost exclusively inspired by the social sciences, denying any autonomy to legal thought. The comparatist who is looking for ideas or solutions for his practical work will often remain bewildered by these approaches. Sometimes, it is the very style of certain contributions that reinforces such reactions. Especially, but not exclusively, postmodern authors show a pronounced tendency to use difficult or even incomprehensible language. Phrases like 'The comparatist must adopt a view of law as a polysemic signifier which connotes inter alia cultural, policitical [sic], sociological [...] referents'[7] or 'There always remains an irreducible element of autochthony constraining the epistemological receptivity to the incorporation of a rule from another jurisdiction'[8] make sense if one is ready to accept the postmodern idea that complexity is the only way to systematically represent a phenomenon that one perceives as complex.[9] Thus, practitioners of (comparative) law are not the only ones to be reluctant to accept such an approach. As a well-known English comparatist remarked: 'some scholars seem to delight in the creation of a "language" that is opaque to all but the initiated.'[10]

Two other particularities of the methodological discussion strike the practical comparatists. Firstly, it is notable that criticism of the traditional method, however strong it may be, is very often not accompanied by an alternative, that is to say, by a concrete and positive proposal for doing better. Of course, alternative methods exist,[11] but in most cases they are not proposed by the advocates of critique. Secondly, the more fundamental the

realism see e.g. Joseph W. Singer, 'Legal realism now', California Law Review 76 (1988), 465; Kischel (n. 1), § 5 marginal note 254 ff.

7 Pierre Legrand, 'The impossibility of "legal transplants"', Maastricht Journal of European and Comparative Law 4 (1997), 111, 116.

8 *Ibid*, 118.

9 For this approach André-Jean Arnaud, 'Some challenges to law through post-modern thought', Rechtstheorie Beiheft 19, 157, 160.

10 Basil Markesinis, *Comparative law in the courtroom and classroom* (2003), 52; for an even more negative description of such tendencies in the social sciences see Karl Popper, 'Against big words' in: Karl Popper, *Lectures and Essays from Thirty Years* (rev. edn 1995), 82, 86, 94: 'Unfortunately, many sociologists, philosophers, et al. traditionally regard the dreadful game of making the simple appear complex and the trivial seem difficult as their legitimate task. That is what they have learnt to do and they teach others to do the same. There is absolutely nothing that can be done about it.' ibid., 94.

11 For a detailed description see Kischel (n. 1), § 3 marginal note 31 ff.

critique of functionalism becomes, the less concrete comparative studies try to do better. It may even be that the same experts who decry functionalism do not really proceed in a fundamentally different way when they are simply *doing* comparative law.[12]

B. Critique of the Traditional Approach

Looking more closely at the critique of the traditional approach, which lies at the heart of much of the methodological literature in comparative law, one can distinguish two different levels: a detailed critique of functionalism (1), and a more general critique of the underlying attitude of the traditional approach (2).

1. The Detailed Critique of Functionalism

Critics of functionalism attack, first of all, the individual aspects of this method. Thus, the very notion of 'function', i.e. the idea that law serves to rationally solve certain social problems, appears dubious to them. They insist on the idea that such a function cannot be determined in a meaningful way. Clearly, a norm can have many different functions. The important thing is to know for whom and against whom it performs this function, in respect of what values, who determines these values, how and with what effects.[13] And indeed, it makes a great difference whether, for example, freedom of opinion is considered to aim at the protection of a general right of personality as well as human dignity, as is the tendency in Germany; or whether it serves primarily to maintain a free marketplace of ideas, as is the tendency in the United States;[14] or if one associates freedom of opinion

12 See e.g. Pierre Legrand, 'Alterity – About rules, for example' in: Peter Birks and Arianna Pretto (eds), *Themes in comparative law* (2002), 21 ff.; another such example is found in Werner Menski, *Hindu law - Beyond tradition and modernity* (2003), passim, who describes himself as 'postmodern', ibid., 545.

13 See Myres S. McDougal, 'The comparative study of law for policy purposes – Value clarification as an instrument of democratic world order' in: William E. Butler (ed.), *International Law in Comparative Perspective* (1980), 191, 219 n. 24.

14 See e.g. Donald P. Kommers, 'Kann das deutsche Verfassungsrechtsdenken Vorbild für die Vereinigten Staaten sein?', Der Staat 37 (1998), 335, 338 ff.; Winfried Brugger, 'Der moderne Verfassungsstaat aus Sicht der amerikanischen Verfassung und des Grundgesetzes', Archiv des öffentlichen Rechts 126 (2001), 337, 359 ff.; on the influ-

with fascist and superstitious propaganda;[15] or if one looks at it not from an individualistic point of view but as an instrument for shaping the way society thinks, as a means to promote a socialist order.[16] Moreover, critics insist on the idea that law often does not solve a rationally defined problem. For example, a statute may be ineffective or symbolic, lose its former function, or involuntarily acquire new functions.[17] Finally, it seems problematic to claim, as some functionalists do, that one cannot compare norms that serve different functions, because this would exclude any function that is not universal, but depends on the social structure or the general conception of the state.[18]

Other points of criticisms may be mentioned, here, without going into further detail: Functionalism, according to its opponents, does not provide information on the process of understanding, on the research strategies to be used.[19] Unlike other sciences, such as theology or sociology, comparative law has not developed theories of comparison; thus, basic questions are not addressed, e.g. what a comparison is, or what the conditions of comparability are.[20] Comparative practice is criticized for focusing too much on the description of different legal orders, and not on the actual comparison.[21]

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ence of human dignity in European and American constitutional law, see in particular the work of James Q. Whitman, e.g. James Q. Whitman, 'The two Western cultures of privacy – Dignity vs. liberty', Yale Law Journal 113 (2004), 1151, passim.

15 On this tendency in Russia see Angelika Nußberger, 'Die Frage nach dem *tertium comparationis* – Zu den Schwierigkeiten einer rechtsvergleichenden Analyse des russischen Rechts', Recht in Ost und West 42 (1998), 81, 83.

16 On socialist theory see e.g. Karl-Peter Sommermann, 'Funktionen und Methoden der Grundrechtsvergleichung' in: Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte*, vol. I (2004), § 16 marginal note 59; on fundamental freedoms in socialism in general see Georg Brunner, 'Grundrechtstheorie im Marxismus-Leninismus' in: Merten and Papier (n. 16), § 13 marginal note 49 ff.

17 See Oliver Brand, 'Conceptual comparisons – Towards a coherent methodology of comparative legal studies', Brooklyn Journal of International Law 32 (2007), 405, 415 ff.

18 See Jaakko Husa, 'Farewell to functionalism or methodological tolerance?', RabelsZ 67 (2003), 419, 431; Brand (n. 17), 417; on the interdependence of national problems and data needs see Constantinesco (n. 3), 54 ff.

19 Husa (n. 18), 433.

20 See Reimann (n. 3), 689 f. and on comparison in other disciplines Nils Jansen, 'Comparative law and comparative knowledge' in: Reimann and Zimmermann (n. 3), 305, 318 ff.

21 See Chodosh (n. 3), 1056 f.; Axel Tschentscher, 'Dialektische Rechtsvergleichung – Zur Methode der Komparistik im öffentlichen Recht', Juristenzeitung (2007), 807, 810, 812.

The cultural context, it is said, does not play an adequate role.[22] Neutrality, to which the functionalist should aspire, is not always necessary, and might not be achievable, at all.[23]

The critique focuses not only on individual aspects of functionalism, but also on its background. For example, functionalism is accused of emphasizing unity rather than diversity. It is supposedly interested only in similarities, not differences, a defect which is brought to a head in the famous *praesumptio similitudinis*.[24] Functionalism is also criticized for focusing only on norms and law. Thus, functionalism appears positivistic, and not realistic.[25] Moreover, functionalism is considered to be unsuited for certain types of research such as legal transfers, the comparison of legal cultures, or comparative research on the intellectual development of a problem and its solution.[26] To some, it lacks the 'big issues' to which all comparatists could contribute their partial results. Such big issues could, for instance, be the basic structures, the nature and the development of law, the relationship between law and economy, or between law and society, or predictions about the future actions of legal actors.[27] Finally, some decry the isolation of traditional comparative law from other social sciences, especially in terms of methodology,[28] as well as the isolation between the various specialized fields of comparative law.[29]

22 Gerber (n. 6), 722; Husa (n. 18), 428.

23 See Tschentscher (n. 21), 1811 f.; Chodosh (n. 3), 1050 f.

24 See Vivian Grosswald Curran, 'Cultural immersion, difference and categories in U.S. comparative law', American Journal of Comparative Law 46 (1998), 43, 67 ff.; Vivian Grosswald Curran, 'Dealing in Difference: Comparative Law's potential for broadening legal perspectives', American Journal of Comparative Law 46, (1998), 657, 666; Pierre Legrand, 'The return of the repressed – Moving comparative legal studies beyond pleasure', Tulane Law Review 75 (2001), 1033, 1033 f.; Frankenberg (n. 3), 436 f.

25 Frankenberg (n. 3), 421, 433, 445; Gerber (n. 6), 722, 725 f., 733.

26 See Michaels (n. 3), 341; Brand (n. 17), 417, 420.

27 See Reimann (n. 3), 697 ff.

28 In this sense see Samuel (n. 2), passim, e.g. 5, 23 et f., 79; Jansen (n. 20), 318 ff.; Michaels (n. 3), 344 ff.

29 See Reimann (n. 3), 687 f.; Gerber (n. 6), 722 ff.; Annelise Riles, 'Wigmore's treasure box – Comparative Law in the Era of Information', Harvard International Law Journal 40 (1999), 221, 230 ff.

2. The Lack of 'Theory'

a) Social Sciences to Save Comparative Law

The root of this criticism can often be found in an attitude that deplores a lack of method, of theory, of reflection on methodology in traditional comparative law. It supposes to overcome the common sense approach, and to replace it by a more theorized one:[30] comparative law must learn from social sciences, recognize their techniques, their methods, their models, in short, the theory developed there. At first sight, this attitude will be rather astonishing to the traditional comparatist. After all, he *does* have a method: In order to compare a question of law in two legal orders, he searches as thoroughly as possible for the solutions given and for their real effects in each legal order, notes the similarities and differences, and then finds the legal, political, social reasons for them. This is a set of systematic steps taken with a specific aim in order to arrive at conclusions that are at least subjectively new. By definition, it is therefore a method. So, where is the problem? The criticism expresses its regrets that it is not clear how the great masters of comparative law, such as Ernst Rabel, arrived at their results,[31] and that the traditional comparative approach seems to proceed more on a case-by-case basis than in any systematic fashion. At first glance, one might therefore assume that the critique is looking for some kind of cooking recipe that would allow the jurist to simply execute one of the prescribed steps after another in order to achieve an interesting, enlightening, creative and up-to-date comparative law results. Such a conception of scholarship would, however, be strongly out of touch with reality. There simply is no such method in the sense of a simple recipe that would allow researchers – be it in natural sciences, in social sciences, or in law – to develop innovations and in-depth knowledge. On the contrary, their starting point is often a brilliant idea, a hypothesis, an inspiration. In a way, however, opponents of the traditional method seem to have realized this. For the few rather traditional authors who have tried – with many reservations – to provide a kind of instruction manual, a recipe for comparative law[32] are, in general,

30 See e.g. recently Samuel (n. 2), 19 f.

31 Markesinis (n. 10), 22.

32 See e.g. Léontin-Jean Constantinesco, *Rechtsvergleichung, vol. II: Die rechtsvergleichende Methode* (1972), 137ff.; Peter De Cruz, *Comparative Law in a Changing World* (3rd edn, 2007), 242 ff.

simply ignored by the critics. What, then, is this method or this theory that critics miss so much?

The current critique of traditional comparative law is very similar to that addressed at historical scholarship around the 1970s. Thus, the debates about historical method and theory can easily serve as a guide to understanding the situation in comparative law. In history, some saw a need for more theory, that is, a need for reflection on the methodological conditions of scientific work, in order to overcome the common sense approach and the naive reliance on this common sense in the analysis of facts. Here, it was said, history could learn from systematic social sciences. Research techniques, methods for developing hypotheses and models, and specific theories worked out in those fields needed to be taken into account.[33] This brief description will immediately sound familiar to any comparatist who has followed the methodological discussions of the last few decades. Indeed, the background is the same: only the analytical models of social sciences, borrowed from natural sciences, are claimed to be scientific, to have scholarly value. Consequently, comparative law (like history), which does not work analytically, but phenomenologically and hermeneutically, seems almost automatically to be without method, without theory, and therefore without value[34] – and in dire need to be rescued by social sciences.

b) Some Theory of Science: Analytical and Historical Questions

In the end, the call for analytical methods to the exclusion of all others is strongly ideological. The typical analytical question starts with contemporary problems and searches for a way to solve them. Existing work on the question is reviewed, connected with the problem, and evaluated according to whether it is correct or incorrect, whether it contributes to a solution or not. In other words, ideas are analyzed in the light of contemporary perspectives, not in their – for instance historical – context.[35] When we read e.g. Thomas More's *Utopia*, an analytical question would be whether women should really obey men, or whether adultery should be punished by death – the answer being clear. On the other hand, a historical question –

33 See the summary of Reinhard Rürup, 'Zur Einführung' in: Reinhard Rürup (ed.), *Historische Sozialwissenschaft* (1977), 5, 8 f.

34 See e.g. recently Samuel (n. 2), 19 ff.

35 On this difference and on the following explanations see Helmut Seiffert, *Einführung in die Wissenschaftstheorie*, vol. II (11th edn, 2006), 57 ff, 234 ff.

which is often found in the humanities - does not consider past statements only as simple contributions to the solution of a specific problem, which are either accepted or rejected, but starts to discuss these statements as such, i.e. initially without evaluation. In the example of *Utopia*, the question is thus not whether More's position is correct or incorrect, acceptable or not, but this position is examined within the context of its time, in light of its significance for the social context in which it emerged – in a word: historically. The concrete historical question could be, for example, in what way More's thinking was new or revolutionary at its time. Other examples can easily be found in music or history of art, where analytical questions (e.g. who makes the best music, the Rolling Stones, Miles Davis or Mozart?) prove to be nonsensical at first sight.

Ideology comes into play, especially in the debates after 1968, when one realizes that a historical question is never 'critical' in the sense that it does not, for example, approach the Middle Ages using modern concepts (emancipation, human rights), does not evaluate the past from a modern point of view, and does not directly try to draw conclusions for present-day problems. The historical approach tries to understand that which is different precisely as different, and to understand it on its own terms. It is not primarily interested in the historical dimension of current problems, it does not orient its research towards certain predetermined interests. The criticism born out of the analytical approach is obvious, and was well formulated in historical science: 'Too often, historicism as a mere doctrine of comprehension has led history not only to limit itself to empathetic approval but also to willingly capitulate to the normative power of the factual by approving of the status quo in the societies and political systems under study. In other words, it has too long contented itself with interpreting intentional conduct using standards immanent to the period under study, while overlooking or denying the fact that the past can and should also be analyzed using today's theoretical points of view.'[36]

36 Hans-Ulrich Wehler, 'Einführung' in: Hans-Ulrich Wehler (ed.), *Geschichte und Soziologie* (2nd edn, 1984), 11, 20 ('Zu oft hat auch die bloße Verstehenslehre des Historismus dazu geführt, daß sich die Geschichte sowohl auf zustimmendes Nachempfinden beschränkt, als auch mit einem bereitwilligen Kniefall vor der normativen Kraft des Faktischen den jeweiligen Status quo in Gesellschaft und Politik gebilligt hat. Anders gesagt: sie hat sich zu lange mit der Interpretation intentionalen Handelns mit Hilfe zeitimmanenter Maßstäbe ... zufrieden gegeben, aber übersehen bzw. geleugnet, daß Vergangenheit auch jeweils unter den theoretischen Gesichtspunkten von heute aufgeschlüsselt werden muß und kann.').

The distinction between analytical and historical questions is typically reflected in different methods. For analytical questions, on the one hand, methods such as induction and deduction, model-building, statistics, or considerations of monetized efficiency (economic analysis of law) are well-suited. For historical questions, on the other hand, hermeneutics is particularly suitable.[37] Historical questions require a phenomenological approach in which we try to grasp and describe a concrete phenomenon as best we can, in an integral and holistic manner, and as free from preconceived categories as possible. In this sense, a hermeneutical science like history is, in fact, 'theory-free': it lacks overreaching ideas or constructs which could serve to explain all of history, to understand it (exclusively) from a specific modern angle, or to squeeze it into a unified, abstract conceptual framework. After all, hermeneutic science, because it is not analytical, does not even try to look at the totality of history as the expression of e.g. class struggle, a clash of cultures, predominantly masculine thought, or economic progress. The label 'theory-free' can be applied with particular emphasis if theory is defined according to rigorous criteria, which demand that any theory must be 'powerfully explanatory'. When applying such a standard, even statements of alternatives and probabilities ('60% of men are ..., while 25 % are ...') can no longer be recognized as theory.[38] Indeed, the more realistic an explanation is, the more it may be rejected by analytical social sciences. As Dahrendorf wrote: 'The more "realistic" assumptions underlying scientific theories become, the more differentiated, limited, and ambiguous they become; but they also increasingly prevent the deduction of certain explanations or prognoses. In this sense, theories are better the more unrealistic they are, namely the more stylized, certain, and unambiguous their underlying assumptions are.'[39]

37 See for the following Seiffert (n. 35), 41 ff., 69 ff., 197 ff.

38 For example, Ralf Dahrendorf, *Pfade aus Utopia – Zur Theorie und Methode der Soziologie* (4th edn, 1986), 199 f.

39 Dahrendorf (n. 38), 200 ('In dem Maße, in dem die wissenschaftlichen Theorien zugrunde liegenden Annahmen "realistisch" werden, werden sie differenziert, eingeschränkt, mehrdeutig; im gleichen Maße aber verbieten sie die Deduktion bestimmter Erklärungen oder Prognosen. In diesem Sinne sind Theorien desto besser, je unrealistischer, nämlich stilisierender, bestimmter, eindeutiger ihre Annahmen sind.').

C. The Contextual Response

In sum, comparative lawyers can remain calm when faced with a critique that focuses on a lack of theorization and presents the analytical methods of social sciences as the ultimate panacea. In the first place, the very existence of the venerable hermeneutical method easily shows that analytical methods cannot neither claim to be the only scientific ones, nor impose their approach and way of thinking on other branches of scholarship. Second, analytical methods are by no means the only accepted ones even in sociology. On the contrary, other methods are at least equivalent. When, for example, the German Council of Science and Humanities in 2008 declared 9 out of 256 research organizations in sociology to be 'excellent', these best entities included, among others, quantitative as well as qualitative methodologies, hermeneutical methods as well as systems theory; even pragmatically oriented syncretists were in the lead.[40] In other words, the reproach of working without theory, without method, is also used within social sciences, addressed for example at sociologists who use hermeneutics or who are pragmatic syncretists. This reproach is part of a debate between different schools that exist within, for example, sociology – a conflict that is ultimately ideological in nature. Comparative law, like any other scholarly endeavor, can therefore take the accusation of a lack of 'theory' in stride. For it does not give rise to any objective and serious doubt about the legitimacy, or even the scientific value, of their approach. On the contrary, this reproach is only an attempt to import one of many viewpoints from social sciences, and to try and recruit more supporters for this position in comparative law. Even the multiplicity, and sometimes the contradictions of the approaches that exist in comparative law should not lead to a feeling of inferiority, because we are in good company here – *variatio delectat.*

For a practical-minded comparatist, the hermeneutical method is often the most useful. The description of historical questions, which we have discussed in contrast to analytical questions, will immediately appear familiar. After all, the search for the atmosphere, the style of a foreign legal order is of primary importance in comparative law, too. French, English

40 Steuerungsgruppe der Pilotstudie Forschungsrating im Auftrag des Wissenschaftsrates, 'Forschungsleistungen deutscher Universitäten und außeruniversitärer Einrichtungen der Soziologie, Ergebnisse der Politstudie Forschungsrating des Wissenschaftsrats,' https://www.wissenschaftsrat.de/download/archiv/pilot_ergeb_sozio.pdf?__blob=publicationFile&v=1 (last accessed 27 January 2023), 33f.

and German judgments, for example, are not only written in very different fashions, but the appropriate ways of reading and working with them differ vastly. In comparative law, a great number of aspects must be considered, a legal phenomenon must be viewed in its entire environment. For example, the law of evidence in the United States is difficult to comprehend without taking into account the importance and influence of the jury.[41] The development of common law through precedent is linked to the exact delineation between law and fact, which is not at all the same as in, say, German or French law.[42] Understanding the operation of law in sub-Saharan Africa requires an awareness of the importance and content of traditional African law.[43] In order to understand any foreign law, the comparatist must slowly familiarize himself with the material, must open himself step by step to its otherness. Through experience, one must develop a certain intuition – a typically hermeneutic approach.

Still, questions of a more analytical character do exist even in comparative law. This is especially the case when comparative law is used to find the best solution, for instance when a comparative interpretation of national law is called for, or in projects of legal harmonization. In such cases, the central interest of the comparatist is not to understand the foreign legal order on its own terms, but to use it as a quarry for ideas. But even in such situations, the basic question remains historical and thus more suited to hermeneutics. For in order to find the best solution, one must first understand the propositions of the different legal orders, their significance and their practical effects in their original environment. There remains, however, a clearly analytical part to these question, and one might well imagine that this part would be open to, and even call for, other methods, especially analytical ones. Yet in a surprising, almost ironic twist, it is the very opponents of the traditional method who do not follow this line of thinking. On the contrary, they admit, often expressly, that the functional

41 See Kischel (n. 1), § 3 marginal note 216; on the jury in general see *ibid.* § 3 marginal note 141 ff.; on the respective differences between the United States and England see *ibid.* § 3 marginal note 232.

42 On the distinction between law and fact in United States law, see Kischel (n. 1), § 5 marginal note 49 ff.; in German law, *ibid.* § 6 marginal note 105 ff.; for certain aspects in French law, *ibid.* § 6 marginal note 141 ff.

43 See e.g. Kischel (n.1), § 8 marginal note 24 ff; Gilles Cuniberti, *Grands systèmes de droit contemporains* (2nd edn, 2011), marginal note 441 ff.

method produces very good results especially when applied to finding best solutions.[44]

D. From Function to Context

Despite all these advantages, the functional method has its limitations. Moreover, the very term 'functional' seems to generate distorted ideas, as well as a defensive reflex among its opponents. It would therefore be better to drop the notion, and replace it with a new one: contextual comparative law. This contextual approach holds fast to the basic idea of functionalism, while avoiding its specific problems.

I. The Basic Idea of Functionalist Thinking

The core of functionalist thinking which should be retained is not the notion of function. On the contrary, it seems that it is precisely this notion that has led to many misunderstandings. The notion of functionalism is far from clear because, in various scientific disciplines, it designates quite distinct concepts.[45] In comparative law, however, these theoretically charged concepts play little role. On the contrary, when speaking of function in comparative law, the idea expressed is a very simple one, based on common sense and experience: The comparatist must free himself from his native thought structures and from the restrictions of his own legal system in order to avoid mistakes and make sensible comparisons.[46] Above all, it must be made clear that the mere wording of a statute, the incidental parallelism of legal concepts (e.g. *pouvoir discrétionnaire*/*Ermessen*/*discretion*) or the absence of a parallel concept (e.g. for the common law rule against perpetuities) must not be considered a sufficient basis for comparison. Once such purely external qualities are excluded, the object of comparison can only be the real-life situations behind the norm, what the norm regulates, as well as

44 See Reimann (n. 3), 691 ff.; Chodosh (n. 3), 1027 ff; Gerber (n. 6), 723.

45 See Michaels (n. 3), 344 ff. who distinguishes seven different concepts; see also e.g. Maurice Adams and John Griffiths, 'Against "comparative method" – Explaining similarities and differences' in: Maurice Adams and Jacco Bomhoff, *Practice and theory in comparative law* (2012), 279, 283 f.

46 See already Hein Kötz, 'Abschied von der Rechtskreislehre?', ZEuP 6 (1998), 493, 504 f.

its real effects, the real or imagined conflicts that the norm tries to solve. It is this approach, and no more, that functionalists refer to when they use the word 'functional'.[47] Critics, on the other hand, use a very different image of functionalism, one that is largely not shared by its adherents. According to this image, functionalism designates a method that needs a single clear function for each norm, that considers only sufficiently similar functions to be comparable, that is conceived essentially for private law, that assumes the same needs and the same solutions in all societies, that aspires to a harmonization of law, that hardly looks at the cultural context, that requires the comparatist to assume a totally neutral point of view, and that neglects the actual comparison[48] – in other words, a pure and simple caricature.

2. The Limits of Functionalism

Nevertheless, the critique also points out some real shortcomings of functionalism. First, functionalism is truly suited to only one of several types of comparative law questions – the classical problem comparison,[49] i.e. the comparison of problems that are laid out, as far as possible, by reference to factual situations (e.g. how is the buyer of a building protected against the possibility that the seller is not the owner?). By contrast, a strict understanding of functionalism would already find issue with a classical comparison that addresses not problems but concepts (e.g., how does federalism work in the United States, Spain and Germany?) Here, the basic question is no longer posed functionally, but uses notions immanent to the legal systems, with two legal concepts being compared in the abstract. The role and explanatory power of functionalism diminish even more when it comes to the various types of non-classical comparisons. When one addresses, for example, the methods of statutory interpretation in France and England, or the training of lawyers in France, the United States, and Japan, one is not talking about purely factual problems. When harmonization is pursued, there is a strong element of evaluation that is not directly addressed by functionalism. Question of a more systematic nature, for example about the development of legal families, are even totally beyond functional analysis.

47 Clearly, e.g. Michael Bogdan, *Komparativ rättskunskap* (2nd edn, 2003), 58 f.
48 For details see Kischel (n. 1), § 3 marginal note 6 ff. with additional references.
49 For a typology of legal comparisons see Kischel (n. 1), § 3 marginal note 165 ff.

These limitations do not, however, serve to refute the functional approach. They are so obvious that it would be rather strange to assume that functionalists are not aware of them. Indeed, Hein Kötz himself has emphasized without the slightest ambiguity that it is precisely the most interesting questions [sic!], concerning styles, procedures, mentalities and values, that the principle of functionalism is unable to grasp.[50] The consequences he draws from these limitations are typical of all traditional comparatists: far from rejecting functionalism, he simply warns 'against the dangers which attend an excessively absolute interpretation of the principle of functionality.'[51] Indeed, while the functionalist method is not directly applicable, its central requirement remains: one must always understand and take into account all aspects of the legal and extra-legal context of each legal phenomenon. For example, when it comes to establishing the methods of statutory interpretation in different countries, a truly wide range of aspects may be important, e.g. the historical development, the technical quality of legislation, the self-image of judges, or the different opinions on *who* should determine the meaning of the laws in the first place. If, to take another example, one wants to compare legal education, one has to consider historical developments, but also the extent to which the law is considered to be systematic in nature, or the typical profiles of legal professions in each country. In other words, the hard core of functionalism serves the comparatist as an excellent preparation for the solution of any type of comparative question. This core consists in always taking the context into account – it is *contextual* comparative law.

The dangers implicit in an excessively absolute interpretation of functionality do not end here. Thus, it is misleading to argue that a comparison must always have objects that serve the same function.[52] Abortion rules in different countries, for instance, may have the function of either limiting or supporting population growth, but this does not preclude a comparison.[53] Consequently, the additional question of whether (and when) two functions are similar enough to allow comparison[54] is meaningless. Moreover, it is not imperative in comparative law to explicitly identify and elaborate,

50 Kötz (n. 46), 505.
51 Kötz, (n. 46), 504 ('vor den Gefahren [zu] hüten, die ein allzu absolut gesetztes Funktionalitätsprinzip mit sich bringt').
52 As even Zweigert and Kötz do, see Zweigert and Kötz (n. 4), 33.
53 See Bogdan (n. 47), 59.
54 See Reimann (n. 3), 690; Husa (n. 18), 428.

at the beginning of any study, the social problem, the function of the norm, and to relate this function to the social problem in the other legal order.[55] The function is an important working tool, but it is not itself the subject of comparison. If, for a given problem, it is not difficult to find its relevant counterpart in the foreign legal order, all that must be done is not to lose sight of the factual problems involved.

3. Two Ways of Thinking

In sum, the traditional method and its critics have very different ways of thinking – which may well explain not only the never-ending controversy but also their mutual incomprehension. Traditional comparatists seek, without dogmatic preconceptions, a practical approach that allows them to avoid mistakes as much as possible. Their image of the comparatist is rather hermeneutic, the image of a researcher who gradually immerses himself into the different legal orders in order to understand their characteristic features and ways of thinking, and to develop an intuition as to their respective style. Many of their opponents, on the other hand, start – consciously or not – from an analytical approach, which prescribes a method to be followed in detail, and which ultimately serves to provide answers to broader, preferably critical and often abstract questions. This difference explains why traditionalists' methodological statements are treated in a literal and absolute manner, which is at odds with the traditional approach itself.[56] A flexible, practice-oriented approach that leaves each comparatist free to determine what interests him is seen by its critics as a common-sense, syncretistic approach. This is not necessarily incorrect. What is incorrect is to deny that it is even a method at all, that it constitutes a valid scientific or scholarly approach.

4. The Contextual Approach in Brief

The basic concept of the contextual approach is the set of ideas presented here. It responds to the critique of functionalism and defends the core

55 As seems to be the underlying assumption in Zweigert and Kötz (n. 4), 33.

56 See also the critique by Sarah Piek, 'Die Kritik an der funktionalen Rechtsvergleichung', ZEuP 21 (2013), 60, 85.

of functionalist thinking while pointing out its problems and shortcomings. Methodologically, it is firmly rooted in the hermeneutic tradition; it does not seek, for instance, grand political or economic guiding ideas (without rejecting them in principle); and it is open to the multiplicity of research questions[57] in comparative law without excluding certain questions, answers, or techniques. However, what the contextual approach does not accept is any attempt to simplify or reduce the complexity of reality, especially in the form of models; on the contrary, it demands that all factors and all insights, legal or extra-legal, be taken into account. Its method is that of a slow familiarization with the foreign law and the legal field in question, of looking for interrelations, with a special eye to the atmosphere, the style of the foreign legal order, which can be grasped only with intuition honed by experience. The contextual approach does not provide an easy formula, in the sense of a recipe that one should follow step by step for any kind of question – simply because there is no such 'method'. Experienced comparatists may well give advice on how to proceed in practice.[58] They can also try to describe and classify typical errors in comparative law in order to better avoid them.[59] But beyond that, each comparative question requires an independent analysis and an attempt to incorporate all relevant aspects of the context.

E. The Practical Perspective

A famous German methodologist has observed that legal practitioners respectfully leave essays on legal theory at their place in the library, that judges pay little heed to academic accounts of methodology.[60] And, in fact, we must be careful not to exaggerate the methodological debate in comparative law and its numerous details. Of course the discourse on method is important; but what is at least as important is to elaborate the more practical aspects of comparative law, which are necessary to facilitate the understanding of the different contexts of the world – the context of civil law, of common law, of African law, or the different contexts in Asia, to mention a few. This is one of the most important goals of comparative law:

57 For a typology see Kischel (n. 1), § 3 marginal note 165 ff.
58 For such practical advice see Kischel (n. 1), § 3 marginal note 235 ff.
59 For such a classification see Kischel (n. 1), § 3 marginal note 202 ff.
60 See Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (2nd edn, 1972), 7 ff.

helping comparatists by providing them with the information necessary to avoid getting lost in foreign law, to prevent mistakes, to understand the context in which they want to work, to slowly become familiar – in a hermeneutical way – with the different contexts that exist in the world.

This short article is obviously not the place to meet these expectations – which we have tried elsewhere.[61] Nevertheless, we should mention very briefly a few examples to at least throw a cursory highlight on the practical side, which is crucial in the contextual approach.

I. Civil Law and Common Law

Civil law and common law, for example, have been so much the focus of comparative studies that one could easily assume that there is hardly anything left so say on the topic. Such a supposition would, however, be erroneous since, quite on the contrary, there are many aspects that deserve a new look. We have already mentioned two points, the jury and the distinction between law and fact. The jury is a factor that certainly explains and highlights many of the peculiarities in common law, but also gives rise to many misunderstandings (it is neither systematically composed of twelve people, nor is it a very common procedure in private law, nor does it decide only questions of fact while the judge is charged with the questions of law).[62] The distinction between law and fact causes many problems in comparative law because comparatists tend to believe that the dividing line between the two is the same everywhere, which is not at all the case if one compares, for instance, English and German law.[63] When an English judge holds that the standard of reasonableness in negligence requires a rider by night to proceed at a speed that always allows him to stop within his range of vision, this is clearly a question of law for a German

61 See Kischel (n.1), §§ 5-11; see also for just one example Uwe Kischel, 'Après la transition – La situation juridique actuelle de l'Europe de l'Est', Revue Internationale de Droit Comparé (2015), 145-166, describing and analyzing the context of Eastern Europe at that moment.

62 See Uwe Kischel, 'Der menschliche Faktor – Der Mythos der Jury im common law' in: Dirk Hanschel, Sebastian Graf Kielmansegg, Uwe Kischel, Christian Koenig and Ralph Alexander Lorz (eds), *Mensch und Recht – Festschrift für Eibe Riedel zum 70. Geburtstag* (2013), 631 ff; Kischel (n. 1), § 5 marginal note 141 ff.

63 On the difference between law and fact in the law of the United States, see Kischel (n. 1), § 5 marginal note 49 ff.; in German law, *ibid.* § 6 marginal note 105 ff. and for certain aspects in French law, *ibid.* § 6 marginal note 141 ff.

lawyer, but a question of fact in English law.[64] The implications not only for the role of the jury, but also for the scope of appeal are obvious. In the final analysis, the question of law and fact even shows that, contrary to widespread assumptions, the common law does not acquire more and more detail through an ever-increasing number of precedents.[65] There are, of course, many other points to be examined more closely. For example, it is impossible to really understand German law without understanding the German technique of 'subsumption', which represents not only a way of writing, but a typical and fundamental way of thinking for German lawyers.[66] Conversely, the venerable institution of the code in France and Germany has become a kind of myth for common law lawyers, the meaning and importance of which are often misunderstood and exaggerated.[67]

Attention must also be paid to necessary differentiations *within* these two traditional contexts. The differences between the law in England and in the United States, which can often be traced back to the influence of legal realism or lack thereof, preclude many generalizations about the common law context as such, and are even important for understanding the position of further common law countries.[68] As regards the context of civil law, one should not forget the diversity between countries and regions, either. Spain, for example, is much less under French influence than is sometimes believed.[69] Eastern Europe has gained in legal importance, but one can no longer simply classify it under the heading of 'transformation states'.[70] Or we could mention Latin America, which is marked, to a greater or lesser degree depending on each country, by a sometimes wide difference between law in books and law in action, by corruption, by the existence of an independent law in the *barrios* or *favelas*, and by a legal pluralism that must recognize the existence of a traditional indigenous law.[71]

64 For English law see *Tidy v. Battman* (1934) 1 KB 319 (CA) 319, 322 f.; *Morris v. Luton Corporation* (1946) 1 KB 114 (CA) 116.
65 See *Qualcast (Wolverhampton) Ltd v. Haynes* (1959) AC 743 (HL) 758 (per Lord Somervell), 761 (per Lord Denning); Kischel (n.1), § 5 marginal note 51.
66 See Kischel (n. 1), § 6 marginal note 109 ff.
67 See Kischel (n. 1), § 5 marginal note 36 ff, 58 ff.
68 See Kischel (n. 1), § 5 marginal note 225 ff, 254 ff, 259 ff.
69 See Kischel (n. 1), § 7 marginal note 16 ff.
70 See Kischel (n. 1), 145, 145 ff.
71 See Kischel (n. 1), § 7 marginal note 180 ff.

2. And the Rest of the World ...

It is, however, non-Western law that even more often poses problems for comparatists and to which, therefore, more attention should be paid. In sub-Saharan Africa, the difference between common law and civil law countries does, of course, exist but it often does not play a decisive role. Moreover, in many of these countries, this law does not seem to work very well. Nevertheless, there is law that plays an important and effective role in people's everyday lives – yet it is not state but rather traditional law. It fills the gaps resulting from ineffective state law, and therefore needs to be analyzed and understood, first on its own terms, but also in its relationship to state law.[72] Other contexts certainly deserve a great deal of attention as well:[73] China, for example, where it is easy to exaggerate the importance of Confucianism, but hardly the importance of Communist Party rule; India, where, surprisingly, law plays a truly important role in the development of the country (but traditional Hindu law does not); Japan, Taiwan and South Korea, which form the core of a context specific to Southeast Asia. Islam is not only the basis of the only religious law that plays an internationally important role today; it is also significant in two distinct ways, in that one must always differentiate between (classical) Islamic law as such, and the law in Islamic countries. Understanding Islamic law, for example its fundamental problem with legal change (*ijtihad*),[74] is becoming increasingly important far beyond the boundaries of academic comparative law, in light of its unmistakable and current political implications. Finally, there are many other contexts that should not be forgotten or ignored in comparative law: Jewish law, canon law, European law, public international law, and even the famous *lex mercatoria*, whose very existence is questionable.

72 See Kischel (n. 1), § 8 marginal note 1 ff.

73 For the following see Kischel (n. 1), § 9 marginal note 66 ff., 100 ff. (China); § 9 marginal note 205 ff., 228 ff., 244 (India); § 9 marginal note 135 ff. (South-East Asia); § 10 marginal note 1 ff. (Islam).

74 See e.g. Wael B. Hallaq, 'Was the gate of ijtihad closed?', International Journal of Middle East Studies 16 (1984), 3 ff.; for a classic Western description see Joseph Schacht, *An introduction to Islamic law* (1964), 69 ff.; in more detail Kischel (n. 1), § 10 marginal note 44 ff.

F. Conclusion

The contextual method provides a practical and pragmatic approach to comparative law. It builds on traditional functionalism, retaining its core while avoiding its problems and limitations. Its methodological basis is hermeneutics, which describes very clearly the typical approach of most experienced comparatists: the slow familiarization with the foreign law and with the environment in which it is inserted, the search for its atmosphere, its style, its legal and extra-legal peculiarities, in order to develop an intuition that allows the comparatist to evade the pitfalls of the topic, and to better understand the functioning of the respective foreign law in its context.

Contextual Comparison and Shifting Paradigms in Comparative Public Law

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Keywords: contextual comparison, administrative law, religion, transformative constitutionalism, environmental constitutionalism

A. Introduction

Contextual comparison is today widely seen as the common methodological denominator of the different approaches to comparative law. It is particularly popular in comparative constitutional law. A leading series on national constitutions which seeks to provide scholars and students with accessible introductions to the constitutional systems of the world uses it as the standard method to identify the key historical, political and legal factors which have shaped the constitutional landscape of each country.[1] A leading treatise on comparative law summarizes the meaning of the concept in the following terms:

> 'The basic idea is to take account of the legal and extra-legal environment in which every legal regulation operates: the comparative lawyer must recognize a norm's conceptual, systematic, and cultural context; move to a more abstract, context-independent level of analysis if necessary; be able to describe the practical problems addressed by the rule regardless of context; understand the history, importance, and impact of foreign legal institutions; and, most of all, answer the questions of why similarities and differences exist by taking into account all relevant information about factors such as the legal, societal, historical, and political background. The core of comparative law is, therefore, always the

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1 Peter Leyland and Andrew Harding (general eds), *Constitutional Systems of the World* (Hart Publishing 2012).

understanding of context: it is *contextual comparative law* [italics in the original].'[2]

It is already clear from this brief description that contextual comparison is a highly ambitious, multilayered undertaking:

'It is open to all manners of research questions, and does not exclude certain questions, answers, or techniques. However, it does refrain from reducing and simplifying the multilayered complexity of reality to a model. In fact, it demands the contrary: the consideration of as many relevant legal and non-legal factors and insights as possible in every individual study. Its method is a slow familiarization with the legal system and legal domain under study, the search for interrelations with a special eye to the specific atmosphere and style of the other legal order, which can be grasped only with intuition honed by experience.'[3]

As is evident from these observations, context is a complex, multi-faceted concept. It is also highly dynamic, as rapid political, economic, and social change has been a hallmark of modern times, change to which public law is exposed even more directly than private or criminal law. In the subsequent sections the breadth and the depth of the resulting challenges to public law comparison will be explored by taking a look at the shifting paradigms of comparative public law thinking in German scholarship and jurisprudence.

B. Administrative Law and the Rule of Law Paradigm in the Late Nineteenth Century

When the study of foreign public law took off in Germany in the late nineteenth century, it was largely limited to the exploration and analysis of the public law institutions of a few advanced European legal systems, namely those of France and Britain.[4] From the beginning, this study for the best German public law scholars had an immensely practical purpose, i.e. the

2 Uwe Kischel, *Comparative Law* (translated by Andrew Hammel) (Oxford University Press 2019), 173-174.

3 Kischel (n. 2), 174.

4 See Christoph Schönberger, 'Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber, *Handbuch Ius Publicum Europaeum, vol. IV: Verwaltungsrecht in Europa: Wissenschaft* (C.F. Müller 2011), para. 34.

development of modern German public law by using concepts and ideas from those countries which they viewed as possible models for Germany in the respective area of their enquiry. In the field of administrative law this applied above all else to France where the Conseil d'Etat in the Third Republic was already well on its way of establishing the foundations of a modern *droit administratif*. It was from France that Otto Mayer took his clue when he developed, in his treatise on German Administrative Law, the basic principles and institutions of general administrative law which for him constituted the very basis of a state governed by law, or *Rechtsstaat*.[5]

This achievement was all the more remarkable since intellectual and academic exchanges between France and Germany in the 19th century, and for much of the first half of the 20th century, were overshadowed by intensely hostile political relations between the two countries in which France appeared, in the eyes of Germany's political class and large parts of its public, as Germany's 'hereditary enemy'. In this difficult environment, Mayer was one of the few prominent voices calling for reconciliation and a better mutual understanding of the two countries, to which he contributed in an exemplary manner through his work in the field of comparative public law.[6] Mayer wrote his theory of French administrative law, in which he analyzed the general concepts that in his interpretation were underlying the much admired French public law,[7] as a preparatory study for his groundbreaking work on German administrative law, published about a decade later.[8] In the latter work Mayer did not simply transcribe the French legal concepts into German law but used them rather as source of inspiration for shaping the doctrinal structure of German administrative law, as evidenced by his adaptation of the notion of administrative act (*Verwaltungsakt*) which played a secondary role in French law but in its refashioned form became the linchpin of modern administrative law doctrine in Germany.[9] There

5 Otto Mayer, *Deutsches Verwaltungsrecht*, vol. 1 (Duncker&Humblot 1895), 65: 'Nichts wäre … verfehlter als zu glauben, die Idee des Rechtsstaates sei eine ganz besondere deutsche Eigentümlichkeit. Sie ist uns in allen wesentlichen Grundzügen gemeinsam mit unseren Schwesternationen, welche die gleichen Entwicklungsstufen durchgemacht haben; insbesondere mit der französischen, mit welcher das Schicksal uns nun einmal trotz alledem geistig zusammengebunden hat.'.

6 Jean-Marie Woehrling and Otto Mayer, 'Un acteur de la coopération interculturelle juridique franco-allemande', La Revue Administrative 52 (1999), 7, 25.

7 Otto Mayer, *Theorie des französischen Verwaltungsrechts* (Truebner 1886).

8 Otto Mayer, *Deutsches Verwaltungsrecht*, 2 vols (Duncker&Humblot 1895/96).

9 Woehrling and Mayer (n. 6), 27.

are few examples where the creative adaptation of foreign law has played such an important and fruitful role in the fashioning of domestic public law doctrine as in Mayer's case.[10]

Whereas administrative law scholars like Mayer looked to French public law in order to get some ideas on how to develop the nascent administrative law of the new German nation state, many jurists who took a keen interest in constitutional law (then still known in Germany as *Staatsrecht*) looked to England when the focus was on the shaping of liberal political institutions.[11] The English institutions of government appeared to many who took part in constitutional reform debates in Germany and other European countries as the obvious model to emulate. The Belgian Constitution of 1831 and the *Statuto Albertino* introduced in 1848 as constitution for the Kingdom of Piedmont-Sardinia[12] (before it was extended to the whole of Italy as national constitution following unification) had both been attempts to transcribe the unwritten British constitution onto continental-style codifications, with the result that these constitutions, in contrast to the US constitution, were to be interpreted as flexible rather than rigid constitutions.[13] The main characteristics of this model was that it did not provide for a role of the courts in the realm of politics or in the settlement of political conflicts. Instead, the English Constitution was based on the sovereignty of Parliament whose freedom of speech and debates or proceedings under the 1688 Bill of Rights could not be 'impeached or questioned in any Court or

10 At the about same the time when Mayer was looking to French administrative law as inspiration for how the modern German *Rechtsstaat* should look like, the famous Victorian lawyer Albert Venn Dicey followed the opposite approach, denouncing the French public law of his day as alien to the English understanding and practice of the rule of law: 'In many continental countries, and notably in France, there exists a scheme of administrative law – known to Frenchmen as *droit administratif* – which rests on ideas foreign to the fundamental assumptions of the English common law, and especially to what we have termed the rule of law' (Introduction to the *Study of the Law of the Constitution* (8th edn, Macmillan 1915), 213). On the resulting different German/French and English rule of law concepts see Rainer Grote, 'Rule of Law, Rechtsstaat and "Etat de droit"' in: Christian Starck (ed.), *Constitutionalism, Universalism and Democracy – a comparative analysis* (Nomos 1999), 269.

11 Christoph Schönberger, '§ 71 Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte' in: von Bogdandy, Cassese and Huber (n. 4), para 37.

12 It was named after King Carlo Alberto of Savoy who conceded the basic law to the people of the Kingdom of Piedmont-Sardinia in response to the revolutionary events in 1848, see Roberto Martucci, *Storia costituzionale italiana* (Carocci 2003), 35.

13 Art. 73 of the Statuto Albertino expressly provides: 'L'interpretazione delle leggi, in modo per tutti obligatorio, spetta exclusivamente al potere legislativo.'.

Place out of Parlyament', thus shielding parliamentary legislation against judicial interference. The Constitution of the German Empire of 1871 (also known after its principal instigator as Bismarck constitution) followed this model of a political (flexible) constitution. In contrast to the aborted liberal constitution of 1849 which had provided for a major role of the Imperial Court (*Reichsgericht*), including in controversies between the Upper and the Lower Chamber of Parliament and the Imperial Government on the interpretation of the Imperial Constitution if the parties to the dispute so agreed,[14] the 1871 Constitution excluded the courts completely from the realm of constitutional politics and interpretation. In other words, the rule of law only fully applied to the relationship between the citizen and the administration, or the administrative state. The Imperial Diet and the Imperial Government, on the other hand, escaped judicial scrutiny. In this situation the alignment on the British constitutional model envisaged by legal scholars and political reformers could only have meant greater parliamentary accountability of the Imperial Government, a reform agenda which never developed any real traction until the collapse of the German Empire at the end of World War I.

With the downfall of the monarchy in 1918, the British model of parliamentary monarchy quickly lost its attraction. The urgent task now was to establish a Republican government in a country which lacked any prior experience with Republicanism and had to come to grips with the disastrous legacy of World War I. In this situation France, which had managed to (re-) establish a Republican form of government following the defeat of the Second Empire in the French-German war of 1870/71, seemed to offer a model from which the drafters of the Constitution of the Weimar Republic could draw some inspiration. And indeed, the experiences in the Third Republic had some influence on the deliberations in the Constituent Assembly in Weimar mainly through the work of the constitutional law scholar Robert Redslob. His book on the genuine and non-genuine forms of parliamentary government offered a detailed account of the institutions and practice of parliamentary government in the major European countries. Following a widely shared view among scholars on the proper, balanced functioning of a parliamentary system, Redslob set great store by the balancing role of the head of state (President of the Republic, constitutional monarch) in such

14 See § 126 b) Frankfurt Constitution.

a system.[15] Redslob's comparative analysis had a substantial impact on the principal drafter of the Weimar Constitution, Hugo Preuss, and convinced him that the smooth functioning of a parliamentary system was crucially dependent on the effective balancing role of the President of the Republic in relation to the political branches, i.e. Parliament and the government, a role which the President would be unable to discharge properly if he depended for his election on Parliament, as was the case in France. Thus, Redslob's ideas drawn from the comparative analysis of the major West European parliamentary systems of the time, and particularly from the French experience, provided the conceptual basis for the establishment of a popularly elected presidency with strong emergency powers which would play a fateful role in the downfall of the Weimar Republic a decade later.[16]

C. Turn to the 'Verfassungsstaat' Paradigm in the Post-War Era

The post-World-War II period saw dramatic change with regard to the dominant paradigms in comparative public law. The advent of the Basic Law accelerated the shift of focus from administrative to constitutional law in public law comparison which had already gathered force in the Weimar Republic. The Basic Law itself reflects to a much greater degree than its predecessors the influence of foreign constitutional law, as could be expected from a document which was drawn up under external supervision. The constitutional drafting process was set in motion by the handing down of the so-called Frankfurt documents by the three Western powers occupying Germany to the heads of government of the *Länder* in the Western occupation zones, documents which provided guidance to West German politicians how the constitutional structure of a reconstituted (West) Germany should look like. Not surprisingly, they were themselves steeped deeply in Western constitutional ideals and traditions, calling for a democratic constitution of a federal type which protected the rights of the participating states, provided adequate central authority, and contained

15 Robert Redslob, *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form – eine vergleichende Studie über die Verfassungen von England, Belgien, Ungarn, Schweden und Frankreich* (Mohr 1918).

16 Manfred Friedrich, 'Plan des Regierungssystems für die deutsche Republik. Zur Lehre vom "echten" und "unechten" Parlamentarismus: Robert Redslob und Hugo Preuß' in: Detlef Lehnert and Christoph Müller (eds), *Vom Untertanenverband zur Bürgergenossenschaft* (Nomos Verlagsgesellschaft 2003), 189-190.

guarantees of individual rights and freedoms.[17] These concepts could be without major problems into the liberal and federal strands of German constitutional thinking that predated the Bismarck era. In particular, the Basic Law restored the liberal framework of parliamentary government which had first been envisaged by the aborted liberal constitution of 1849. It also reconnected with the tradition of a strong central judicial power which this time was not to be vested in a Supreme Court, but in a newly created Federal Constitutional Court with unprecedented powers of constitutional review.

The new Federal Constitutional Court soon proved to be the most successful institutional innovation of the Basic Law. Starting in the late 1950's, it developed its constitutional jurisprudence on the individual rights section of the Basic Law as an 'objective order of values' which was intended to strengthen the effectiveness of the constitutionally protected fundamental rights in all areas of the law. Based on the dignity of the human personality developing freely within the social community, this order of values affects all spheres of law, public and private, and serves as a yardstick for measuring and assessing all actions in the areas of legislation, public administration, and adjudication.[18]

Never before had a court ascribed such comprehensive legal effects to a constitutional Bill of Rights. The ruling ratified the paradigmatic shift from administrative law to constitutional law, as it confirmed authoritatively that administrative law, like any other branch of ordinary law, cannot be viewed separately from constitutional law, since its creation and application are both intensely shaped by the dictates of constitutional law. This was quickly acknowledged by administrative lawyers, most importantly by the first President of the German Federal Administrative Court who coined the memorable formula '*Verwaltungsrecht ist konkretisiertes Verfassungsrecht*' to emphasize this dependency,[19] a statement which marked a striking change from the equally famous observation by Otto Mayer just a few decades earlier who, when commenting on the impact of the change from the Bismarck constitution to the Weimar constitution on German administrative

17 Peter H. Merkl, *The Origin of the West German Republic* (Oxford University Press 1963), 50-51.

18 BVerfGE 7, 198.

19 Fritz Werner, 'Verwaltungsrecht als konkretisiertes Verfassungsrecht', DVBl 1959, 527.

law had noted that administrative law had remained virtually the same.[20] In institutional terms the supreme authority of constitutional law provided the basis for the undisputed authority of the Federal Constitutional Court as the final arbiter for all constitutional matters, turning it from a body with specialized and limited jurisdiction into the linchpin of the entire legal and judicial system.[21]

The consequences of this turn to constitutional law and constitutional jurisprudence in the domestic realm were also quickly felt in comparative law. While a shift from administrative law towards constitutional law had already taken place in the interwar period but largely been limited to institutional issues, i.e. comparative government studies, individual rights and constitutional jurisdiction now emerged as major points of interest in the field. This focus also limited the range of foreign models and experiences which could be included in the comparative analysis, as only a limited number of countries in America and Europe had any relevant experience to offer on these issues.[22] If only those countries were taken into account where a constitutional Bill of Rights and an active and robust constitutional jurisprudence existed, the range of relevant jurisdictions dwindled even further. Only the United States in the 1950s and 1960s offered the model of a country where a powerful Supreme Court with important constitutional review functions was engaged in a highly dynamic process of individual rights adjudication which could be studied profitably in order to better understand what the German Federal Constitutional Court was doing with the Bill of Rights in the German Basic Law. The Federal Constitutional Court itself acknowledged as much when, in its *Lüth* decision,[23] it referred to Benjamin Cardozo's holding in *Palko v. Connecticut* that freedom of opinion is 'the matrix, the indispensable condition of nearly every other

20 '"Verfassungsrecht vergeht, Verwaltungsrecht besteht"; dies hat man anderwärts schon längst beobachtet.' Otto Mayer, *Deutsches Verwaltungsrecht* (Duncker & Humblot 1924), Vorwort.

21 Matthias Jestaedt, 'The Karlsruhe Phenomenon – What makes the Court What It is' in: Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger (eds), *The German Federal Constitutional Court: The Court without Limits* (Oxford University Press 2020), 40.

22 See Heidelberg Colloquium on Constitutional Jurisdiction (1961), *Verfassungsgerichtsbarkeit in der Gegenwart* (C. Heymann 1962).

23 BVerfGE 7, 198, 208.

form of freedom'[24] – one of the rare cases in which the German Court has quoted directly from the ruling of a foreign or international court.

While the range of countries suitable for comparative analysis slowly extended in later years, until the end of the Cold War in the late 1980s it remained essentially limited to legal systems in Western Europe and North America and the Pacific which had a constitutional structure basically similar to that of the Federal Republic. This also meant that comparative law analysis did not have to worry greatly about context and could largely focus on variations in the organization of constitutional adjudication and the interpretation and limitation of fundamental and individual rights, with a marked emphasis on civil and political rights adjudication. The same applied to the comparative study of institutional issues where the diversity was more marked, but still shaped by broadly similar political, sociological, philosophical, religious and cultural contexts. This only changed in the late 1980s when the onset of the latest wave of globalization for the first time broadened the perspective and brought into view the manifold challenges of a truly global study of comparative public law.

D. Growing Complexity of Contextual Comparison in the Era of Globalization

Globalization has made public law comparison, and above all constitutional comparison, much more complex. For a moment it seemed that the end of the Cold War and the dismantling of totalitarian and authoritarian political regimes in many parts of the world which accompanied it would usher into a new era of global constitutional convergence on the basis of liberal democracy, individual rights and the rule of law.[25] If this trend had indeed prevailed, it would have been possible to preserve the focus of comparative public law analysis on a few advanced Western democracies like the US, France or Britain, from whose experience all the major issues raised by the further development of fundamental rights, liberal democracy, the rule of law, constitutional adjudication, the administrative state etc. could have been gleaned. Instead, history returned with a vengeance even before the fall of the Twin Towers in September 2001, exposing mercilessly the delusion about the seemingly unstoppable trajectory towards the perfection of

24 302 US 319, 327 (1937).

25 This was the view proposed in Francis Fukuyama's famous article 'The End of History?', National Interest 16 (1989), 3-8.

liberal democracy in its rights as well as its institutional aspects which had informed much comparative thinking in in the 1990s. It became evident that the focus on a handful of liberal democracies did no longer allow a deeper understanding of relevant trends in public law which first emerged in regions outside Europe and North America but whose impact was soon also felt in the European and North American democracies. Three broad issues which have emerged in recent years as major topics of comparative constitutional debate shall illustrate this development: the reinvigorated role of religion in constitutional politics and constitutional law, the rise of transformative constitutionalism, and the debate on the foundations of ecological constitutionalism.

I. Reemergence of Religion as a Major Issue in Comparative Public Law

The first example to be discussed here concerns the reemergence of religion as a major factor in shaping constitutional politics and constitutional law. Modern constitutionalism in the form in which it developed in the United States of America at the end of the 18th century was built on the separation between state and church, between secular politics and religion, as evidenced by the First Amendment to the US constitution which expressly prohibits the establishment of religion by Congress. Following a different path of constitutional modernization, many countries in Western and Northern Europe since the late 18th century have either banned religion from politics altogether – as in France, where the principle of *laicité* was enshrined in legislation and in the constitution[26] – or reduced it to a largely symbolical or 'dignified' element of the constitution, as in England and the Scandinavian countries.

It was in the Muslim world where religion first made a stunning comeback under the banner of 'political Islam'. Since the late 1970s constitutional lawyers in many African and Asian countries had to come to grips with growing demands by militants, clerics and Islamist parties to reserve a central place for Islam in the political and constitutional order or, even

26 Article 2 of the French Constitution: 'La France est une République indivisible, laïque, démocratique et sociale.' Since Article 89 protects the Republican form of government against revision by way of constitutional amendment and Article 2 refers to laïcité as a defining element of Republican government in the French tradition, an argument can be made that the strict separation of State and religion in France forms part of the unalterable features of the French Constitution.

more fundamentally, to entirely construct that order on the basis of the central tenets of Islam. Such demands could not be satisfied merely by terminological adjustments but resulted in far-reaching changes in the design and operation of both the bills of rights and the institutional arrangements of the respective constitutions.

As far as individual rights are concerned, the impact of Islamization of the constitutional order substantially affects the way in which freedom of religion, freedom of expression and women's rights are interpreted and applied. Religious freedom and freedom of opinion in a society which defines itself as Islamic cannot be conceived in the same way as it is conceived in a liberal society. The granting of full religious freedom not only to Muslims, but also the followers of other religions, and especially of non-monotheistic religions, is difficult to reconcile with the teachings of Islam. In the same vein, a liberal understanding of religious freedom as including the freedom to abandon or disavow one's religion cannot be sustained in a predominantly Muslim society where such conduct by a Muslim would amount to an act of apostasy. Nor can in such a society opinion which demean the Prophet Muhammad or desecrate the Quran claim constitutional protection. Even more liberal constitutions like the constitution of Tunisia of 2014 have been at great pains to strike a delicate balance between the privileged position of Islam in public life and the rights of believers of non-Islamic faiths. The constitution expressly recognized Islam as the religion of Tunisia and prescribed that a candidate for the presidency of the Republic must have Islam as his or her religion, a requirement which already featured in the preceding Constitution. In addition, it conferred upon the State the special role as the 'guardian' of religion – not merely of Islam, but of all religions. The constitution accordingly defined the concept of guardianship in terms which directly related to the goal of creating an open and tolerant Islamic society, by establishing the duty of the State to prevent mosques and other places of worship from being used for partisan purposes and to disseminate the values of moderation and tolerance, in addition to protecting the holy places. In a similar vein, the new Constitution of August 2022 emphasizes the duty of the state to realize the objectives of Islam (*vocations de l'Islam authentique*) in the protection of life, honor, property and liberty of the citizens.

Not surprisingly, there is no mention of religious freedom at all in illiberal Islamic countries like Iran and Saudi Arabia where statehood is defined in terms of (Shia or Sunni) Islam entirely. According to Article 2 of the

Iranian Constitution of 1979, the Islamic Republic is based on the exclusive sovereignty of the One God, His right to legislate and the necessity of submission to His commands. All civil, penal, financial, economic, and administrative and other laws and regulation shall be based on Islamic standards (i.e. the norms of the *shari'a*). Article 177 declares the provisions of the Constitution enshrining the Islamic character of the political regime to be unalterable. The equal protection of the law for men and women and the obligation of the government to ensure the rights of women 'in all respects' expressly depends on their conformity with Islamic standards.[27]

References to Islam also abound in the Saudi Basic Regulation of 1992. Its first three chapters which deal with the general principles, the monarchy and the basic values of Saudi society, leave no doubt that religion is the main foundation of the Saudi state. According to Article 1, the Kingdom of Saudi Arabia is an Islamic state with Islam as its official religion. As a result, narrow constraints are imposed on a whole set of fundamental rights, including religious freedom, liberty of conscience, private and family life, and freedom from discrimination on the basis of gender or religion.[28] Unlike Iran Saudi Arabia has chosen to ratify the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), but subject to the far-reaching reservation that it will uphold Islamic law in case of conflict with the guarantees of the Convention.[29]

In institutional terms, the dramatically enhanced role of religion has found expression in the incorporation of a general clause in a number of constitutions according to which Islamic *shari'a* is the principal source of legislation.[30] Other countries like Saudi Arabia and Iran have gone further. Article 1 of the Saudi Basic Regulation states that man-made law, only the Qur'an and the Prophet's Sunnah are the Kingdom's Constitution. But it is the Iranian constitution which has been the most radical, with its establish-

27 Articles 20, 21 Iranian Constitution.

28 Abdulhamid A. Al-Hargan, 'Saudi Arabia and the International Covenant on Civil and Political Rights: a Stalemate Situation', International Journal of Human Rights 9 (2005), 491-505 (493-494).

29 For a critical appraisal see Elham Menea, 'The Arab State and Women's Rights: The case of Saudi Arabia – Limits of the Possible', *Orient* 49 (2008), 5-15.

30 It first featured prominently in the 1971 Egyptian constitution and influenced subsequent constitution-making in other Islamic countries, not least through the careful interpretation it received by Egypt's Supreme Constitutional Court, see Adel Omar Sherif, 'The Relationship between the Constitution and the Shari'ah in Egypt' in: Rainer Grote and Tilmann Röder (eds), *Constitutionalism in Islamic Countries* (Oxford University Press 2012), 121-133.

ment of a truly theocratic form of government based on the guardianship of the jurist (*wilayat al-faqih*). According to Article 5 of the Constitution the leadership of the *umma* during the absence of the Wali al-'Asr, the hidden final Imam of the Twelve Imams, shall devolve upon the just and pious who is fully aware of the circumstances of his age, courageous, resourceful and capable to handle administrative matters. He has to be distinguished by his religious scholarship, justice and piety, and political and social perspicacity. His responsibilities include the definition of the political priorities of the regime and their execution through the legislative and executive bodies.

Moderate Arab monarchies have often used the rise of political Islam to strengthen their constitutional position. Thus in Morocco where previously the functions of the King as head of state and commander of the faithful were dealt with in one provision, the Constitution of 2011 now deals with the central missions of the monarch in two different provisions, one of which refers to his religious functions as head of the Muslim community and guarantor of the free practice of religious cults (Article 41) while the other summarizes his main secular functions as symbol and guarantor of the unity of the nation and the continuity of the state and the supreme arbiter of its institutions (Article 42). This is a not too subtle reminder for those who need reminding that in Morocco the monarchy is an institution which is deeply rooted in, and closely tied to the Islamic identity of society, and that consequently the institution of monarchy cannot be abolished or reduced to the kind of merely symbolical kind of institution known from European constitutional monarchies without undermining the Islamic character of Moroccan society as a whole.

The stirrings of political Islam have nor remained limited to Arab and Muslim countries. They also have had important repercussions on constitutional debates in European countries, due to great number of Muslims living especially in major Western countries like France, Britain, and Germany, and have provoked a major rethinking on the appropriate role of religion in public life, a debate which had seemed settled during much of the 20th century after the confrontations between state and church triggered by rise of the secular nation state in the wake of the French revolution. The integration of religion into the state, in one way or the other, has been central to the emergence of the modern secular state in Europe, and was not achieved without sometimes violent conflict. European states have often been reluctant to touch the constitutional settlement on State-Church relations, even if it no longer corresponds to the needs of fast changing,

multi-religious and increasingly secular societies.[31] Constitutional reforms addressing the basic relations between state and religion have therefore been slow and piecemeal, whereas in other countries change has been limited to statutory legislation and jurisprudential practice.

In England, for example, it was only in 2013 that the Succession to the Crown Act 2013 ended the disqualification of a person who marries a Roman Catholic from the line of succession to the throne. The central elements of the system, however, including the position of the monarch as head of the Anglican Church and the legislative role of the 26 Anglican Bishops in the House of Lords, have been preserved. A similar inertia can be observed in Germany. Article 140 of the Basic Law on the relationship between the state and religious denominations simply carries over the historical compromise reached on this thorny issue in the Weimar Constitution into the Basic Law. According to the relevant article of the Weimar Constitution 'religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same status upon application, if their constitution and the number of their members give assurance of their permanency.' The article's primary purpose was to spare the traditional churches – i.e. the Protestant churches often organized as 'state churches' at the level of the principalities which had historically composed the German Empire, and the Catholic Church – the status of mere private associations. In the early 21th century these rules in many respects seem to be out of date with the increasingly multi-religious and secular character of German society, but the task to accommodate this profound transformation at the constitutional level has been largely left to the Federal Constitutional Court's jurisprudence on the constitutional right to religious freedom and its various dimensions.

In Norway, reforms adopted on the occasion of the bicentenary of the Norwegian *Grunnloven* have been more comprehensive. The provision that the Evangelical Lutheran Church shall be the official religion of the State was removed from the Norwegian Constitution by constitutional reform of 2012 and replaced by a general commitment to Norway's 'Christian and humanist heritage' (Grl. § 2). The obligation of Norwegians professing the Evangelical-Lutheran religion to raise their children in the same faith has disappeared from the constitutional text. Though the Church of Norway, an

31 Rainer Grote, 'The Changing Constitutional Framework of Church-State-Relations in Europe' in: Anja Schoeller-Schletter (ed.), *Constitutional Review in the Middle East and North Africa* (Nomos 2021), 329-344.

Evangelical-Lutheran Church, will remain the established Church of Norway and will as such be supported by the State, this support is no longer an exclusive privilege of the Evangelical-Lutheran Church. In addition to guaranteeing the freedom of religion to all inhabitants § 16 now provides for public support of all religious and belief communities 'on equal terms'.

In Italy, the privileged status accorded to the Catholic Church under the 1947 Constitution has become more controversial over the years, and negotiations to modify the relations between State and Church were initiated in the late 1960's. After 17 years of negotiation, a new concordat was concluded in 1984 which ended the status of Roman Catholicism as the established state religion and eliminated many of the other privileges of the Church, such as compulsory religious education in schools and exemptions from civil law jurisdiction granted to priests, while confirming the freedom of the Church to pursue its charitable, educational and pastoral endeavors.[32] A number of other issues, such as regulations applied to ecclesiastical property as well as various financial matters, were left to a special commission which was able to reach agreement in a protocol signed in November 1984. In the protocol, the Vatican and the Italian government agreed to cancel state subsidies for clerical salaries, although generous tax breaks were provided to taxpayers in return for contributions to the bishops' funds from which the salaries were paid. In addition, churches and seminaries open to the public would receive tax benefits, and the State promised to support the Church in the maintenance of religious buildings and works of art open to the public.[33]

A European country which confers upon the established church a particularly strong constitutional position is Greece. Article 3 of the Greek Constitution refers to the Greek Orthodox Church as the 'prevailing' religion, a provision which is understood as constitutional acknowledgement of the unique role the Orthodox clergy and the Orthodox Church have played in preserving Greek language, culture and identity during four centuries of Turkish rule.[34] However, the resulting lack of constitutional protection of minority religions has given rise to several successful complaints against

32 Maria Elisabetta de Franciscis, *Italy and the Vatican – The 1984 Concordat between Church and State* (Peter Lang Publishing Inc. 1989), 142-146.

33 De Franciscis (n. 32), 146-149.

34 See Philipos K. Spyropoulos and Theodore P. Fortsakis, *Constitutional Law in Greece* (3rd edn, Kluwer Law International 2017), para. 721, who note that Greece has the greatest degree of religious homogeneity of any European country.

Greece, which in Article 13 (2) of the Constitution explicitly prohibits proselytism – a provision which is likely to work to the disadvantage of the minority religious groups rather than to the detriment of the Orthodox Church in a country where 90 percent of the total population already are Orthodox Christians – before the European Court of Human Rights.[35]

At the other end of the spectrum, constitutional arrangements based on a strictly secular understanding of the state-religion relationship have also come under pressure. In France the principle of *laïcité* has been increasingly challenged in the public education system since the 1990s when pupils and students began to openly wear symbols of their religious affiliation like headscarves or refused to attend certain classes, like biology or physical education, which they considered to be at odds with their religious beliefs. After much argument and litigation, the French Parliament finally enacted the Act on Secularity and Conspicuous Religious Symbols in Schools which bans the wearing of 'conspicuous' religious symbols in French public primary and secondary schools. The legislation was (unsuccessfully) challenged for violation of the religious freedom of Muslims and their discrimination on religious grounds before the European Court of Human Rights.[36]

2. Rise of Transformative Constitutionalism

Another important development in the era of globalized constitutional discourse has been the rise of the concept of transformative constitutionalism. Since it was introduced by Karl Klare in his seminal article on the South African constitution and its interpretation a quarter of a century ago,[37] the concept has frequently been used to describe and analyze processes of constitutional renewal and regeneration in various countries and regions of the world. Klare saw in its transformative aspirations the defining feature of the South African constitutional project which he described as a 'long-term

35 *Kokkinakis v. Greece* A 260-A (1993) (concerning proselytizing activities by Jehova's Witnesses); *Larissis and Others v. Greece* 1998-I (concerning proselytizing activities by members of the Pentecostal Church in the Greek air force).

36 *SAS v. France (GC)*, Reports 2014-III, 291. On the Court's ruling see Christoph Grabenwarter, 'Das Urteil des EGMR zum französischen Verbot der Burka' in: Stephan Hinghofer-Szalkay und Herbert Kalb (eds), *Islam, Recht und Diversität* (Verlag Österreich 2018), 523.

37 Karl Klare, 'Legal Culture and Transformative Constitutionalism', South African Journal on Human Rights 14 (1998), 146, 149.

project of constitutional enactment, interpretation, and enforcement committed [...] to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.'

Klare's view obtained broad support, including among the members of South Africa's Constitutional Court themselves.[38] It rapidly found favour beyond South Africa and has frequently been used to characterize processes of constitutional renewal and regeneration also in other parts of the world.[39] It is perhaps not accidental that the concept of transformative constitutionalism gained such wide currency following the end of the Cold War, filling a void that had been left by the collapse of Marxist and Socialist ideologies which had dominated political and constitutional debates especially in the non-Western world for much of the 20th century. With its emphasis on the need for proletarian revolution as an indispensable precondition for any lasting fundamental social and political change, Marxism had contributed to discrediting the idea that fundamental social, economic and political change might also be achieved through peaceful constitutional reform, in particular through enshrining the ideal of social justice in the constitution. As long as it lasted, Marxism's ideological hegemony tended to obscure the fact that the question whether and to which extent constitutionalism can be an effective tool for radical change has been around ever since the concept originated in the great debates of the US and French revolutions at the end of the eighteenth century.[40]

Individual and collective rights, in particular social and economic rights, have often been seen as the essence of transformative constitutionalism. Indeed, the constitutions of countries like South Africa, Colombia and

38 Dikgang Moseneke, 'A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa, Georgetown Law Journal 101 (2012), 749, 757.

39 Armin von Bogdandy, Eduard Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Flávia Piovesan (eds), *Transformative Constitutionalism in Latin America – The Emergence of a New Ius Commune* (Oxford University Press 2017); Moshe Cohen-Eliya, 'The Israeli Case of a Transformative Constitutionalism' in: Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Hart Publishing 2013), 173-188.

40 See Ruti Teitel, 'The Role of Law in Political Transformation', Yale Law Journal 106 (1997), 2009-2080 (2051-2077).

India and the constitutional courts of these countries have gone to great lengths in crafting new approaches to the implementation of social and economic rights. South Africa's constitution has gone furthest in equalizing the recognition of socioeconomic with civil and political rights, although the South African Constitutional Court's jurisprudence has been criticized for being too cautious in their application by failing to provide individuals with a concrete sense of entitlement to the resources that they can claim from the state under the Bill of Rights.[41] In India where the effective implementation of socio-economic rights had been hampered by the dichotomy between fully protected fundamental rights and merely aspirational directive principles of state policy in the text of the Constitution during the first decades after its entry into force, the Supreme Court has found ways to integrate the latter into the former, thus giving a new impetus to their effective realization. With the development of Public Interest Litigation (PIL) since the 1980s, the Court has taken another important step in increasing judicial protection for the goal of transformative socio-economic change enshrined in the Constitution by inaugurating a new type of litigation which is in its own words shall 'bring justice within the reach of the poor masses, who constitute the low visibility area of humanity. [It] is a totally different kind of litigation from the ordinary traditional litigation … it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed.'[42] Another country where socio-economic rights have become a prominent feature of constitutional adjudication is Colombia where the Constitutional Court has shown an unusual willingness to engage with questions of minimum substantive standards to be derived from these rights and to redirect the use of public resources based on its understandings of the demands of the key constitutional principles of life and dignity.[43]

The push from countries of the Global South for the increased effectiveness of socio-economic rights has also reshaped the terms of the interna-

41 David Bilchitz, 'Constitutionalism, the Global South, and Economic Justice' in: Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South – The Activist Tribunals of India, South Africa and Colombia* (Cambridge University Press 2013), 75.

42 *People's Union for Democratic Rights and Others v. Union of India &Others* 1983 SCR (1), 456.

43 Bilchitz (n. 41), 75.

tional debate on these rights. It has contributed greatly to the success of efforts to put economic, social and cultural rights on an equal footing with civil and political rights. A first major step in this direction was taken with the establishment of the Committee on Economic, Social and Cultural Rights which took over the task of examining States parties' reports under the International Covenant on Economic, Social and Cultural Rights from the Economic and Social Council.[44] The Committee did not only develop new procedures for the examination of the national reports, it also started to issue General Comments on the nature and substance of the provisions of the ICESCR, thus bringing the monitoring practice under the Covenant into line with that of the other independent treaty bodies, including the Committee on Civil and Political Rights. In particular, the Council wasted no time in clarifying the legal nature and content of the States parties' obligations under Article 2 of the Covenant in its General Comment No. 3. It emphasized that the Covenant, while acknowledging the constraints in the implementation of socio-economic rights due to the limits of available resources and therefore providing for their 'progressive' and not their 'immediate' realization, also had a number of direct and clearly identifiable legal effects. This was followed by the adoption of an Additional Protocol in 2008 which provided for the creation of a mechanism for the examination by the Committee of individual communications in cases where States parties had allegedly violated their obligations under the Covenant. Jurisprudential developments in countries like South Africa, Colombia and India played an important role in paving the way for the adoption of the Protocol because they demonstrated that it was indeed possible to establish meaningful criteria for the justiciability of socio-economic rights.[45]

The debate has had an impact also in countries which have traditionally taken a skeptical view of the enforceability of such rights. This includes constitutional systems where the basis for the protection of socio-economic rights in the constitutional Bill of Rights is rather small, as in Germany. In its recent jurisprudence Germany's Federal Constitutional Court has been much more explicit on the minimum standards derived from the Basic Law which protect beneficiaries against reduction in public aid or assistance

44 Through ECOSOC Res. 1985/17, UN Doc. E/RES/1985/85 (1985).

45 Rainer Grote, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – Towards a More Effective Implementation of Social Rights?' in: Holger P. Hestermeyer et al. (eds), *Cooxistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff Publishers 2012), 417-436.

below a certain threshold. When it examined the constitutionality of the labour market reforms adopted by the federal government which reduced significantly the length and amount of unemployment benefits to be paid to jobless persons in order to create greater incentives for them to actively seek reintegration into the job market, the Court invalidated parts of the legislation, emphasizing the social dimension of the applicable basic rights. It stressed that Article 1.1 of the Basic Law declares human dignity to be inviolable and obliges all state authority to respect and protect it, thereby creating an obligation of the State not merely to respect human dignity, but also to protect it in positive terms. This means the state is obliged to ensure that the material prerequisites for a life in human dignity are at the disposal of the person in need of assistance if he/she does not have the material means to guarantee such an existence because he/she is unable to obtain it either out of his or her gainful employment, or from own property or by benefits from third parties. This includes both the physical existence of the individual (food, clothing, household goods, housing, heating, hygiene and health), but must also ensure the possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life, given that humans as persons of necessity exist in social relationships. The guarantee of a subsistence minimum that is in line with human dignity must be safeguarded by a statutory claim.[46] The Federal Constitutional Court has shown greater willingness than in the past to strike down statutory determinations of benefit claims which it deems insufficient to guarantee an existential minimum in accordance with human dignity under the criteria set out in its jurisprudence.[47]

Transformative constitutionalism is not limited to socio-economic rights, important as these may be. It also means justice for groups which hitherto had been routinely marginalized and repressed. Thus the codification of an extensive list of rights for indigenous people has been an important aspect of transformative constitutionalism especially in Latin America.[48] The 1991 Colombian Constitution, for example, guarantees the cultural and linguistic rights of indigenous communities and the exercise of proper

46 BVerfGE 125, 175, 223.

47 See Order of 19 October 2022 – 1BvL 3/21 – which declares reduced 'special rate' of benefits for single adult asylum seekers living in collective accomodation unconstitutional, www.bundesverfassungsgericht.de.

48 See Rainer Grote, 'The Status and Rights of Indigenous Peoples in Latin America', Heidelberg Journal of International Law 59 (1999), 497-528.

judicial powers within their territories, but it also provides for a right to consultation in those decision-making processes at the central level which affect their vital interests. In its 2008 decision on the unconstitutionality of the General Forestry Law the Colombian Constitutional Court unconstitutional took a broad view of the relevant constitutional provisions, in this case the requirement of prior consultation with indigenous peoples in cases where the use of natural resources impacted on their way of life. It turned to ILO Convention 169 to determine the meaning and the scope of the constitutional right to consultation, concluding that in the case under consideration there had been no substantial consultation with the affected indigenous communities prior to the adoption governing the management of the forests.[49]

Some recent Latin American constitutions go further, expressly recognizing the plurinational character of the state. According to the preamble of the 2008 Constitution of Ecuador, the people of Ecuador is committed to the consolidation of the unity of the Ecuadorian nation, in recognition of the diversity of its regions, peoples, ethnicities and cultures ('*en reconocimiento de la diversidad de sus regions, pueblos, etnías y culturas*'). Article 1 proclaims the pluricultural and multiethnic character of the Ecuadorean state. The Constitution of Bolivia, adopted one year later, refers in its Preamble to the plural composition of the Bolivian people, and expressly recognizes plurinationality as one of the constitutive elements of the Bolivian state ('*Estado plurinacional*'). Both constitutions move beyond the boundaries of liberal democratic constitutionalism and use a revised and extended concept of democratic citizenship, one which incorporates the sense of individuals of belonging to different ethnic and cultural groups within the same state.[50] This approach is also meant to atone for grave injustices in the past, when especially indigenous people were often discriminated or repressed, or worse. By recognizing the full equality of all the different ethnic and indigenous groups in the country as constituent entities, these constitutions move beyond traditional concepts of nationhood.

While the concept of plurinationality has been developed in the specific historical, cultural and political context of the countries concerned, i.e. a context in which the continued presence of large indigenous groups on the

49 Sentencia C-030/08, consid. VI. 5.2.

50 Ferran Requejo, 'Cultural pluralism, nationalism and federalism: A revision of democratic citizenship in plurinational states', European Journal of Political Research 35 (1999), 255, 262.

national territory which descend from precolonial times makes it difficult to establish inclusive statehood on the basis of traditional Western concepts of nationhood, it might also prove useful to pacify conflicts revolving around nationhood in other contexts. Neither the text nor the drafting history of the respective constitutional texts provides any evidence that the recognition of plurinationality is meant to bestow a right to secede and establish their own state on the different groups living on the national territory. Such a concept might be useful in settling long-running national conflicts also in Europe where, as in Spain, the approach of granting extended autonomy rights to restive constituent entities while at the same time sticking to the constitutional fiction of undivided nationhood may have exhausted its conflict-solving potential. It might also be worth considering whether the European integration process could not be reconceived on the basis of plurinationality, as this concept, unlike the concept of supranationality, does not conjure up notions of hierarchical structures being imposed on member countries but stresses the aspect of coordination and cooperation among the various nations taking part in the integration project.

3. Emergence of Environmental Constitutionalism

The expansion of fundamental rights has not been limited to their full incorporation in the constitutional bills of rights and their more effective enforcement by constitutional courts. The last few decades have also seen the rise of a new category of constitutional rights which reflect the growing perception of the enormous risks to human life and health and thus to the enjoyment of all other fundamental rights by the rapidly advancing degradation of the environment in many parts of the globe. The response to these new and huge threats has not only featured prominently in the discussions at the international level and led to the adoption of a number of important instruments like the Convention on Biodiversity and the Paris Agreement on Climate Change, it is also increasingly reflected in national constitutional law, especially in the rise of a new category of rights, environmental rights.

It is fitting that one of the first countries in Europe to solemnly proclaim such rights was France, one of the birthplaces of the modern idea of universal human rights. In France, environmental rights have been incorporated into the Constitution by way of adoption of a Charter of the Environment

(*Charte de l'Environnement*) in 2004. Constitutional Act No. 2005-205 has inserted a reference to the Charter of the Environment the Preamble of the French Constitution, thereby giving the Charter the same constitutional status as the other two fundamental texts mentioned in the Preamble, i.e. the Declaration of the Rights of Man and the Citizen of 1789 and the Preamble of Constitution of the Fourth Republic of 1946. The Charter establishes the main principles which shall govern the conduct of the French authorities and the French people with regard to the environment. It proclaims the conservation of the environment as one of the fundamental goals and interests of the French Nation and enumerates a series of rights and obligations designed to promote the achievement of this goal. The relevant rights include a general right to live in an ecologically stable and healthy environment (Art. 1). More specifically, citizens have a right of access to the information on environmental matters held by the public authorities, and the right to take part in the making of public decisions which have an impact on the environment (Art. 7). This last provision echoes the famous guarantees in the Declaration of the Rights of Man and the Citizen which confirm the right of the citizens, personally or through their representatives, to participate in the law-making process in general, and in the adoption of tax legislation in particular (s. Arts. 6, 14 of the Declaration).

Other countries which put the bill of rights squarely at the centre of the national constitution have proceeded in a similar way, putting environmental rights on the same footing as civil, political, social, economic, and cultural rights. The 1991 Colombian Constitution contains, directly behind the chapter on economic and social rights, a chapter of collective rights and the environment which includes, among other things, the right of every individual to enjoy a healthy environment.[51] In a similar vein, section 24 of the South African constitution provides that everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

51 Article 79 (1): 'Todas las personas tienen derecho a gozar de un ambiente sano. La ley garantizará la participación de la comunidad en las decisiones que puedan afectarlo.'.

In contrast to other rights, however, environmental rights are often (not always) accompanied by duties and obligations, which in some cases are addressed to the state, in others to the individuals themselves. An example of the first approach is the Article 79 of the Colombian Constitution which, following the introduction of the right of everyone to enjoy a healthy environment, continues by imposing on the state the obligation 'to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends.' An example of the second approach is provided by the French Charter of the Environment which, in contrast to previous rights declarations, contains a number of obligations of the individual which are linked to the preservation of environment. They focus on the obligation to avoid any conduct which could be damaging to the environment and to repair the damage which could not be prevented (Arts. 2 to 4). The Charter imposes a duty on the public authorities to frame their policies and actions in such a way that the conflicting interests of environmental protection, economic development and social progress can be reconciled, and requests the educational and research institutions to contribute through their activities to the effective protection of the environment (Art. 6, 8 and 9). It is obvious that the authors of the Charter viewed the rights (and obligations) it contains as 'third generation' rights, i.e. the generation of ecological rights which complements the civil and political rights enshrined in the Declaration of the Rights of Man and the economic and social rights proclaimed by the Preamble of the 1946 Constitution. But whereas the human rights guarantees of the first and second generation were primarily or even exclusively framed as entitlements, the Environment Charter also emphasizes the duties of the individual. It is framed in terms of policy prescriptions whose main objective is not, as with the traditional rights, to benefit the living generation, but which explicitly aim to preserve the natural resources for the use of future generations.[52]

The approach taken to the codification of environmental rights thus betrays doubts whether the application of the established rights paradigm which conceives rights as entitlements primarily, if not exclusively for the

52 In the literature, the reform has been criticized for diluting the legally binding character of the Preamble through the addition of sloppily drafted, vague principles of environmental protection which have not even been subjected to the approval of the French people, see Guy Carcassonne, 'Amendments to the French Constitution: One Surprise after Another', West European Politics 22 (1999), 76-91.

benefit of their holders still makes sense in the case of the protection of the environment. The frequent reference to future generations can be interpreted as an implicit acknowledgment that measures designed to preserve the environment, the climate, biodiversity are not exclusively, and perhaps not even primarily designed for the benefit of the present generation, but are intended to preserve a functioning environment for people who are not yet born. Such considerations of intergenerational equity constituted the basis of the landmark decision by Germany's Federal Constitutional Court on the constitutionality of the 2019 Federal Climate Protection Act. The Court ruled that the Act, by failing to specify emission targets for the period beyond 2030, had rolled over the main burden of adaptation to climate change to future generations, thereby creating a huge risk to their fundamental rights. This was unconstitutional, the Court held, since under certain conditions the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations.[53]

A more radical view openly questions whether the anthropocentric approach to environmental protection provides an adequate basis for measures designed to save the ecosystem from partial or total destruction. According to this view, it is the ecosystem, and it is life as such – including animal and plant life – which should not merely be the object, but the subject of the respective constitutional and legal protection. This radically different approach to environmental protection has inspired far-reaching constitutional reforms in recent years. The majority of these countries are to be found in Latin America, where 'rights of nature' were first constitutionally recognized. In order to understand the meaning and scope of these reforms it is necessary to understand their distinct political and cultural context. They formed part of comprehensive re-constitutionalization processes in the region which seek to fully recognize for the first time the contribution of previously marginalized groups like indigenous peoples, native communities and Afro-descendants to the societies of which they are a part. 'Rights of nature' are often deeply rooted in the ancestral cosmovisions of these groups which take a different view of the relationships between humans and non-humans and do not give absolute precedence

53 BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18, para. 183.

to human needs and human life over the needs of plants and animals, stressing instead the interdependence of all forms of life.[54]

One of the first countries which has taken this alternative route to environmental protection is Ecuador. The 2007 Constitution of Ecuador recognizes nature, or *Pacha Mama* (Mother Earth), as the subject of the rights conferred upon it by the Constitution. In doing so, it builds upon traditional indigenous conceptions of nature as a living organic entity. The most important right of nature recognized by the Constitution is the right to integral respect for its existence and for the maintenance and regeneration of its life cycles.[55] Every individual and every group is entitled to request the enforcement of the rights of nature from the public authorities. In a groundbreaking decision of December 2021, the Constitutional Court of Ecuador has confirmed that the rights of mother nature, like the other rights established in the Ecuadorian Constitution, have full normative force. The ruling states that the constitutional recognition of nature as a subject with rights is not merely a rhetorical statement but gives expression to a fundamental value. The granting of mining permissions in the area of a protected forest reserve had therefore not only violated the rights of the indigenous communities living in the area to prior consultation, but also the rights of the forest reserve as a constituent part of mother nature.[56]

E. Conclusion

While it is generally recognized that contextual comparison is the main objective and method of comparative law today, it is less often acknowledged that the number and scope of factors which have to be considered has extended substantially in the recent era of globalization, and most dramatically in the area of comparative constitutional law. While serious public law comparison for a long time had been limited to the study of central institutions and norms in a handful of major Western countries considered to be especially relevant in the respective area of enquiry, such a

54 Marie Petersmann, 'Towards More than Human Rights? From the Living Constitution to the Constitution of the Living?', Heidelberg Journal of International Law 82 (2022), 769-799.

55 Article 71 of the 2008 Constitution of Ecuador: 'La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos.'.

56 Judgment 1149-19-JP/21 of November 10, 2012 *Los Cedros*.

narrow perspective has largely outlived its usefulness on a growing number of issues, some of which have been presented in the preceding sections. The dynamics of jurisprudential and doctrinal development on central issues like the constitutional relevance of religion, social and economic rights, or the protection of the environment have moved beyond the limited geographical area where relevant developments on central public law issues used to originate for most of the modern era.

Another factor which has added to the complexity of comparative public law analysis is the growing influence of international law. International law is no longer limited to a body of mostly formal rules on treaty making, diplomatic relations and state immunity, but increasingly gives expression to key values shared by large parts of the international community, most obviously in the growing number of universal and regional human rights treaties and the jurisprudence of the UN and regional human rights bodies clarifying their meaning. As has repeatedly been pointed out in the previous sections, this has had a profound impact especially on the development of the national bills of rights and their application by domestic courts. As a result, comparative constitutional law can no longer plausibly limit itself to horizontal comparison of different national approaches to human rights, democracy and rule of law issues, but must also include a 'vertical' dimension which examines how these approaches are being shaped by the impact of the applicable regional and universal human rights norms. The jurisprudence of a growing number of constitutional courts in democratic countries like Colombia, South Africa or India is showing the way here, as these courts nowadays routinely incorporate the analysis of international human rights norms and standards, but also of foreign fundamental rights jurisprudence in their interpretation and application of the corresponding national rights provisions.[57] This has opened up a whole new field in comparative constitutional law analysis which could barely have been imagined a few decades ago.

57 For a particularly wide-ranging comparative analysis of both international human rights law and foreign constitutional law on the issue of the constitutional protection of a right to privacy see the decision of the Indian Supreme Court in *Justice K. S. Puttaswamy and Another v. Union of India and Others*, 24 August 2017, Judgment by D.Y. Chandrachud, J. paras 129-134.

Comparative Administrative Law: Particularities, Methodologies, and History

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Keywords: harmonization, legal transplants, ideologies, reflexivity, legal positivism, comparative administrative law histories, comparative private law

A. Introduction

In 20th-century scholarship on administrative law, comparison played a subordinate role for a long time. Just as public law in general was a pure relative of private law in matters of legal comparison, administrative – as opposed to constitutional – law suffered from neglect within the field of comparative public law. The argument went that it is precisely administrative law which most clearly reflects the historical and cultural particularity of the individual state, thus making comparison impossible or at any rate very difficult. Just as historians liked to claim the incomparable particularity of their national history, professors of public law did the same for their respective national administrative law. The individual countries assumed that their national paths were distinctive. What is more, a remarkable paradox arose: diverse processes of reception and borrowing characterised administrative law in particular since its modern period of origin in the 19th century. There is hardly another field of law in which foreign regulations are taken up and imported as often as in the field of administrative law. Here, the political influence of individual nations, the objective persuasiveness of a foreign solution for a novel problem or even mere trends have always led to a great permeability between the national legal systems. Already

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these phenomena of exchange alone suggest the usefulness of comparative law in this area. Yet despite or precisely because of such transfer processes, claims of historical singularity persisted in the 20th century, thus hindering comparative administrative law. While a comparative approach still constituted the basic method of the emerging scholarship on administrative law in the 19th century, from Robert von Mohl to Lorenz von Stein and Rudolf von Gneist all the way to Otto Mayer,[1] it was later mostly relegated to the margins of scholarly engagement.

Since the 1980s, this traditional situation has gradually begun to change. In the European Union, Community law is superimposed on the Member States' traditional administrative law systems in various ways, so that they are increasingly confronted with one another. Some observers already discern that the Member States' administrative law systems seem to be broadly converging. Following a long period in which scholars hastily put forth claims of incomparability, a similarly hasty process of convergence now predominates. Growing globalisation has also exposed the individual administrative legal systems to a novel comparative pressure to justify themselves, primarily related to their significance as inhibiting or promoting factors in the worldwide economic competition. As a result, comparative administrative law is experiencing a renaissance, which suggests that it is time to reflect anew on its particularity, methodologies, and historical development.

With regard to the longer tradition of comparative private law, this contribution will first explore the particularities of comparative administrative law by contrasting it with comparative private law (B). Then it will turn to the methodologies of comparative administrative law. This also involves a more detailed discussion of the possibilities for capturing the various transfer processes between the national administrative legal systems (C). The study then turns to the historical development of comparative administrative law since the early 19th century. Here, a rich inventory of traditions emerges, on which the current discussion can build (D). A concluding outlook focuses on the new challenges that Europeanisation and internationalisation present for scholarship in comparative administrative law (E).

1 In detail on this below, D.

B. Particularities of Comparative Administrative Law in Contrast to Traditional Comparative Private Law

The general instruments of comparative law do not change with the particular legal sub-area that uses them, be it private law, criminal law, or public law. But comparison can have different aims and be employed in very different functional contexts.[2] Traditionally, comparative private law often pursues the policy objective of legal harmonisation. By contrast, for a long time, comparative approaches in administrative law were not aimed at legal harmonisation but sought to gain scholarly insights from putting domestic administrative law into relation with other legal systems. Moreover, comparative administrative law was motivated by the policy interest of importing individual administrative legal institutions from foreign legal systems. Individual aspects of the comparative approach may therefore certainly be weighted differently in the individual sub-areas of the law.[3] Additionally, each specialised area modifies the comparative approach, giving it a particular profile. The particular profile of comparative administrative law can be perceived more clearly if one contrasts it with comparative private law. Discussions of comparative public law commonly point out that comparative private law is more developed.[4] Just as private law is older than administrative law, it also has broader and more profound experience in the area of comparative law. But this fact does not warrant describing comparative administrative law as a mere latecomer trying to catch up. Rather, the contrast with comparative private law allows for a clearer – and itself comparative – grasp of fundamental questions of comparative administrative law.[5]

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2 On the different tasks of comparative administrative law, see below, C2.

3 However, this does not mean that there are as many comparative methodologies as there are individual areas of the law: Léontin-Jean Constantinesco, *Rechtsvergleichung, vol. 2: Die rechtsvergleichende Methode* (1972), 65 ff.; cf. also Jörg Manfred Mössner, 'Rechtsvergleichung und Verfassungsrechtsprechung', Archiv des öffentlichen Rechts 99 (1974), 192, 224.

4 Cf. representatively Joseph H. Kaiser, 'Vergleichung im Öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 391, 402; Rudolf Bernhardt, 'Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 431; Martin Bullinger, 'Zwecke und Methoden der Rechtsvergleichung im Zivilrecht und im Verwaltungsrecht' in: *FS für Peter Schlechriem* (2003), 331.

5 Such a quasi-'internal' comparative law is always especially instructive for administrative law, particularly in relation to private law. On this issue, for ex. Peter L. Strauss,

I. Domestic Applicability

It is firstly of great practical significance for this contrast that foreign private law is traditionally also applied domestically in the context of *international private law*.[6] Within national law, international private law refers to foreign private law for legal relationships that involve certain foreign elements (cf. art 3 ff. of the Introductory Act to the German Private Code). It could be, for example, that a dispute on child custody between parents is decided according to Egyptian family law before a German court, due to the nationality of one of the spouses. Therefore, foreign private law must be held ready for its application before domestic courts, and legal scholarship produces the pertinent knowledge of foreign legal systems also for this reason. This study of foreign law as such is not yet comparative law scholarship, but at least it creates the preconditions for it. Precisely through international private law, scholars have repeatedly come to engage with comparative law.[7]

Comparable constellations do not play a significant role in public law, however.[8] In principle, only the pertinent national administrative law is applied to cases containing a foreign element. But in individual constellations, national law may accord foreign administrative law or foreign administrative decisions internal legal effects.[9] Thus, for instance, German nationality law provides that in principle, a German loses his or her cit-

'Administrative Law: The Hidden Comparative Law Course', The Journal of Legal Education 46 (1996), 478 ff.

6 Ernst Zitelmann, 'Aufgaben und Bedeutung der Rechtsvergleichung', DJZ 5 (1900), 329 f. Cf. offering contrast with public law, in greater detail Bullinger (n. 4), 331, 332 ff.; Georgios Trantas, *Die Anwendung der Rechtsvergleichung bei der Untersuchung des öffentlichen Rechts* (1998), 22; Alessandro Pizzorusso, 'La comparazione giuridica e il diritto pubblico', Il Foro Italiano 102 (1979), Parte V, 131, 132; Raymond Legeais, 'L'utilisation du droit comparé par les tribunaux', Revue internationale de droit comparé (1994), 347, 349 ff.

7 For instance, Swiss Adolf F. Schnitzer, whose two-volume Vergleichende Rechtslehre (2nd edn, 1961) is still very much worth reading. On the frequent intertwining of figures in international private law and comparative law in general Mathias Reimann, 'Comparative Law and Private International Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), 1363 ff.

8 For a similar finding in the field of *criminal law* see Hans-Heinrich Jescheck, *Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung* (1955), 25.

9 Classically on this Karl Neumeyer, *Internationales Verwaltungsrecht*, vol. 4 (1936), 473 ff. Inasmuch as the matter at hand is the transnational effect of national authorities' decisions – today predominantly under the influence of European law – the more recent discussion addresses this issue using the concept of the 'transnational administrative act'; cf. in summary Matthias Ruffert, 'Der transnationale Verwaltungsakt', Die

izenship upon acquiring foreign citizenship, where such acquisition results from an application filed by the German concerned (cf. § 25 para. 1 cl. 1 Nationality Act). In the case of these rules, for a legal effect to materialise under German law, a legal issue must have previously been resolved under foreign law.[10] National authorities and courts must therefore interpret and apply foreign administrative law. This *international administrative law*, shaped by the conflict of laws, is currently – in part under the influence of European Community law – gaining practical importance[11] and increasing the epistemological value of comparative work in administrative law.[12] But it is still unable to match the significance of international private law, since it lacks the alternative domestic applicability of a complete foreign legal regime. National law only allows certain points of entry for foreign administrative law, which, due to their selective character, do not entail that foreign administrative laws are systematically held ready for application before domestic courts.

Verwaltung (2001), 453 ff.; Gernot Sydow, *Verwaltungskooperation in der Europäischen Union* (2004), 138 ff.

10 Cf. in greater detail on this issue, using the example of nationality law, Hans von Mangoldt, 'Rechtsvergleichung im öffentlichen Recht: Das Beispiel der Staatsangehörigkeit', StAZ 53 (2000), 285, 290 ff.

11 Christoph Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts: Strukturen des deutschen Internationalen Verwaltungsrechts* (2005). Yet usage of the term vacillates. Increasingly, the term international administrative law is no longer used to designate (only) national administrative conflict of laws but to refer primarily to administrative law internationalised by international law: Matthias Ruffert, 'Perspektiven des Internationalen Verwaltungsrechts' in: Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht: Eine Analyse anhand von Referenzgebieten* (2007), 395, 398 ff.; Eberhard Schmidt-Aßmann, 'Überlegungen zu Begriff und Funktionskreisen des Internationalen Verwaltungsrechts' in: *FS für Heinrich Siedentopf* (2008), 101, 103 ff.

12 A summary in Stephan Neidhardt, *Nationale Rechtsinstitute als Bausteine europäischen Verwaltungrechts* (2008), 26 f. An analysis truly grounded in comparative law is generally only required if the application of the foreign administrative law rule – just as in international private law – is subject to a national *ordre-public* clause; cf. in greater detail Olivier Dubos, 'Le droit administratif et les situations transnationales: des droits étrangers au droit comparé?' in: Fabrice Melleray (ed.), *L'argument de droit comparé en droit administratif français* (2007), 69, 83 ff.

2. Legal Harmonisation

The knowledge of foreign private law has traditionally been much more important in international trade than a knowledge of the relevant administrative law. Above all in areas related to the economy, private law was already strongly internationalised in the 19th century; the relevant rules of trade or economic law were also often somewhat removed from the national core of rules or, like stock corporation law, relatively new.[13] Moreover, the old phenomenon of international trade encouraged comparative efforts early on, particularly in the area of trade, sea, or exchange law, in order to determine shared rules.[14] This explains why there have been repeated efforts in private law towards an international uniform law,[15] with comparative private law *preparing the harmonisation of law*. While in private law, too, this only applied to sub-areas – more idiosyncratic and more deeply rooted areas such as family law or property law were hardly affected by it[16] – the possibility of an international harmonisation has nevertheless always represented an important backdrop for comparative efforts. For public law, a comparable situation is discernible only in a limited way to date. Moreover, trade contacts between the citizens were traditionally distinctly more intense than their contact with foreign administrations or the connections of various national administrations among one another. As a result, administrative law has rarely been perceived as very significant for international transactions,[17] and above all, there have hardly been efforts to arrive at international harmonisations.[18] For a long time, comparative

13 On this Helmut Coing, 'Rechtsvergleichung als Grundlage von Gesetzgebung im 19. Jahrhundert', Ius Commune 7 (1978), 160 ff.

14 Karl Otto Scherner, 'Allgemeine Rechtsgrundsätze und Rechtsvergleichung im europäischen Handelsrecht des 17. und 18. Jahrhunderts', Ius Commune 7 (1978), 118 ff.

15 Jan Kropholler, *Internationales Einheitsrecht: Allgemeine Lehren* (1975). Ein Beispiel bietet etwa das UN-Kaufrecht nach der Wiener Kaufrechtskonvention von 1980: Peter Schlechtriem, *Internationales UN-Kaufrecht* (2007).

16 Rightly emphasised in Stig Strömholm, 'Rechtsvergleichung und Rechtsangleichung. Theoretische Möglichkeiten und praktische Grenzen in der Gegenwart', RabelsZ 56 (1992), 611, 615; Nico Florijin, *Rechtsvergelijking in het wetgevingsproces* (1993), 16.

17 Vividly on this Clifford Larsen, 'The Future of Comparative Law: Public Legal Systems', Hastings International and Comparative Law Review 21 (1998), 847, 857 f.: 'no short-term commercial necessity'; cf. also Jean Rivero, 'Vers un droit commun européen: Nouvelles perspectives en droit administratif' in: Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe. Nouvelles Perspectives d'un droit commun de l'Europe* (1978), 389, 392.

18 On the corresponding contrast to private law Kaiser (n. 4), 400.

public law therefore lacked the pragmatic driving impulse that the prospect of legal harmonisation always supplied for comparative private law.

Yet this traditional contrast is increasingly fading. In current administrative law, a growing need for mutual knowledge and coordination is emerging internationally, which has reached broad areas from environmental to economic administrative law all the way to security law.[19] Especially within the European Union, comparative administrative law often prepares the groundwork for a certain harmonisation of the Member States' administrative legislations.[20] In any event, it is doubtful that the traditionally divergent significance of legal harmonisation in private and administrative law results from the different degree of substantive difficulty that each process of harmonisation entails. Administrative legal provisions often react to shared problems in developed societies, and tradition often weighs less heavily on them than it does on private law, thus potentially facilitating harmonisation.[21]

3. Universality?

A further important difference is linked to different basic premises of comparison in private and public law. Comparative private law usually works on the implicit assumption that its actors and constellations of issues are essentially the same worldwide. It assumes that its legal institutions – be they purchase, exchange, inheritance, or tort – are at least relatively universal. Private law often involves problems, interests, and legal constructions that are centuries if not millennia old and so constitute virtually anthropological elementary constellations. Comparative private law has therefore often

19 On this in greater detail George A. Bermann, 'Comparative Law in Administrative Law' in: *L'Etat de droit. Mélanges en l'honneur de Guy Braibant* (1996), 29 ff.; Harold Hongju Koh, 'Transnational Public Law Litigation', Yale Law Journal 100 (1991), 2347 ff.; cf. also Ralf Michaels, 'Im Westen nichts Neues?', RabelsZ 66 (2002), 97, 105 f.

20 Cf. in greater detail on this below, section C (3).

21 Cf. on this already Giovanni Fontana, *Introduzione al Diritto Pubblico Comparato* (1938), reprint 1954, 125, who already energetically opposed the thesis that comparative law shows greater promise in private than in public law (119 ff.); cf. on this also below, B4 and B6. Moreover, Fontana emphasised that comparative private law often produces harmonisation projects but that these fail just as frequently.

based its analyses on a 'universal archetypology'.[22] It has always tended 'to discover common solutions based on common problems'.[23] It is certainly also problematic[24] to assume the existence of universal legal archetypes in private law, and at times, it tempts comparative private law to suggest too hastily that similarities do exist. But at any rate, such assumptions are more plausible than in the field of public law. George A. Bermann formulated this as follows:

> 'Comparative law inquiries in private law tend to assume that legal actors are basically the same the world over. This is thought to be true not only of contracting parties, but also of tortfeasors, testators, spouses, and physical and legal persons generally. Even if this is not entirely true, the differences that do exist are generally deemed to be irrelevant for comparative law purposes and have not been allowed to interfere with that enterprise. Assumptions of universality are by no means made to the same degree outside the private law field, and comparative law may have been generally less welcome there as a result.'[25]

Beyond this elementary plausibility of its problems and constructions, private law recognises an older layer of commonality due to the shared inheritance of Roman law[26] (although the extent of this older commonality

22 Constantinesco (n. 3), 75. Precisely this link to such an archetypology and elementary constellations of interest must also explain the greater ability of private law to connect to the economic analysis of the law; on the differences in this regard to public law in detail Martin Morlok, 'Vom Reiz und vom Nutzen, von den Schwierigkeiten und den Gefahren der Ökonomischen Theorie für das Öffentliche Recht' in: Christoph Engel and Martin Morlok (eds), *Öffentliches Recht als Gegenstand ökonomischer Forschung* (1998), 1 ff.

23 Thus a classic formulation by Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1956), 349. This conviction continues to determine functional approaches to comparative law in private law; cf. in particular the standard work by Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (1996).

24 For a critique see Constantinesco (n. 3), 75 ff.

25 Bermann (n. 19), 30 (author's translation).

26 As is well known, this is recalled more strongly in the course of Europeanisation; cf. representatively for ex. Reinhard Zimmermann, 'Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit', JuristenZeitung 47 (1992), 8 ff.; Rolf Knütel, 'Rechtseinheit in Europa und römisches Recht', Rechtseinheit in Europa und römisches Recht 2 (1994), 244 ff.; Jean-Louis Halpérin, 'L'approche historique et la problématique du Jus Commune', Revue internationale de droit comparé (2000), 717 ff.

is quite uncertain).[27] For this reason, too, it has always made sense to return to this shared foundation again by means of comparison.

Matters are different in public law, however. Here, here was no original unity that later weakened or was lost.[28] Instead, public law is often the product of the end of the older legal unity.[29] Its connection to the state binds it to specific organisational and institutional contexts more strongly than private law.[30] The shared fact that all administrative legal systems were strongly influenced in their formation phase by the already existing categories of private law[31] (and in part still are to this day) does not suffice as a foundation of commonality.[32] While there are immemorial problems and constructions in private law, hardly any legal institution of administrative law is much older than two hundred years.[33] Moreover, unlike private

27 Criticism of an idealised description of the supposed earlier legal uniformity on the basis of Roman law for instance in Pio Caroni, 'Der Schiffbruch der Geschichtlichkeit. Anmerkungen zum Neo-Pandektismus', Zeitschrift für Neuere Rechtsgeschichte 16 (1994), 85 ff.

28 On this Nils Herlitz, 'L'étude du droit administratif comparé', Revue Internationale des Sciences Administratives 18 (1952), 796, 799; Rivero (n. 17), 389, 394; John S. Bell, 'Comparative Administrative Law' in: Reimann and Zimmermann (n. 7), 1259 ff.

29 Cf. on this in greater detail below, D2.

30 Cf. Christoph Möllers, 'Methoden' in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol. 1 (2006), § 3 mn. 40. This applies similarly to procedural law; instructively on this issue the comparative analysis of the USA and France in Antoine Garapon and Ioannis Papadopoulos, *Juger en Amérique et en France. Culture juridique française et common law* (2003).

31 Classically for Germany on this Fritz Fleiner, *Über die Umbildung zivilrechtlicher Institute durch das öffentliche Recht* (1906); on the significance of the connection to private law and the attempt of nascent German administrative law to emancipate itself from it, in detail Roger Müller, *Verwaltungsrecht als Wissenschaft. Fritz Fleiner 1867-1937* (2006), 47 ff. and 69 ff.; Wolfgang Meyer-Hesemann, *Methodenwandel in der Verwaltungsrechtswissenschaft* (1981), 29 f.

32 Vividly on this Rivero (n. 17), 389, 394: 'The model of Roman law constitutes the origins of private law. Administrative law refers to it only indirectly, in the second degree; for the only materials that the pioneers of administrative law had at their disposal were the words and concepts that originated in the repertoire of legal concepts developed within the framework of private law in the Roman tradition. This does not suffice in order to establish links between them that are just as close as the links between the individual private laws that result from a direct descent from a common source' (author's translation). This holds especially true because the young science of administrative law has everywhere attempted, to a certain extent, to emancipate itself from private law in particular.

33 On this Pizzorusso (n. 6), 131, 134; Rivero (n. 17), 389, 394: 'Par rapport aux droits privés, qui s'enracinent dans des traditions multiséculaires, les droits adminis-

law, public law has always changed at a comparatively faster rate, had to react and always reacted more quickly and nervously to social and political developments. Its development 'sways much more strongly in the political wind than that of private law, which is substantively more stable'.[34] This, too, has hindered comparison, especially since scholarship has always had its hands full appropriately perceiving the quick transformation of its domestic law and translating it into doctrine.[35] Instead, constructions and institutions have always migrated regularly between the different national legal systems in public law, both in constitutional and in administrative law. Here, there have been many ad hoc imitations of foreign models in concrete historical situations and for concrete political motives, but they were seldom prepared or accompanied by comparative legal analyses.[36] While private law was shaped by relatively constant problems and efforts towards legal harmonisation, great historico-political contingency and the unsystematic importation of individual fragments from foreign legal systems were characteristic of public law.

However, one must not underestimate that for administrative law in particular, similar issues are often reflected more directly in the respective legal systems, because they are less prestructured by codificatory legislation

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tratifs sont des tard-venus'; Sabino Cassese, *La construction du droit administratif. France et Royaume Uni* (2000), 13; Gerd Beinhardt, 'Der öffentlich-rechtliche Vertrag im deutschen und französischen Recht. Eine rechtsvergleichende Betrachtung', VerwArch 55 (1964), 151. But this certainly also represents an advantage for comparative administrative law, since it has to do with material that is more limited both historically and substantively: Massimo Severo Giannini, 'Lo studio comparato del diritto amministrativo (Discussione sul libro di Marco D'Alberti, Diritto amministrativo comparato)', Rivista trimestrale di diritto pubblico (1995), 259.

34 Michael Stolleis, *Nationalität und Internationalität: Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts* (1998), in: Stolleis, Konstitution und Intervention. Studien zur Geschichte des öffentlichen Rechts im 19. Jahrhundert, (2001) 170, 183.

35 Vividly on this, already in 1952, Herlitz (n. 28), 800: 'It is unnecessary to emphasise how natural it is that the lawyers restrict their analysis in this way. The study of administrative law – a young discipline everywhere – is already a more than sufficient task when it limits itself to national law, which develops quickly and is subject to profound changes. Scholarship is constantly in a futile race with a legislation that progresses with crushing speed. Under these circumstances, it may seem like neglect of one's duties or unnecessary entanglement if one now also analyses the law of other states in depth. This is all the more true because one always has the impression of being without guidance in a foreign world, which it is difficult, if not very difficult, to get to know.' (author's translation).

36 On these 'legal transplants' in administrative law in detail below, B6.

than in private law. In administrative law, too, the problems to be addressed in different countries display parallels, especially in places where industrial societies react to novel shared challenges, such as in environmental law or information law.[37] Moreover, some of the questions to be solved are just as constant as private law issues, for instance in public liability law.[38] Already Lorenz von Stein viewed the similarity of the problems to be solved as the particular basis for comparisons in the field of administrative law: 'A road is a road, may road law be what it may, a school is a school, credit is credit, an epidemic is an epidemic, entirely indifferent to school legislation, credit law, the sanitation police […]. Thus, all legislation shares the lasting nature of living conditions. This is the primary basis of any comparison of positive law.'[39] Although the relevant institutional context is more significant for administrative law, the fact that the universality of private law issues is more plausible seems to be based on private law's more linear developmental history rather than on the lesser similarity of issues in administrative law.

4. Codification

In the modern era since the French Revolution, the fact that private law was systematically codified in many states also promoted comparative private law. This considerably facilitated the initial comparative access, at least in Continental Europe. Yet administrative law of the Continental European countries, too, was and still is characterised by the general absence of such systematic codifications. Even in the area of administrative procedure, the pertinent legislation is rarely comprehensive, and the legal sub-areas

37 Jürgen Schwarze, *Europäisches Verwaltungsrecht* (2005), 91; in the same vein already in 1912 Otto Koellreutter (cf. below, C2 and D6).

38 Thought-provoking discussion of this issue in Basil Markisenis, *Rechtsvergleichung in Theorie und Praxis: Ein Beitrag zur rechtswissenschaftlichen Methodenlehre* (2004), 182 ff. More recent comparative overview in Duncan Fairgrieve, Mads Andenas and John Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002); pioneering study on this already in Roger Bonnard, *De la responsabilité civile des personnes publiques et de leurs agents en Angleterre, aux États-Unis et en Allemagne* (1914) (a comparison of the public liability regime in Britain, the United States and Germany, written from a French perspective).

39 Lorenz Stein, 'Über die Aufgabe der vergleichenden Rechtswissenschaft, mit besonderer Beziehung auf das Wasserrecht', Österreichische Vierteljahresschrift für Rechts- und Staatswissenschaft 7 (1861), 233, 238.

are hardly linked as a whole.[40] This is caused in part by the traditional diversity of legal sources and materials in administrative law, which in turn is linked to the complexity of the relevant constitutional, administrative, and judicial organisation. It is an exacerbating factor that in many countries, certain administrative law questions are usually regulated in private law and that the importance of the ordinary courts varies in administrative law questions.[41] In view of the fragmented variety of legal texts and the often central meaning of administrative practice and jurisprudence, comparative administrative law thus confronts especially high hurdles even when first attempting to approach foreign administrative law.

5. Historico-Political Particularity

Public law, more than private law, is defined by the state's individual historical and cultural path. Administrative law in particular belongs 'to those legal matters that most clearly reflect the national character of a people and a state.'[42] To fully understand administrative law, it is thus indispensable to closely attend to the relevant national evolution. Pierre Legendre's studies demonstrate this impressively in the case of French administrative law.[43] The state structure in question and historico-political

40 Cf. Jean Rivero, 'Réflexion sur l'étude comparée des sources des droits administratifs', in: *Mélanges Michel Stassinopoulos* (1974), 135 ff.; Bernhardt (n. 4), 433 f.; Rainer Grote, 'Rechtskreise im öffentlichen Recht', Archiv des öffentlichen Rechts 126 (2001), 10, 19 and 21 f.; Giorgio Lombardi, *Premesse al corso di diritto pubblico comparator: Problemi di metodo* (1986), 103 ff.; Larsen (n. 17), 860 f.

41 Jean Rivero, 'Le droit administratif en droit comparé: Rapport final', Revue internationale de droit comparé (1989), 919, 921. Thus, for instance, the different meaning of private law and the ordinary jurisdiction within the framework of the relevant administrative law constitutes a focus of comparative analysis also for the fundamental work by Marco D'Alberti, Diritto amministrativo comparato. Trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia (1992).

42 Ulrich Scheuner, 'Der Einfluss des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung', 16 *Die öffentliche Verwaltung* (1963), 714; cf. also Eberhard Schmidt-Aßmann and Stéphanie Dagron, 'Deutsches und französisches Verwaltungsrecht im Vergleich ihrer Ordnungsideen', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 67 (2007), 395, 396; Larsen (n. 17), 857; Markisenis (n. 38), 181.

43 Cf. representatively Pierre Legendre, 'La facture historique des systèmes. Notations pour une histoire comparative du droit administratif français', Revue internationale de droit comparé 23 (1971), 5 ff.

development usually affect public law more directly than private law. As a result, the corresponding comparative approach is from the outset directed more strongly than its private counterpart towards a perspective that is not only synchronous but also diachronous.[44] Anyone who wants to examine a public-law legal institution in comparative perspective generally cannot avoid examining its historical development in greater detail. This does not mean that comparison would inevitably become more difficult to the degree that a legal institution takes on a 'more political' character.[45] But comparison is often more demanding as a legal institution's development in the pertinent historico-social context must be considered as well.

Yet the realisation that comparative administrative law depends on historical embedding to a greater extent than comparative private law should not mean that the administrative law systems in question are always interpreted as an expression of particular national administrative legal cultures and compared *en bloc*. Historical immersion is not synonymous with the (re)construction of self-contained national administrative law systems. The understanding of foreign administrative law systems does not require an isolated immersion in national history but a historical classification within the framework of a comparative administrative (law) history, which takes diverse commonalities and receptions into account.[46] A comparative history of administrative law highlights the exchanges that have always been characteristic of administrative law.[47] From the outset, this long history of mutual exchanges calls into question the image of homogenous national administrative legal spaces which have never existed. It shows on the contrary that the shaping power of national legal traditions is at times even greater in private law than in public law. Private law has often developed with a relatively great degree of independent continuity, while there have always been varied processes of exchange in public law, due to its greater sensitivity to changing political and social conditions. Raymond Saleilles already emphasised as much at the International Congress of Comparative Law in 1900.[48] What is more, the great codification movements after the French

44 Pizzorusso (n. 6), sp. 131, 134.

45 Thus the thesis of Bernhardt (n. 4), 431, 437 ff. and 450 ff.; rightfully critical of this Pizzorusso (n. 6), column 131, 134 with n. 13.

46 Gerhard Robbers, 'Europäische Verwaltungsgeschichte' in: Reiner Schulze (ed.), *Europäische Rechts- und Verfassungsgeschichte* (1991), 153 ff.

47 On the issue of 'legal transplants' in administrative law in detail below, B6.

48 Raymond Saleilles, 'Rapport d'ensemble résumant les divers rapports présentés sur la question du régime parlementaire' in: *Congrès International de Droit Comparé. Tenu*

Revolution tended to compartmentalise various national private laws. By contrast, due to their very nature as a conglomerate of the most diverse rules and institutions, which were systematized only at a late stage and often only by academic writing, administrative law remained more open to the import of foreign solutions.[49] Therefore, as much as comparative administrative law requires profound historical analysis, such an analysis must not take the form of an isolated national history, which tends to reinforce, rather than challenge the self-perception that has traditionally characterised the scholarship of national administrative law.

6. Methodological Reflectivity

Ultimately, there is no longer any reason to lament that comparative administrative law seems to have developed more slowly than comparative private law. Instead, comparative private law scholarship could profit from a stronger engagement with comparative public law. For the insufficient attention given to public-law experience with the states' historico-political difference reinforces the tendency – already widespread among legal comparatists of private law – to quickly universalise their categories, thus not actually exposing themselves to the foreignness of the foreign. Furthermore, the relative hegemony of private law means that fundamental reflections on comparative work often occur through the lens of private law, which, as the older sibling, engages in reflections 'from its perspective for the entire family.'[50] A stronger engagement with comparative public law would also fit into broader trends of comparative law methodology, where, even as private law is concerned, previous functional assumptions of similarity

à Paris du 31 juillet au 4 août 1900, Procès-Verbaux des Séances et Documents, vol. 1 (1905), 69, 73: 'While the development of private law has almost always occurred very traditionally, one might even say: exclusively nationally, public law – as the law of societies and communities – has, in almost all historical time periods since the Barbarians, been subject to a series of mutual borrowing that was entirely unpredictable and almost always irrational […]'.

49 Jean Rivero, 'Les phénomènes d'imitation des modèles étrangers en droit administratif' in: Walter Jean Ganshof van der Meersch, *Miscellanea W. J. Ganshof van der Meersch*, vol. 3 (1972), 619, 621; Pizzorusso (n. 6), column 131, 132 f.; Grote (n. 40), 19; cf. also already Fontana (n. 21), 125.

50 Thus accurately Bernhardt (n. 4), 430.

are fundamentally criticised[51] or at least differentiated.[52] A broad tendency in the fundamental debate of comparative law currently emphasises the historico-cultural difference of the examined legal systems. There are good reasons for this. In a less obvious way than public law, private law has been subject to political and social development and was influenced by such factors. Thus, for instance, James Q. Whitman has shown to what extent different conceptions of *legal protection of personality rights and rights against defamation* were and are premised on different social models in Germany, France, and the United States: In Europe, the legal protection against defamation was extended from the aristocratic ruling class to society as a whole. By contrast, in the United States, the former aristocratic privileges of protection against defamation were abolished and unified at the lesser level of protection that had previously applied only to the lower social classes.[53] Moreover, there were also rapidly developing areas in private law, such as stock corporation law, in which comparative law played an important role – as it did in administrative law – for purely pragmatic reasons, in order to make foreign innovations quickly available in national law.[54] Not least under European influence, more recent legal development then further blurred the problematic boundary between public and private law.[55] Private law, too, is more quickly exposed to political and social changes.[56] Some particularities of comparative administrative law are therefore increasingly the conditions of comparative law as a whole.

Thus, today, the particularities of administrative law provide comparative scholarship in this field with an advance in terms of methodological

51 On the corresponding criticism by theoreticians of 'difference' such as Pierre Legrand, in detail below, C.

52 Cf. on this for instance the contributions of Ralf Michaels, 'The Functional Method of Comparative Law', and Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in: Reimann and Zimmermann (n. 7), 339 ff. and 383 ff.; interim evaluation in Jaako Husa, 'Farewell to Functionalism or Methodological Tolerance?', RabelsZ 67 (2003), 419 ff.

53 James Q. Whitman, 'Enforcing Civility and Respect: Three Societies', Yale Law Journal 109 (2000), 1279 ff.

54 On this Richard M. Buxbaum, 'Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft', RabelsZ 60 (1996), 201, 208.

55 See on this for instance Walter Pauly, 'Deutschland' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber (eds), *Handbuch Ius Publicum Band IV: Verwaltungsrecht in Europa: Wissenschaft* (CF Müller 2011), 59; Barbara Leitl-Staudinger, 'Österreich' in : von Bogdandy, Cassese and Huber (n. 55), 220.

56 Cf. Buxbaum (n. 54), 201, 217 ff.; Horatia Muir Watt, 'Globalization and Comparative Law' in: Reimann and Zimmermann (n. 7), 579 ff.

reflection: its unique character as a comparatively recent legal area, which, on the one hand, is closely linked to a state's constitutional structure and historico-political development but, on the other hand, must react quickly to industrial societies' changing concerns and therefore depends, to a significant degree, on using foreign experiences. Comparative administrative law has reacted to this specific combination of a deep historical rootedness and a restless surface. Therefore, it has the advantage of being traditionally more sensitive to the historico-cultural particularity of the compared legal systems than its private-law counterpart. Thus, it can benefit from the current problematisation of conventional assumptions of similarity in comparative private law in order to subject hypotheses of convergence to a critical review. Particularly when comparing administrative legal systems in the European Union, it is vital to combine sensitivity to the historico-cultural path of individual administrative systems with an openness to the analysis of varied processes of exchange and rapprochement. The administrative law systems of the Member States are at once similar and different, and it is the task of comparative administrative law to conceptualise this simultaneity of commonality and difference.

C. Methods of Comparative Administrative Law

1. Ideologies of Comparative Administrative Law

Scholars in the field of comparative administrative law often write from the perspective of an ideological premise without revealing or critically examining this premise, at times even without being conscious of it. Centrally, what is at stake here – as in comparative law as a whole – are two fundamental attitudes, which one can describe as the *ideology of difference* and the *ideology of similarity*.

The *ideology of difference* emphasises the ineluctable particularity and historico-cultural uniqueness of national administrative law systems. It often appeared in comparative administrative law, above all during the first two thirds of the 20th century. Frequently, the claim that a certain national administrative law was unique merely served as a pretext for declaring comparative work in this area to be useless and superfluous. This position has once again become very popular in the general debate on the principles of comparative law and belongs to an overarching trend that can be described

as the *postmodern theory of comparative law*.[57] Thus, the French Canadian Pierre Legrand in particular emphasises the historico-cultural difference and uniqueness of individual national legal systems, the radically foreign nature of the other law in question, and warns that comparative discussions are too strongly shaped by the endeavour to find similarities between the various laws.[58]

The *ideology of similarity* takes the opposite position. Traditionally, it is at home in comparative private law, but today, under the influence of European integration, it is gaining supporters in the field of administrative law as well.[59] The ideology of similarity emphasizes the commonality of the legal problems shared by different legal systems. It assumes that there are analogous substantive and legal issues beneath the surface of different national styles, provisions, and concepts. Its representatives therefore typically emphasise the convergence and further possibilities for harmonising the compared administrative law systems.

Both ideologies suffer from comparable problems. The legal systems the comparatist deals with are radically different or resemble one another, depending on the chosen premise. The premise determines the research results from the start. Thus, both the ideology of difference and that of similarity emphasise only one aspect of comparison. Since comparison always consists in examining the differences as well as the similarities of at least two legal systems, it is self-evident that one can turn either of these two aspects into an absolute. But in doing so, both ideologies ultimately

57 Erik Jayme, 'Betrachtungen zu einer postmodernen Theorie der Rechtsvergleichung (1997/98)' in: Erik Jayme, *Gesammelte Schriften, vol. 2: Rechtsvergleichung – Ideengeschichte und Grundlagen von Emerico Amari bis zur Postmoderne* (2000), 103 ff., cf. also Dominik Richers, 'Postmoderne Theorie in der Rechtsvergleichung?', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 67 (2007), 509.

58 Pierre Legrand, *Le droit comparé*, 1999; Legrand, 'European Legal Systems are not Converging', International and Comparative Law Quarterly 45 (1996), 52 ff.; Legrand, 'The Impossibility of Legal Transplants', Maastricht Journal of European and Comparative Law 4 (1997), 111 ff.; Legrand, 'Public Law, Europeanisation and Convergence: Can Comparatists contribute?' in: Paul Beaumont, Carol Lyons and Neil Walker (eds), *Convergence and Divergence in European Public Law* (2002), 225; already previously in this direction Günter Frankenberg, 'Critical Comparisons: Rethinking Comparative Law', Harvard International Law Journal 26 (1985), 411 ff. (German version: Kritische Vergleiche. Versuch, die Rechtsvergleichung zu beleben, in: Günter Frankenberg, *Autorität und Integration. Zur Grammatik von Recht und Verfassung* (2003), 299 ff.).

59 On the tendency towards convergence in comparative administrative law, as inspired by European law, see in detail below, D2.

lose sight of comparison itself. The ideology of difference is ultimately no longer able to explain how one can establish a relationship between two different legal systems at all. Because of its 'neo-Romantic turn',[60] it sees any effort to develop concepts that apply equally to the compared subjects as disregarding the ineluctable particularity of each individual legal system. It is a theory of comparative law that attempts to show the impossibility of comparison. Above all, it can be understood as an endeavour to counter the idealistic functionalism that, for a long time, was characteristic of comparative private law and viewed comparison mainly as a step towards legal harmonisation. Inasmuch as these efforts often go hand in hand with the ideal of borderless markets, fundamental protest against such projects and ideals also inheres in the ideology of difference. It rubs salt into the wound of the ideology of similarity, which considers the divergence between the legal systems less as a phenomenon to be understood than a problem to be overcome. The ideology of similarity, in turn, does not really expose itself to the foreignness of foreign law but always looks for a presumed common foundation under the surface of difference. In this perspective, historico-political difference and the individual paths of national administrative legal systems quickly appear only as bothersome hindrances that must be overcome on the path to convergence. The ideologies of difference and of similarity enforce an either-or, when in fact simultaneity is at stake: the simultaneity of commonality and difference. One of the doyens of comparative public law, Robert von Mohl, therefore considered comparisons based on similarity and those based on difference equally worthwhile. Concerning comparison with English law, he wrote, 'Comparing the English state institutions with those of the Continent, namely also of the constitutional German states, directly benefits life. It is difficult to say whether this comparison is more important in those aspects in which the English institutions have served or should serve as a predecessor and model for our own or in those aspects in which they are entirely different, as is often the case in the administration.'[61]

Instead of engaging in the ideological process of rendering difference or similarity absolute, comparative administrative law in particular must

60 James Q. Whitman, 'The neo-Romantic turn' in: Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003), 312 ff.

61 Robert von Mohl, Die Geschichte und Literatur der Staatswissenschaften, vol. 2 (1856), 3.

assume shared substantive problems[62] so as to better grasp the uniqueness of the solution in each national legislation. That the individual legal systems share substantive problems while differing in their problem-solving structures does not constitute a theoretical opposition but rather the two poles between which every comparative analysis must move inevitably.

2. Tasks, Instruments, and Forms

Comparative administrative law can fulfil very different *tasks*, and its instruments and forms change with the tasks as well. One may distinguish very generally between *practical* and *theoretical* tasks.[63] The area of practical tasks includes preparing foreign solutions for national policy debates or – increasingly important in the European Union – working out new shared European rules on the basis of a comparative inventory of the Member States' administrative law systems, be it in law-making or jurisprudence.[64] By contrast, at the level of theory, the focus is on scholarly findings. Comparison is supposed to help better understand foreign and one's own administrative law system by confronting them. Thus, administrative law scholarship can develop a broader foundation.

Traditionally, *country reports* belong to the usual *instruments of comparative administrative law*. Employing a shared questionnaire, experts describe the national administrative legal systems or individual legal institutions to be used as a basis for comparative reflections in a subsequent step.[65] This approach certainly has the advantage of offering profound documentation of the individual administrative law systems, which isolated

62 Cf. on this already above, B3. Still worth reading, on this issue, is the fundamental debate from the 1920s concerning the question whether comparative law should be understood as a science of substantive problems: Max Salomon, *Grundlegung zur Rechtsphilosophie* (1925), 26 ff.; Julius Binder, *Philosophie des Rechts* (1925), 935 ff.

63 On the practical and theoretical tasks of comparative administrative law in summary, Bullinger (n. 4); Karl-Peter Sommermann, 'Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa', Die öffentliche Verwaltung (1999), 1017, 1019 ff.

64 On this below, E.

65 Examples in the area of administrative law are the volumes published by the Max-Planck-Institute for Comparative Public Law and International Law: *Haftung des Staates für rechtswidriges Verhalten seiner Organe. Länderberichte und Rechtsvergleichung* (1967); *Gerichtsschutz gegen die Exekutive*, 3 vols, (1969-1971); *Die Kontrolldichte bei der gerichtlichen Überprüfung von Handlungen der Verwaltung* (1993).

individual research would not be able to provide. It accomplishes this aim especially well if the examined regulatory problems or legal institutions are closely linked to the structure of modern administrations. Yet from a comparative perspective, this approach also has considerable disadvantages.[66] The national reporter generally remains caught up in his own legal system and does not necessarily report on what would be significant from a comparative perspective. She considers some questions too self-evident to mention. Others do not even occur to her, given her national horizon, although they would be especially instructive for the foreign observer. The truly comparative reports are in turn presented by legal scholars, who themselves have no direct knowledge of the compared legal systems and must draw on the national reporters' statements. Thus, the risk lies in the fact that comparative cross-section reports, which are not based on comparative work by the reporter himself, join the 'parallel monologues' of national scholars (Constantinesco). If many individual reports are juxtaposed, there is also the risk that the comparative synthesis tends to identify shared principles at a very abstract level, largely ignoring the individual legal systems which have been reported on. These problems can be somewhat mitigated if the research results are first discussed, aligned, and interlinked at an authors' conference, so that shared perspectives can emerge from this dialogue.

Advances in comparative administrative law have often been achieved when individual authors concentrate on a single foreign administrative law system, with the in-depth *monographic presentation of a foreign legal system or a foreign legal institution by a legal scholar from another country* in his or her language. This may not make sense at first glance. The description of a foreign administrative law system seems to be merely the study of foreign law, at best useful information concerning another country's legal system, which does not even reach the level of comparison. One might think that a

66 On the corresponding problems, Constantinesco (n. 3), 176 ff.; cf. also Axel Tschentscher, 'Dialektische Rechtsvergleichung – Zur Methode der Komparatistik im öffentlichen Recht', JZ (2007), 807 ff.; Bell (n. 28), 1260: 'Comparisons with more than one system are often less successful. If a single author undertakes such an enterprise, then it is often difficult for her or him to have an adequately deep understanding of how the governmental systems of all the different countries work. If there is a collective work, then the explanation of the national systems has to be undertaken in a genuinely comparative way, which is not always easy for national legal experts. This requires a close interaction between the reporters. As a result, there are fewer examples of successful comparative administrative law spanning many jurisdictions than in private law.'.

study is truly comparative only if the monograph juxtaposes at least two different legal systems and examines the relationship between them. But such an assumption would underestimate how arduous it already is to present only one foreign administrative law system in depth and how many implicit – and often also explicit – comparative reflections the person has to engage in to explain a foreign administrative law to the domestic specialised public using familiar categories. Impressive models of this genre are, for instance, Otto Koellreutter's monograph 'Administrative Law and Administrative Jurisprudence in Modern England' (1912), which thoroughly contrasts its presentation of English law with German and French administrative law,[67] the book 'French Administrative Law and the Common Law World' (1954) by Bernhard Schwartz, who dedicates himself to French administrative law from the Anglo-American perspective,[68] Michel Fromont's French study on the distribution of competences between the administrative jurisdiction and ordinary courts in German law (1960),[69] and Oliver Lepsius' study on the genesis of US administrative law, '*Verwaltungsrecht unter dem Common Law*' (Administrative Law under Common Law) (1997).[70] As the authors describe the development of foreign administrative law in their own language,[71] as they try to make the concepts and institutions of another legal system comprehensible to the reader versed in the law of their home country, as they explicitly or implicitly contrast the two systems of administrative law, a new image of *both* systems emerges. The new, distanced description constructs the foreign administrative law in a form that the national lawyer could not have achieved.[72] Only the foreign scholar's observation makes

67 On this monograph in detail below, D6.

68 Bernhard Schwartz, *French Administrative Law and the Common-Law World* (1954); there cf. also the title of the first chapter: 'A Common Lawyer Looks At The Droit Administratif'.

69 Michel Fromont, La Répartition des Compétences entre les Tribunaux Privates et Administratifs en Droit Allemand, (1960); partially a German translation in: Michel Fromont, Rechtsschutz gegenüber der Verwaltung in Deutschland, Frankreich und den Europäischen Gemeinschaften (1967), 15 ff. (with the title: Die Abgrenzung von privatem und öffentlichem Recht durch die Rechtsprechung).

70 Oliver Lepsius, Verwaltungsrecht unter dem Common Law: Amerikanische Entwicklungen bis zum New Deal (1997).

71 On the complex translation issues that emerge here for the administrative-law context, instructively Fritz Paepcke, 'Sprache und Recht. Zu Grundbegriffen des Verwaltungsrechts im Sprachenpaar Französisch-Deutsch', in: Wolfgang Bergerfurth and Erwin Diekmann, *Festschrift für Rupprecht Rohr zum 60. Geburtstag* (1979), 339 ff.

72 Otto Pfersmann fittingly writes that comparative law offers an 'interprétation conceptuelle différenciée' of the national law in question: 'Le droit comparé comme

what seems self-evident within the national scope worthy of questioning. Examining phenomena that seem entirely negligible to the domestic lawyer allows connections to emerge that remain obscured in national self-descriptions. In this sense, the comparatist might understand foreign law better than the national lawyer. And conversely, the challenging examination of foreign administrative law can affect the perception of one's national legal system. Because the comparatist has moved beyond the domestic horizon, national law also becomes the subject of new and different questions. Comparison enables re-examining one's national legal system from a distance, which, precisely because it refers to the positive law practiced elsewhere, is more intense than other forms of distancing, such as those legal philosophy may provide.

Only the detailed examination of a foreign administrative law, which obliquely considers national law as well, enables the comparatist to engage institutional context and historico-cultural particularity with sufficient intensity. An example that seems familiar at first glance may illustrate this point. As is well known, the *Verwaltungsakt* of German administrative law and the *acte administratif* of French administrative law do not have the same scope of application. While German law only defines an agency's individual decision as an administrative act, legislative decrees are also a form of the *acte administratif* in French law.[73] Comparative analysis cannot content itself with merely describing this contrast. It must ask what explains this difference. In this example, one must take into account that the French conception of administrative-law remedies as an objective review suggests, from a procedural perspective, including the regulations in the *recours pour excès de pouvoir*, while the subjectification of the German law of administrative procedure and of the action for annulment contributed to a concentration on individual decisions. What is more, the strong position of the *Conseil d'État* – which, due to the centralism of French administration, was originally and for a long time the only general administrative court – and its dual function as a court and the government's counselling body meant that the jurisdiction of the French administrative courts has never been

interprétation et comme théorie du droit', Revue internationale de droit comparé (2001), 275, 283 ff.

73 See for instance Michel Fromont, 'Typen staatlichen Verwaltungsrechts in Europa' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum, Band III: Verwaltungsrecht in Europa: Grundlagen* (C. F. Müller 2010), 558.

limited to the traditional domain of adjudication between the state and private parties. By contrast, the German law of administrative procedure followed the model of civil procedure, thus primarily deciding individual legal disputes between citizens and the administration.[74] In addition, unlike French constitutional law, German constitutional law emphasises the regulation's proximity to legislation and therefore its distance from individual administrative decisions.[75] Comparative analysis guides the German viewer's attention to the particularities of French historical and institutional conditions and demonstrates that even the seemingly self-evident German conception of the administrative act and of administrative legal protection is itself the contingent product of a specific historical and institutional development, which requires a more detailed explanation in its own right.

Here, the central task of scholarship in comparative administrative law becomes apparent. Beyond the diverse individual manifestations in positive law, it can reveal structural and functional connections. Only by confronting the diverse historico-political and cultural contexts of the individual administrative legal orders is it possible to develop and test credible hypotheses concerning the crucial structural characteristics and relatively invariant factors of the administrative development in question. By categorising various phenomena evolutionarily, based on certain relationships of similarity, comparative administrative law can elaborate *comparative typologies* and *paradigmatic functional contexts*.[76] Here, the importance of methodological guidelines and warning signs should not be overestimated. Those guidelines are usually either self-evident or extremely problematic. Thus,

74 On this Jean Marie Auby and Michel Fromont, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne* (1971), 455 f.; Michel Fromont, 'Die richterliche Nachprüfung der Verwaltungsakte und Rechtsverordnungen in Deutschland (1964)', in: Fromont (n. 69), 143, 144 ff.; Fromont, *Droit administratif des États européens* (2006), 161 ff. On other aspects, in particular the civil courts' lack of power to incidentally dismiss legislative decrees in France, cf. also Fromont, 'Der französische Staatsrat und sein Werk', DVBl (1978), 89 ff. Recently, a certain tendency to give objective administrative review a stronger dimension of individual protection has emerged in French administrative law as well; summarising this issue Thomas von Danwitz, *Europäisches Verwaltungsrecht* (2008), 60 ff.

75 Emphasised in Jean Rivero, Cours de droit administratif comparé, rédigé d'après les notes et avec l'autorisation de M. Rivero, Les Cours de Droit, Diplôme d'Études Supérieures de Droit Public (1956/1957), 98.

76 Still especially stimulating on this subject are the methodological reflections of Julius Hatschek (cf. on this below, D6); see also Erk Volkmar Heyen, 'Lorenz von Stein und die europäische Rechtsgeschichte' in: Erk Volkmar Heyen (ed.), *Wissenschaft und Recht der Verwaltung seit dem Ancien Régime: Europäische Ansichten* (1984), IX, XVII.

it should be obvious today that it is necessary to culturally contextualise foreign administrative law.[77] By contrast, the oft-cited rule that the comparatist must first prepare and present foreign law in a neutral, positivistic way, in order to then engage in comparative analysis in a separate methodological step, does not stand to reason.[78] This rule either makes a virtue of necessity – if the respective 'country report' is written by a national scholar who cannot compare – or it misjudges the practice of comparative work, in which foreign and national law take turns as the object of attention and productivity consists precisely in making this back and forth explicit in the representation, reflecting on it, and using it to form analytical hypotheses.

3. Legal Transplants in Administrative Law

Today, a specific task of comparative administrative law is dealing with the phenomenon of legal transplants. Administrative law has always been characterised by the lively import and export of entire administrative structures or individual constructions and legal institutions. Here, Roscoe Pound's insight is especially accurate: 'History of a system of law is largely a history of borrowings of legal materials from other legal systems […].'[79] Thus, countries such as Italy, the Netherlands, and later also Belgium imitated the model of the French *Conseil d'État*.[80] The Soviet Union exported elements of its administrative organisation – such as the prosecution's odd role as guardian of lawfulness – into several Eastern European states, where they have survived, in part even after the collapse of Communism, to the present

77 Erk Volkmar Heyen, Kultur und Identität in der europäischen Verwaltungsrechtsvergleichung – mit Blick auf Frankreich und Schweden (2000). For comparative constitutional law: Peter Häberle, Verfassungslehre als Kulturwissenschaft (1982); Peter Häberle, Rechtsvergleichung im Kraftfeld des Verfassungsstaates (1992); Rainer Wahl, 'Verfassungsvergleichung als Kulturvergleichung' (2000) in: Rainer Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (2003), 96 ff.

78 Fundamental criticism of this in Tschentscher (n. 66).

79 Roscoe Pound, cited in Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974), (1993), 22.

80 On the export of the Franch *Conseil d'État* within Europe and to Africa Maxime Letourneur, 'Die Staatsräte (Conseils d'État) als Organe der Verwaltungsrechtsprechung' in: Helmut Külz and Richard Naumann (eds), *Staatsbürger und Staatsgewalt*, vol. 1 (1963), 337 ff.; for the comparison with Italy in detail Yves Mény (ed.), *Il Consiglio di Stato in Francia e in Italia* (1994).

day.[81] Countries like France and Great Britain oriented themselves towards the Swedish ombudsman.[82] The Austrian model of an early codification of administrative procedure influenced Czechoslovakia, Poland, Yugoslavia, and Hungary.[83] In its own way, Switzerland received German administrative law and German administrative jurisdiction.[84] There are many other examples, extending to the current spread of the independent administrative agencies – originating in the United States – in Europe.[85] Nevertheless, the problem of legal transplants, which is now receiving greater attention in general comparative debates[86] and which scholars of history similarly discuss as a problem of the relationship between comparative studies and cultural transfer[87], has been examined only cursorily so far with regard to

81 Herbert Küpper, 'Sozialistische Überreste in den Verfassungen der neuen EU-Mitgliedstaaten im Lichte des gemeinschaftsrechtlichen Homogenitätsgebots', JOR 48 (2007), 203, 240 ff. Cf. on this for Hungary in detail Herbert Küpper, 'Ungarn' in: von Bogdandy, Cassese and Huber (n. 73), 443; on continued effects of real socialism in Hungarian administrative law scholarship also András Jakab, 'Ungarn' in: von Bogdandy, Cassese and Huber (n. 55), 386.

82 On the export of the *ombudsman*, in summary Rivero (n. 47), 626; see in detail Frank Stacey, *Ombudsmen Compared* (1978).

83 Franz Becker, *Das allgemeine Verwaltungsverfahren in Theorie und Gesetzgebung: Eine rechtsvergleichende Untersuchung* (1960), 63 ff. and 79 ff.; there – 146 ff. – also an instructive depiction of the development towards the Federal Administrative Procedure Act of 1946 in the USA; cf. also Alfonso Masucci, 'Das Verwaltungsverfahren in Italien', AöR 121 (1996), 261, 262 f., on the model function of the German codification of administrative procedure in 1976 for the corresponding Italian legislation.

84 Roger Müller, 'Wissenschaftstransfer des deutschen Verwaltungsrechts in die Schweiz' in: Vanessa Duss et al. (eds), *Rechtstransfer in der Geschichte* (2006), 84 ff.

85 On this Johannes Masing, 'Die US-amerikanische Tradition der Regulated Industries und die Herausbildung eines europäischen Regulierungsverwaltungsrechts', Archiv des öffentlichen Rechts 128 (2003), 558 ff.; detailed comparative classification in the various administrative law traditions in England, the USA, France, and Italy in D'Alberti (n. 41).

86 Imre Zajtay, 'Die Rezeption fremder Rechte und die Rechtsvergleichung', Archiv für die civilistische Praxis 56 (1957), 361 ff.; Watson (n. 79); Jean Carbonnier, 'A beau mentir qui vient de loin ou le mythe du législateur étranger (1974)', in: Jean Carbonnier, *Essais sur les Lois* (1979), 191 ff.; William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants', American Journal of Comparative Law 43 (1995), 489 ff.; Legrand, Legal Transplants (n. 58); David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (2001); Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in: Reimann and Zimmermann (n. 7), 441 ff.; Marie Theres Fögen and Gunther Teubner, 'Rechtstransfer', Rechtsgeschichte 7 (2005), 38 ff.; Duss et al. (n. 84).

87 Johannes Paulmann, 'Internationaler Vergleich und interkultureller Transfer. Zwei Forschungsansätze zur europäischen Geschichte des 18. bis 20. Jahrhunderts', His-

administrative law. While there are individual studies that look at foreign influences on their own national administrative law,[88] there has seldom been any attempt to develop systematic categories for such processes.[89]

a) An Inquiry into the Types of Exchange Processes

To conceptualise these exchange processes, it is necessary to make several distinctions. Initially, it makes sense to typologise the *different forms of the respective exchange processes*. Thus, exchange may be based on the dominance of a politically more powerful state, which *imperially exports* its legal order. Examples include the Napoleonic export of French administrative organisation in Europe, the propagation of the Soviet Union's administrative model within the Eastern bloc, or the implementation of the motherlands' administrative law in the colonies. Such imperial exports usually continue to have an impact far beyond the time of the exporting state's direct dominance.[90] But the exchange can also occur *autonomously*, if national law independently adopts a foreign legal institution, for reasons grounded in the individual national state. The adoption of the ombudsman outside of Sweden constitutes one example. Between these two extremes, there are many nuanced forms of the phenomena of exchange, in which the participating states occupy fundamentally *unequal positions* and the *transplant*, for the receiving state, is often the *condition for obtaining advantages* (such as financial funding, acceptance into international organisations).

torische Zeitschrift 267 (1998), 649 ff.; Matthias Middell, 'Kulturtransfer und Historische Komparatistik – Thesen zu ihrem Verhältnis', Comparativ 10 (2000), 7 ff.; Michael Werner and Bénédicte Zimmermann, 'Vergleich, Transfer, Verflechtung. Der Ansatz der Histoire croisée und die Herausforderung des Transnationalen', Geschichte und Gesellschaft 28 (2002), 607 ff.; Michel Espagne, 'Au delà du comparatisme' in: Espagne, *Les Transferts Culturels Franco-Allemands* (1999), 35 ff.

88 Cf. for ex. for Germany: Scheuner (n. 42), 714 ff.; for France: Fabrice Melleray, 'L'imitation de modèles étrangers en droit administratif français', AJDA (2004), 1224 ff.; for Spain: Alfredo Gallego Anabitarte, 'La influencia extranjera en el derecho administrativo espanol desde 1950 a hoy', Revista de Administración Pública 150 (1999), 75 ff.

89 Reflections on this issue, concerning administrative law in particular, in Rivero (n. 49), 619 ff.; Melleray (n. 88), 1224 ff.; cf. for constitutional law also Peter Häberle, 'Theorieelemente eines allgemeinen juristischen Rezeptionsmodells', JuristenZeitung (1992), 1033.

90 On the varied reasons for this (institutional sluggishness, training of local elites in the 'motherland', etc.), in detail Rivero (n. 49), 624 f. Instructive case study in Helmut Janssen, *Die Übertragung von Rechtsvorstellungen auf fremde Kulturen am Beispiel des englischen Kolonialrechts. Ein Beitrag zur Rechtsvergleichung* (2000).

Examples include the export of Western administrative law models to the Eastern European reform states after 1989[91] or the efforts undertaken in particular by the World Bank, in the context of development cooperation, to impel the receiving countries to ensure their administrative structures' greater efficiency and transparency in the name of 'good governance'.[92] Because of the participating states' disparate power and the link to possible advantages, such transplants oscillate between imperial coercion and autonomous import.

Moreover, the legal exchange between states that are integrated in a *multi-level structure* is becoming increasingly significant. Here, the institutions of the higher level often mediate the transplant. For instance, such a *guided horizontal transplant* exists between the individual states within the United States or the European Union Member States.[93] This includes *the import of legal constructions, required or at least prompted by European law, from the law of individual Member States into other Member States.* Thus, the notion of the protection of legitimate expectations ('*Vertrauensschutz*'), developed above all in German law, was imported into French administrative law, to which it was previously foreign, by way of the jurisprudence of the European Court of Justice.[94] In part, such imports go back to the European Court of Justice's legal comparisons, as prescribed or suggested

91 On the associated problems, for instance Paul H. Brietzke, 'Democratization and … Administrative Law', Oklahoma Law Review 52 (1999), 1 ff.

92 Margrit Seckelmann, 'Good Governance. Importe und Re-Importe' in: Duss et al. (n. 84), 108, 117 ff.; there – 120 f. – also observations on the later re-import of the exported legitimacy standards to the countries of origin. In detail on the corresponding concepts of the World Bank Christian Theobald, *Zur Ökonomik des Staates. Good Governance und die Perzeption der Weltbank* (2000); Graham Harrison, *The World Bank and Africa. The construction of governance states* (2004); cf. for the national level also Oliver Meinecke, *Rechtsprojekte in der Entwicklungszusammenarbeit: Theorie und Praxis am Beispiel von GTZ-Projekten zur Konsolidierung des Rechtsstaats in Südafrika und Sambia* (2007).

93 Kristine Kern, *Die Diffusion von Politikinnovationen. Umweltpolitische Innovationen im Mehrebenensystem der USA* (2000), 186 ff., speaks ambigously of a 'vertical transfer' in this respect.

94 In detail on this Neidhardt (n. 12), 119 ff.; cf. also Melleray (n. 88), 1225 f.; for similar examples, see Constance Grewe, 'Les influences du droit allemand des droits fondamentaux sur le droit français: le rôle médiateur de la jurisprudence de la Cour européenne des droits de l'homme', Revue universelle des droits de l'homme (2004), 26 ff.; Margrit Seckelmann, 'Im Labor. Beobachtungen zum Rechtstransfer anhand des Europäischen Verfassungsvertrags', Rechtsgeschichte 8 (2006), 69 ff.; Seckelmann (n. 92), 108 ff.

by European law.[95] *Vertical transplants*, the *export of individual states' legal constructions to the level that encompasses them*, belong in this context as well.[96] Thus, the development of the law concerning employees of international organisations and the European Union is based on the legal concepts of the national civil service legislation,[97] and international environmental law adopted the institution of emissions trade developed in the United States.[98] The procedure before the European Court of Justice, strongly influenced in its development by French law of administrative procedure, is also the product of such a transplant.[99] International and European Union law have drawn on the wealth of models and experience of national law for their regulatory needs.

b) Scope and Objects of Transplants

In addition to the structures of the relevant exchange process, it is vital to consider to what *extent* reception occurs. The spectrum ranges from the reception of a foreign system of administrative organisation and administrative law *in complexu* to merely adopting the individual regulation of a specific problem. Often, the relevant legal institution is deliberately

95 On the uniqueness of this comparative law, see below, E.

96 On this Hans F. Zacher, 'Horizontaler und vertikaler Sozialrechtsvergleich' (1977) in: Zacher, *Abhandlungen zum Sozialrecht* (1993), 376, 389 f. and 404 ff.; Jonathan B. Wiener, 'Something Borrowed For Something Blue: Legal Transplants and the Evolution of Global Environmental Law', Ecology Law Quarterly 27 (2001), 1295 ff.; on such transplants between the states and the federal level in the USA, Virginia Gray, 'Competition, Emulation and Policy Innovation' in: Lawrence Dodd and Calvin Jullson (eds), *New Perspectives on American Politics* (1994), 230, 231.

97 Karl Zemanek, 'Was kann die Vergleichung staatlichen öffentlichen Rechts für das Recht der internationalen Organisationen leisten?', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 453, 465 f.; Georg Ress, 'Die Bedeutung der Rechtsvergleichung für das Recht internationaler Organisationen', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 36 (1976), 227, 247 ff. and 263 ff.

98 On this, with further systematic reflections on 'vertical transfer', Wiener (n. 96), 1295 ff.

99 Ulrich Everling, 'Das Verfahren der Gerichte der EG im Spiegel der verwaltungsgerichtlichen Verfahren der Mitgliedstaaten' in: Rainer Grote et al. (eds), *Die Ordnung der Freiheit - Festschrift für Christian Starck* (2007), 535 ff.; cf. in older scholarship Peter Becker, *Der Einfluß des französischen Verwaltungsrechts auf den Rechtsschutz in den Europäischen Gemeinschaften* (1963).

changed during the transplant and tailored to the receiving legal system.[100] In Great Britain, for instance, Parliament's special position in the review of the administration means that the citizens cannot seize the newly introduced ombudsman directly, as is the case with its Scandinavian model, but can only do so through the Members of Parliament.[101] The *various objects* of the transplant are just as significant. These may involve a certain foreign written rule, which the domestic legislature takes up, or the solution of a problem in foreign jurisprudence, which provides inspiration for domestic courts. Particularly in the field of administrative law, the *import of scholarly systematisations and doctrinal categories* is also very important. In an area of the law in which the legislature often acts less in a codificatory way and jurisprudence occupies an especially strong position, foreign law often only becomes recognisable, exportable, and imitable in the form of scholarly systematisations. The corresponding import of foreign categories and concepts then gradually also changes the perception of national law in the country of import.[102] Thus, the administrative law of Great Britain and the United States often only entered the awareness of domestic observers as to its existence and particularity by being classified using the categories of continental European administrative law.[103]

c) On Legal Scholarship's Appraisal of Transplants

Beyond such a phenomenology of legal transplants in administrative law, the corresponding exchange processes raise fundamental questions. There-

100 Richard Rose, *Lesson-Drawing in Public Policy. A Guide to Learning Across Time and Space* (1993), 29 ff.; cf. also David Dolowitz and David Marsh, 'Who learns what from whom: a review of the policy transfer literature', Political Studies 44 (1996), 343, 349 ff.

101 On this Rivero (n. 49), 631; cf. on this singularity of the British 'Parliamentary Commissioner for Administration' in detail Stacey (n. 82), 122 ff.

102 On this vividly Rivero (n. 49), 629 f.

103 It is no coincidence that the first detailed study of modern English administrative law was written by a foreigner, the German public law scholar Otto Koellreutter (cf. on this below, D6). von Mohl (n. 61), 7 already noted that in English administrative law, 'foreigners oddly enough accomplished by far the best work'. Bell (n. 28), 1260 n. 1, accurately describes it from the current British perspective: 'In many ways, the English distinctive definition of the subject has come out of intense comparison with other jurisdictions.' US administrative law was also first classified by authors with a background in German legal scholarship; cf. on all of this below in detail, D4 and D6.

fore, even if a written rule of law is adopted literally, the question arises whether it does not change its nature as a result of the transplant.[104] From the perspective of systems theory, one may ask whether a transplant does not automatically signify the transgression of a system boundary and so inevitably entails the reconfiguration of the borrowed legal institution in a different context.[105] If one emphasises the fundamental dimension of the relevant national legal culture, then one must question the possibility of a useful legal transplant even more.[106] In the discussion about legal transplants, one thus also encounters the fundamental debate over the ideologies of similarity and of difference,[107] which here takes the shape of a perspective in favor of transplantation and one that is sceptical about it.[108] Often, in any event, the reception will not bring about a convergence of the legal orders concerned but will instead unfold like the well-known children's game of 'telephone'. As it might occur in the case of an organ transplant, the receiving body may more or less accept the new organ, but it may also reject it. The transferred complexes of rules may be encapsulated in the receiving law or become a mere official façade, behind which the older legal structures continue to exist unchanged.[109] In the words of Robert von Mohl 'the mere transfer of forms without their spirit will have no effect,

104 Still very much worth reading in the area of comparative private law is the study by Felix Holldack, *Grenzen der Erkenntnis des ausländischen Rechts* (1919). Using the example of the adoption of rules of the French *Code de Commerce* in Belgium, Holldack showed how legal practice developed in fundamentally different ways, despite agreement on underlying statutes, a common language, and even consideration of the rulings of foreign supreme courts. He based methodologically profound reflections on the particularities of reception processes on these findings (42 ff. and 95 ff.) and emphasised, 'The concept of reception invariably encompasses the concept of creation' (101).

105 Fögen andTeubner (n. 86), 38, 45, thus come to the radical conclusion that there is no such thing as a legal transplant but only 'different border-crossings as part of the resignification of legal rules'.

106 Legrand (n. 86), 111 ff.

107 On this, too, already very instructively Holldack (n. 104), 43 ff.

108 A summary that contrasts the two perspectives in Rose (n. 100), 34 ff. (who opposes 'total fungibility' and 'total blockage' as extreme positions); cf. also Martin de Jong, Virginie Mamadouh and Kostantinos Lalenis, 'Drawing Lessons about Lesson Drawing' in: Martin de Jong, Virginie Mamadouh and Kostantinos Lalenis (eds), *The Theory and Practice of Institutional Transplantation. Experiences with the Transfer of Policy Institutions* (2002), 283; Seckelmann (n. 94), 72 f.

109 General reflections from the social-science perspective in Rudolf Stichweh, 'Transfer in Sozialsystemen: Theoretische Überlegungen' in: Duss et al. (n. 84), 1, 10.

while transplanting an institution into entirely divergent conditions will have a different, perhaps opposing effect.'[110]

One need not be a radical theorist of difference to realise that a legal transplant will practically never mean that a legal institution familiar from the original legal system takes the same form in the receiving legal system. This is an old insight on all forms of reception. Thus, a scholastic axiom says: '*Quidquid recipitur ad modum recipientis recipitur* (Whatever is received is received according to the nature of the recipient)'.[111] A telling example is provided by the import of the German law principle of proportionality into British law. The principle of proportionality entered into British administrative law by way of European law. While British administrative law changed as a result, no standard of review comparable to German doctrine emerged there. The tradition of parliamentary sovereignty and the restrained understanding of the judicial review of the administration meant that the principle of proportionality, following its import into British administrative law, took on different contours there than in German law. The diffusion of a legal institution does not automatically entail convergence; it can also go hand in hand with old or even new divergence.[112] Therefore, the concept of an 'irritation of the law' (*Rechtsirritation*), developed by Gunther Teubner, seems more useful in analysing legal transplants.[113] The transplant of a norm or a legal institution into another legal system functions as an irritation of the receiving law. This in turn triggers unforeseeable reactive processes, changing both the meaning of the imported norm and the internal legal context. At the same time, one must be careful not

110 von Mohl (n. 61), 3 (there with regard to the reception of English state institutions on the European continent).

111 Cf. Thomas von Aquin, *Summa theologica* (1852), vol. 1, Quaestio 75, Articulus V, 4: '*Manifestum est enim quod omne quod recipitur in aliquo, recipitur in eo per modum recipientis* (For it is clear that whatever is received into something is received according to the condition of the recipient).'.

112 Christoph Knill and Florian Becker, 'Divergenz trotz Diffusion? Rechtsvergleichende Aspekte des Verhältnismäßigkeitsprinzips in Deutschland, Großbritannien und der Europäischen Union', Die Verwaltung (2003), 447 ff.; cf. also Carol Harlow, 'Export, Import. The Ebb and Flow of English Public Law', Public Law (2000), 240 ff.; Matthias Ruffert, 'Die Methodik der Verwaltungsrechtswissenschaft in anderen Ländern der Europäischen Union' in: Eberhard Schmidt-Aßmann and Wolfgang Hoffmann-Riem (eds), *Methoden der Verwaltungsrechtswissenschaft* (2004), 165, 199; Seckelmann (n. 108), 78.

113 Gunther Teubner, 'Rechtsirritationen: Zur Koevolution von Rechtsnormen und Produktionsregimes' in: Günter Dux and Franz Welz (eds), *Moral und Recht im Diskurs der Moderne: Zur Legitimation gesellschaftlicher Ordnung* (2001), 351, 353.

to ontologise the legal orders that participate in a legal transplant or to declare them to be *black boxes* for one another. Instead, it is precisely the perception of the ubiquity of the phenomena of exchange that serves as an effective immunisation against the tendency sometimes encountered in comparative law to contrast national legal systems with one another *en bloc*, thus reinforcing national preconceptions and self-images rather than critically examining them.[114] Dealing with the diverse phenomena of export and import makes it possible to find a way out of some of the impasses of traditional comparative law.

D. The History of Comparative Administrative Law

The history of comparative administrative law illustrates the tasks and problems of comparative administrative legal scholarship in various ways. This history is relatively short, as short as the history of administrative law as a legal field and scholarly discipline. With manifold predecessors in canonical law[115] and in territorial organisation since the early modern period,[116] which was repeatedly accompanied by sidelong glances to foreign administrations,[117] the modern history of administrative law only began after the French Revolution,[118] when relationships between the administration and the citizens were brought into the ambit of constitutional law.[119] Throughout Europe, the 19th century was thus the founding era of adminis-

114 On this general danger of comparative law, Espagne (n. 87), 35 ff.

115 Gabriel Le Bras, 'Les origines canoniques du droit administratif' in: *L'évolution du droit public. Études offertes à A. Mestre* (1956), 395 ff.

116 Overviews of this evolution for the various European countries in Erk Volkmar Heyen (ed.), *Geschichte der Verwaltungsrechtswissenschaft in Europa* (1982).

117 References to this in Rivero (n. 75), 14.

118 On the discussion about the existence and significance of administrative law in the *ancien régime*, about continuity and discontinuity, paradigmatically for France, the different perspectives in: Jean-Louis Mestre, *Introduction historique au droit administratif français* (1985); Jean-Louis Mestre, 'Frankreich' in: von Bogdandy, Cassese and Huber (n. 73), mn. 19 ff.; Benoît Plessix, 'Nicolas Delamare ou les fondations du droit administratif français', Droits 38 (2003), 113 ff. (emphasis on the continuity with the *ancient régime*); Grégoire Bigot, *Introduction historique au droit administratif depuis* (1789, 2002), 18 ff. (emphasis on the new start as a consequence of the Revolution).

119 A summary in Michael Stolleis, 'Entwicklungsstufen der Verwaltungsrechtswissenschaft' in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol. 1 (2006), § 2 mn. 4 ff.

trative law,[120] and comparative administrative law came into being at the same time. In this founding phase of administrative law, comparison was not a mere sub-branch of scholarship on administrative law but stood at its centre. In attempting to grasp the particularity of administrative law and to understand its structures, it was natural to look beyond one's own borders and inform oneself comprehensively on the development of administrative law in neighbouring states. Yet after 1900, administrative law scholarship retreated into its national forms. Subsequently, comparison was no longer constitutive for administrative law scholarship but instead became a matter for individual experts. This only changed markedly under the influence of European integration.

I. Early 19th Century and the Dawn of Comparative Public Law in Europe

Very generally speaking, the 'long' 19th century was the true 'period of comparison' (Nietzsche). There were many reasons for this.[121] In legal scholarship, the long era of common law in Europe was ending. National codifications in the national language took their place, and Latin lost its pan-European significance as the language of scholarship and teaching. Consequently, the distance among the national legal systems increased and became more noticeable. Traditional Aristotelianism no longer prevailed in social philosophy, and with it, the long era of a supratemporal and supranational natural law also came to an end. Around 1800, the perceived world also suddenly expanded geographically, as world travellers James Cook, Georg Forster, and Alexander von Humboldt reported. The new perception of time and space clearly demonstrated that one's own world of experience was relative. Like all social phenomena, law was now increasingly historicised and relativised as well. This is what made modern comparative law possible in the first place. Since the law was no longer understood as an expression of supratemporal and immutable principles but as man-made and changeable, it could come into view in its respective reality and be

120 In individual countries, the emergence of administrative law lagged behind due to developmental particularities. This applies particularly to Switzerland, where a cooperative view of the state, the complexities of federalism and the absence of an independent administrative jurisdiction slowed and weakened the development; cf. on this Pierre Tschannen, 'Schweiz' in: von Bogdandy, Cassese and Huber (n. 55), mn. 2 ff.

121 Concise summary in Stolleis (n. 34), 179 ff.; cf. also Léontin-Jean Constantinesco, *Rechtsvergleichung, vol. 1: Einführung in die Rechtsvergleichung* (1971), 88 ff.

perceived in its relativity. Yet from the perspective of the contemporaries, modern comparative law therefore also became necessary. The more the shared, overarching, and binding elements of the past disappeared, the more the need grew to find an empirical substitute for them in comparative work.

In the area of public law, the situation changed dramatically with the French Revolution, or generally speaking with the constitutional movement, which, originating in the newly established United States and France, seized all of Europe from the end of the 18th century on. It manifested itself in a wealth of modern constitutions, in codified constitutional texts that expressed the new anti-corporative order of freedom and equality in varying forms. Ever new constitutional waves – during the Revolution and under the reign of Napoleon, after the Vienna Congress of 1815, after the French July Revolution of 1830, and finally after 1848/49 – produced ever new constitutional texts, all of which were interdependent, linked, and mutually reactive. Paradoxically, this created the conditions for a novel form of comparative public law. For on the one hand, the legal autonomy of the individual states emerged more clearly as a result of the respective written constitutions: now, the law – as artificial as it may have been in the individual case – was state law, national law. On the other hand, this distance was accompanied by a new form of exchange and interweaving, thus practically suggesting comparison. In this new diversity of states, the documents resembled one another in many ways; there were foundational texts and the texts inspired by them, overt and covert borrowings of all kinds and quality. For continental Europe, French law – with its inexhaustible wealth of constitutions after the Revolution – was the obvious point of reference for comparative purposes, while for the French authors, English constitutional law remained the primary reference point for comparative studies.[122] Substantial compilations gave access to the relevant texts, permitting closer examination.[123] In the major debates on the framing of the constitutional

122 Roberto Scarciglia, 'Profili storici dell'insegnamento del diritto pubblico comparato' in: Roberto Scarciglia and Fabio Padovini (eds), *Diritto e Università. Comparazione e formazione del giurista nella prospettiva europea* (2003), 77, 93 ff.

123 The Saxon constitutional scholar Karl Ludwig Heinrich Pölitz, for instance, published a four-volume compendium, frequently consulted at the time, on *The Constitutions of the European States in the Last 25 Years* (1817-1825; 1832-33). On Pölitz, Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2 (1992), 165 f. A similar compilation in France at that time in Pierre Armand Dufau, Jean Baptiste Duvergier and Jean Guadet, *Collection des Constitutions, Chartes Et Lois*

texts, the liberal or conservative interpretation of constitutional monarchy, comparative constitutional law became particularly significant, especially in Germany. Scholarly analyses focused – enthusiastically or critically – mainly on the West, on France and Great Britain.

2. Comparative Administrative Law in Germany

Yet this focus beyond national borders concerned not only constitutional questions but also questions of the slowly emerging administrative law, from poor law and municipal law to public liability law and the judicial review of the administration.[124] Initially, the important authors in Germany were Carl Salomo Zachariae and Robert von Mohl. Together with Karl Josef Anton Mittermaier, Zachariae founded the 'Critical Journal for Foreign Jurisprudence and Legislation' (*Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*),[125] which focused particularly on foreign public law.[126] Towards mid-century, these authors were followed by Rudolf von Gneist, with in-depth comparative studies on English administrative law,[127] and Lorenz von Stein, who dealt specifically with French, English, and German administrative law in the context of a European

Fondamentales Des Peuples De l'Europe et Des Deux Amériques; Avec des Précis Offrant l'Histoire Des Libertés et Des Institutions Politiques Chez les Nations Modernes, 6 vols (1821-1823).

124 Overview in Erk Volkmar Heyen, 'Französisches und englisches Verwaltungsrecht in der deutschen Rechtsvergleichung des 19. Jahrhunderts: Mohl, Stein, Gneist, Mayer, Hatschek', Jahrbuch für europäische Verwaltungsgeschichte 8 (1996), 163 ff.

125 On the significance of this journal Constantinesco (n. 3), 112 f. On Mittermaier's importance as a pioneer of comparative law in the area of criminal law Lars Hendrik Riemer, '"Die Welt regiert sich nicht durch Theorien": Strafrechtsvergleichung und Rechtspolitik in Karl Josef Anton Mittermaiers Konzept einer "praktischen Rechtswissenschaft"' in: Sylvia Kesper-Biermann and Petra Overath (eds), *Die Internationalisierung von Strafrechtswissenschaft und Kriminalpolitik (1870-1930). Deutschland im Vergleich* (2007), 19 ff.

126 Cf., for administrative law, the references in Heyen (n. 124), 164 (n. 3); on the French monitoring of German public law, see Jean-Louis Mestre, 'La connaissance des droits administratifs allemands en France entre 1830 et 1869 à partir de la "Revue étrangère" de Foelix', Jahrbuch für Europäische Verwaltungsgeschichte 2 (1990), 193 ff.

127 Rudolf Gneist, *Das heutige englische Verfassungs- und Verwaltungsrecht*, 2 vols (1857/1860).

comparative theory of administration[128] and also examined specific areas such as water law in historical and comparative perspective.[129] In the German-speaking space, the view beyond state borders – for instance from Austria to Germany[130] – was self-evident in any event. German scholars often sought out Western models, be it in France or in England, to develop their own administration.[131] Thus, in 1857, von Gneist explained his interest in English administrative law – which he compared to a 'path through a jungle' – as follows: 'In any case, the universality of the German spirit loves constant comparisons with foreign nations. Now that the French state is no longer the exemplary model, England has come to the fore more strongly than ever for us.'[132] The English tradition of local self-government, whose image von Gneist borussified in an idiosyncratic way, was supposed to guide the Prussian-German administration's modernisation under the rule of law.[133] Comparative work was similarly important at the time in France, where administrative law authors from Anselme Batbie to Edouard Laferrière quite naturally discussed the administrative law systems of the

128 Lorenz Stein, *Die Verwaltungslehre*, 7 vols (1865-1868); Stein, *Handbuch der Verwaltungslehre und des Verwaltungsrechts mit Vergleichung der Literatur und Gesetzgebung von Frankreich, England und Deutschland* (1870).

129 Lorenz Stein, 'Die Wasserrechts-Lehre', Österreichische Vierteljahresschrift für Rechts- und Staatswissenschaft 18 (1866), 227 ff.

130 Wilhelm Brauneder, 'Formen und Tragweite des deutschen Einflusses auf die österreichische Verwaltungsrechtswissenschaft 1850-1914' in: Heyen (n. 76), 249 ff.

131 Taking stock for England: Wolfgang Pöggeler, *Die deutsche Wissenschaft vom englischen Staatsrecht. Ein Beitrag zur Rezeptions- und Wissenschaftsgeschichte 1748-1914* (1995).

132 Rudolf Gneist, *Das heutige englische Verfassungs- und Verwaltungsrecht*, vol. 1 (1857), V and VI ('*Weg durch einen Urwald*' [path through a jungle]). Very much worth reading in this respect also the preface to the third edition, published under a different title: Rudolf Gneist, *Das Englische Verwaltungsrecht der Gegenwart in Vergleichung mit den Deutschen Verwaltungssystemen*, vol. 2 (1884), III ff.: 'Much came together here [in England] that invited imitation' (III). Vividly on this Julius Hatschek, '49 Artikel: Gneist', ADB (1904), 403, 408: 'Almost all of these men have the peculiarity of turning their attention to England when adversity is the greatest at home and there is an impending or actual crisis of the domestic state. With such politically biased views, they consider the English model, projecting those facts onto English law that they regard as necessary for further domestic state development. G. [Gneist] cannot be absolved of this error either.'.

133 On von Gneist's pioneering achievements in comparative administrative law, in detail Christoph Schönberger, 'Die altenglische Selbstverwaltung als Vorbild für den preußischen Rechtsstaat: Rudolf von Gneist (1816-1895)' in: *Festschrift zum zweihundertjährigen Bestehen der Berliner Juristenfakultät* (2009).

most important European states in detail in their major treatises on French administrative law.[134]

There were, however, hardly any explicit discussions of the methods of comparative administrative law at the time. Only Lorenz von Stein dedicated an essay entirely to this subject. He argued that the possibility of comparative law was founded on the commonality of the regulated conditions of life, which then constituted the basis for an analysis, focusing primarily on legal history, of the individual national developments.[135] Such an explicit reflection on methods was rare also because a comparative approach was, at the time, the 'natural' method of the slowly emerging scholarship on administrative law.[136] There were pragmatic as well as fundamental reasons for this:[137] the need for new scholarly work on administrative law to justify itself; a policy interest in discovering solutions for analogous problems;[138] and not least the individual construction of national administrative law, delimited from other nations. Internationalism and nationalism were dialectically intertwined; the external focus could never be separated from the

134 Anselme Batbie, *Traité théorique et pratique de droit public et administratif contenant l'examen de la doctrine et de la jurisprudence; la comparaison de notre législation avec les lois politiques et administratives de l'Angleterre, des États-Unis, de la Belgique, de la Hollande, des principaux États de l'Allemagne, et de l'Espagne, la comparaison de nos institutions actuelles avec celles de la France avant 1789 et des notions sur les sciences auxiliaires de l'administration, l'économie politique et la statistique*, 8 vols (1862-1868); Edouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, 2 vols (1887/1888); on this Jean Rivero, 'Droit administratif français et droits administratifs étrangers' (1969) in: André de Laubadère et al. (eds), *Pages de Doctrine*, vol. 2 (1980), 475, 477. Thus, there are long passages on the most important European administrative laws as well as on emerging US administrative law in Laferrière, the true founding father of modern French administrative law (in detail on him Pascale Gonod, *Édouard Laferrière, un juriste au service de la République* (1997)), in which the author remarks on the impact of French administrative law with satisfaction: Traité de la Juridiction Administrative et des Recours Contentieux, vol. 1 (1896), Preface, V: '[…] les réformes accomplies à l'étranger semblent le plus souvent s'inspirer des idées françaises'.

135 Lorenz Stein, 'Über die Aufgabe der vergleichenden Rechtswissenschaft, mit besonderer Beziehung auf das Wasserrecht', Österreichische Vierteljahresschrift für Rechts- und Staatswissenschaft 7 (1861), 233, 235 ff.

136 Thus accurately Bernd Wieser and Bernd Kante, 'Vergleichendes Verfassungs- und Verwaltungsrecht in Österreich von 1848 bis 1918 – Eine Bibliographie', ZÖR 57 (2002), 251, 286.

137 On this, Heyen (n. 124), 163 f. and 188 f.

138 This notably applied also to areas of specialised administrative law, such as mining law or social law, which were subject to rapid change as a result of technical or social development: Wieser and Kante (n. 136), 287.

internal focus, and the perception of the other was also – and often even primarily – self-perception.

A peculiarity of German comparative public law was *inner-German comparative law*, involving the constitutional systems of the several German states. Scholarship developed a common German *constitutional law*, whose legal validity and substance however, remained unclear and disputed.[139] Comparison was used to determine typical common features of state constitutional law and qualify them as legally binding. In this scholarly endeavour, there was often still a late echo of natural law rationality. Until the foundation of the *Reich*, this pan-German constitutional law served as a shared national and constitutional bond between the individual German states. Similar tendencies also existed at the time in the developing scholarship on *administrative* law.[140] Thus, the Swabian senior civil servant Friedrich Franz Mayer attempted to develop a pan-German administrative law in 1862 by comparing the administrative law systems in the individual German states. While doing so, he also considered French administrative law, which had greatly influenced Southern Germany.[141] Mayer held that comparison allowed the contours of the individual states' legal institutions to emerge more clearly. At the same time, he thought that the comparative approach would help to find policy role models for countries with 'less

139 Manfred Friedrich, 'Die Erarbeitung eines allgemeinen deutschen Staatsrechts seit der Mitte des 18. Jahrhunderts', JöR new version 34 (1985), 1 ff.; Carl Schmitt, 'Das "Allgemeine Deutsche Staatsrecht" als Beispiel rechtswissenschaftlicher Systembildung', ZgesStW 100 (1940), 5 ff.; in detail on this issue now Carsten Kremer, *Die Willensmacht des Staates. Die gemeindeutsche Staatsrechtswissenschaft des Carl Friedrich von Gerber* (2008), 71 ff.

140 A similar situation arose later in Poland, after the country regained sovereign autonomy in 1918, when comparative law and the harmonisation of law in light of the continued validity of Russian, Prussian, Austrian, and Hungarian law in different parts of the country became a domestic task: Irena Lipowicz, 'Rechtsvergleichende Perspektiven der Verwaltungsrechtswissenschaft', Die Verwaltung, suppl. 2 (1999), 155, 156 f.; on Polish development in detail Andrzej Wróbel, 'Polen' in: von Bogdandy, Cassese and Huber (n. 73), mn. 41 ff.

141 Friedrich Franz Mayer, *Grundsätze des Verwaltungs-Rechts mit besonderer Rücksicht auf gemeinsames deutsches Recht, sowie auf neuere Gesetzgebung und bemerkenswerthe Entscheidungen der obersten Behörden zunächst der Königreiche Preußen, Baiern und Württemberg* (1862); on Mayer's method of comparative administrative law: Bodo Dennewitz, *Die Systeme des Verwaltungsrechts. Ein Beitrag zur Geschichte der modernen Verwaltungsrechtswissenschaft* (1948), 67 ff.; Toshiyuki Ishikawa, *Friedrich Franz von Mayer. Begründer der juristischen Methode im deutschen Verwaltungsrecht* (1992), 116 ff.; Christian Starck, 'Rechtsvergleichung im öffentlichen Recht', JuristenZeitung 21 (1997), 1021, 1022.

developed positive law'.[142] It was precisely comparative law that called for scholarly abstraction and the development of general fundamental legal concepts and legal institutions.[143] Unlike French administrative law, which developed from administrative jurisprudence in the 19th century, administrative law in Germany emerged precisely as a product of scholarship. For scholarly generalisations unified German administrative law beyond the diversity of the individual states' administrative legislations.[144] The approach practiced in 19th century pan-German constitutional law stressed what was unifying, harmonisable, or 'progressive' vis-à-vis distinct particularities and is reminiscent of certain present-day efforts to establish a pan-European administrative law.

3. French Administrative Law: Archetype but not Prototype

For the emerging administrative law of the European states, France played the same role that Great Britain played for constitutional law. While post-revolutionary scholarship on constitutional law essentially came into being by grappling with British parliamentarianism, the corresponding scholarship on administrative law developed above all in dealing with French administrative law. Just as the British constitution was understood as a natural model of the liberal constitutional state as a whole, French administrative law was also considered the matrix of administrative law as such, demanding comparative treatment. Comparative administrative law in the 19th century therefore primarily meant a 'passive rejection or active

142 Mayer (n. 141), 49, argues that a considerable economic gain arises 'when 1. the particular modifications of a legal institution in the individual country emerge more clearly and distinctly when compared with the developments of the same institution in other countries; 2. the detailed positive development of a legal institution in individual countries often presents itself as corresponding to the concept of the latter, and elsewhere, where positive law is less developed, the legal conclusions to be drawn from this can be deduced with even greater certainty, while it is possible, at any rate, to obtain guiding principles for the further positive development of the law.'

143 Accurately on this Dennewitz (n. 141), 67 f.

144 Contrasted in Rivero (n. 75), 82 f. To a certain extent, due to the strong dominance of *Länder* law in many matters of administrative law, such as communal or police law, this situation continues to the present day also in the Federal Republic. Cf. on this Beinhardt (n. 33), 151.

adoption of the French system'.[145] Yet there is a certain paradox in the special position of France. For French administrative law remained singular within continental Europe in many of its specific traits. Its genesis required a centralised state with authoritarian features. French administrative law freed the administration and administrative law completely from private law – including liability and contract law – in a way that no other European country has matched to the present day.[146] The reasons for this lie in the particularities of France's development after 1789. In belated reaction to the various conflicts between the monarchical centralised administration and the powerful courts (*parlements*) in the *Ancien Régime*,[147] the perception prevailed during the Revolution that the separation of powers forbid the (ordinary) courts from interfering in the area of the administration.[148] This created the conditions for the *Conseil d'État*, established by Napoleon in 1799, to answer all legal questions concerning the administration without interference from the ordinary courts. Thus, the French *droit administratif* was able to close the administration off from private law and ordinary courts in a singular way. In this sense, French administrative law served more as an archetype than as a prototype for the administrative systems of other European states[149] much as the British Constitution also remained an inimitable singular specimen despite its many foreign admirers.

145 Accurately on this Strömholm (n. 16), 616.

146 On this Rivero (n. 17), 395 ff. Hence, it is certainly paradoxical that this administrative legal system, so deeply rooted in French national history – and moreover based on the casuistry of judge-made law –, could become a successful export product: Yves Gaudemet, *L'exportation du droit administratif français. Brèves remarques en forme de paradoxe, Mélanges Philippe Ardant* (1999), 431 ff.

147 On the conflicts between the *parlements* and the monarchical bureaucracy in the *ancient régime* before the Revolution, in detail Christoph Schönberger, 'Frankreichs Parlamente im späten Ancien Régime. Gerichtshöfe zwischen Verfassungsgerichtsbarkeit, ständischer Opposition und moderner Nationalrepräsentation' in: *Selbstverwaltung in der Geschichte Europas in Mittelalter und Neuzeit.* Tagung der Vereinigung für Verfassungsgeschichte in Hofgeismar vom 10. bis 12. März 2008 (2009).

148 The negative demarcation from the *parlements*' previous position was also expressed in the summarising description of the new, strongly reduced role of the courts in title III, chapter V, article 3 of the constitution from September 2, 1791: '*Les tribunaux ne peuvent, ni s'immiscer dans l'exercice du Pouvoir legislatif, ou suspendre l'exécution des lois, ni entreprendre sur les fonctions administratives, ou citer devant eux les administrateurs pour raison de leurs fonctions.*' On the revolutionary reorganisation of the judiciary, in detail Jean-Pierre Royer, *Histoire de la justice en France* (2001), 273 ff.

149 Jean Rivero, 'Droit administratif français et méthode comparative', Revista de la facultad de derecho y ciencias sociales 23 (1975), 375, 380: '*Non pas prototype, reproduit*

France's archetypal role was especially manifested in the work of Otto Mayer, who, at the end of the 19th century, developed his idea of German administrative law by engaging with the French administrative law created by the *Conseil d'État*.[150] In France's administrative law, he saw 'a wonderful work of art, equal to Roman private law.'[151] Mayer still had to deal with the numerous administrative legislations of the individual German *Länder*, where remained, despite the growing involvement in the *Reich* context, the bulk of administrative activity. Mayer's German administrative law was certainly a 'general German administrative law of the *Länder*' in the sense of an abstracting synthesis.[152] Yet he obtained his insights hardly from traditional inner-German comparativism but rather from looking outside the country, at the self-contained administrative law of centralised France, which was perceived as exemplary:[153]

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en série, mais bien plutôt archétype, expression extrême d'une certaine tendance, et prestigieux parce que solitaire.'.

150 Otto Mayer, *Theorie des französischen Verwaltungsrechts* (1886); Mayer, *Das deutsche Verwaltungsrecht*, vol. 1 (1895); on this Erk Volkmar Heyen, 'Otto Mayer: Frankreich und das Deutsche Reich', Der Staat 19 (1980), 444 ff.; Alfons Hueber, *Otto Mayer – Die 'juristische Methode' im Verwaltungsrecht* (1982), 77 ff. and 148 ff.; Francine Graff, *Otto Mayer et la théorie du droit administratif français en Allemagne, Thèse Strasbourg III* (1989).

151 Otto Mayer, 'Besprechung zu: Gaston Jèze, Das Verwaltungsrecht der Französischen Republik (1913)', AöR 32 (1914), 275, 277.

152 Ottmar Bühler, 'Otto Mayers Deutsches Verwaltungsrecht (Zweite Auflage). Seine Bedeutung für die Praxis und die kommende Zeit der Verwaltungsreform', VerwArch 27 (1919), 283, 306, with reference to the tradition of general German constitutional law before the founding of the *Reich*. In *ibid*., 286, Bühler also mentions that Mayer had presented a 'theory of German administrative law', insofar as his work 'abstracted, to a certain extent, the individual *Länder* legislations, which had been mainly decisive for administrative law to date, thus so to speak offering an average administrative law for the German states, which did not apply anywhere exactly as written but rather everywhere only with strong modifications and additions'; cf. on this also Dennewitz (n. 141), 125 f.

153 Friedrich Franz Mayer had already developed his pan-German administrative law a generation before, not only by means of inner-German comparative law but also by orienting himself towards the French model. He argued that of the non-German countries, 'despite certain excesses, French administrative law is the eminent choice for the development of the modern state, due to its clarity and suitability as well as its scholarly attributes in particular': Mayer (n. 141), 49 (n. 5), with reference to Gabriel Dufour; cf. on this in detail Dennewitz (n. 141), 69 f. and 122. On Otto Mayer's unconventional continuation of the comparative-law tradition of German common law, Schmitt (n. 139), 19 ff. In the preface to his *German Administrative Law* (*Deutsches Verwaltungsrecht*), vol. 1 (1895), VII, Mayer writes, 'There [in France] I was confronted with the unitary state with entirely national law. Here,

> 'French legal development – apart from the fact that it is always somewhat advanced temporally and the past is always easier to understand than the present – is especially instructive for us already because it declares and executes all new ideas of public law with a certain brusqueness, corresponding to the French nature. To put it figuratively, we always find them there in their purest forms.'[154]

Mayer's primary interest was not in a truly comparative legal view of each country's particularities, which, after all, he wanted to overcome for the German side. Rather, he undertook a holistic scholarly project, which was guided by the French example[155] but at the same time entirely autonomous in its conceptualisation.[156] Moreover, his work pertained less to the administrative law of the contemporary Third Republic than to the more authoritarian one of the preceding Second Empire of Napoleon III.[157]

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the variety of the *Länder* laws, in turn to a varying degree subject to the influence of foreign, that is, French law. There, a new law from a single mould, as it emerged from the smelting furnace of the Revolution. Here, gradual transitions, pervaded by immobile remnants of the old. There, based on these conditions, a well-established scholarship, with astounding homogeneity among the scholars. I was able to write very honestly, at the time, that I am only a reporter describing the French lawyers' deeds. All legal concepts were readily available and complete […] Who could claim that our German scholarship of administrative law has even come close to a similar conclusion?'.

154 Mayer, *Das deutsche Verwaltungsrecht* (n. 150) 55 ('French' italicised in the original).

155 With respectful criticism concerning this issue, already Erich Kaufmann, 'Otto Mayer', Verwaltungsarchiv 30 (1925), 377, 391 f.

156 Very nuanced on this Scheuner (n. 142), 718 f., with the question 'whether O. Mayer really brought the two legal orders closer together, or whether the transposition into German thought and the coining of new concepts did not greatly overshadow his role as a mediator' (719). Thus, Mayer was already criticised by his contemporaries, on the one hand for allegedly falsifying German law by reconstructing it according to French categories (thus for instance Erich Kaufmann [n. 155]). On the other hand, however, he was also reproached with misrepresenting French administrative law by describing it with his own conceptual apparatus, one indebted to a certain movement in German legal scholarship (Edgar Loening, 'Die konstruktive Methode auf dem Gebiete des Verwaltungsrechtes', Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich 11 (1887), 541, 547 f.).

157 Mayer's book on French administrative law, published in 1886, had set itself the initial task of explaining the law still in force in the area to the judges and civil servants in the *Reichsland* Alsace-Lorraine, and already for this reason, it referred expressly only to French administrative law as it stood in 1870; cf. Mayer, *Theorie* (n. 150), Preface, VII f. Mayer's views were thus defined by French scholarship on administrative law before its true modern refounder Laferrière; cf. on this Rivero (n. 75), 83 f.

In view of the influence that France's administrative law had exercised throughout the entire 19th century and considering the parallels in the structure of markedly bureaucratic states, Mayer's orientation towards the French model had a stronger foundation in reality than the Anglophilia of von Gneist a generation before.[158] From Otto Mayer to Fritz Fleiner, the comparative approach remained characteristic of general administrative law in particular. For as a legal area of general, not codified principles, it especially depended on that mixture of induction and abstraction from various administrative law systems that characterises comparative law.[159]

4. Anglo-American Administrative Law at the Margins

Initially, Great Britain and the United States were hardly included in these comparative efforts. While von Gneist had still still been able to declare the older English administrative law the model for Prussian-German development mid-century, the differences between continental Europe and the common law tradition seemed unbridgeable soon after, especially in the field of administrative law. However, in the United States, Frank J. Goodnow had already published a book explicitly dedicated to comparative administrative law in 1893. His foundational volume *Comparative Administrative Law* examined the administrative law systems of Great Britain, the United States, France, and Germany, with the explicit goal of employing comparison to obtain categories for the young North American administrative law.[160] It played a crucial role that Goodnow, like other pioneers of

158 Accurate contrasting in Heinrich Heffter, *Die deutsche Selbstverwaltung im 19. Jahrhundert* (1950), 744. Otto Mayer emphasises this as well: 'French administrative law should also be able to claim our more general interest. Numerous legal concepts that have now become the common domain of German scholarship originally flourished on its grounds, and our legislations, namely those of Southern Germany, readily derived many a legal institution from its contexts' ([n. 157], preface, VIII).

159 Wieser and Kante (n. 136), 286 f. An example of a corresponding monograph based on a comparative approach from the time before the First World War is the study by Rudolf von Laun, *Das freie Ermessen und seine Grenzen* (1910).

160 Frank J. Goodnow, *Comparative Administrative Law: An Analysis of the Administrative Systems National and Local of the United States, England, France and Germany*, 2 vols (1893); on the significance of this pioneering study, which was long underappreciated Lepsius (n. 70), 265 ff.; Sabino Cassese, 'Lo studio comparato del diritto amministrativo', Rivista trimestrale di diritto pubblico (1989), 678, 680; D'Alberti (n. 41), 99 ff.

American administrative law, had a German academic background and was influenced by German models.[161] His study had a historical and institutional focus and primarily treated the development and contemporary form of each administrative organisation at the national and local level.

By contrast, comparative law in Great Britain faced the great obstacle that Albert Venn Dicey, the most important legal scholar of Victorian England, stylised Great Britain as a country without administrative law. Dicey pointedly contrasted Great Britain and France. He viewed France as the country of an authoritarian special regime of public power called administrative law, while Great Britain appeared as the country of freedom, parliamentarism, and common law, which was adverse to a law of privilege.[162] In Dicey's view, the lack of an independent administrative jurisdiction in Great Britain – historically rooted in the Parliament putting an end to the British monarchy's tendencies towards bureaucratisation in the Glorious Revolution of 1688[163] – expressed its liberal constitution as a country without *droit administratif* in the French sense. Already prior to this, Anglophile French liberals had similarly criticised French administrative law. Alexis de Tocqueville, for instance, held that French administrative law inclined towards an arbitrary and authoritarian understanding of the state, which he contrasted with an idealised English situation, in which, according to his interpretation, the administration did not possess any special rights and was subordinated to the jurisdiction of the ordinary courts. At the end of the 19th century, Dicey adopted the contrast to France, which French liberals had outlined mid-century, as an English

161 On this Lepsius (n. 70), 61 ff. and 251 ff.; Thomas Henne, 'Kontinentaleuropäische Wurzeln des amerikanischen Verwaltungsrechts', Ius Commune 25 (1998), 367 ff.

162 Albert V. Dicey, *Letters introductory to the law of the constitution* (1885); after that in many editions with the title: *Introduction to the Study of the Law of the Constitution*. In detail on this Sabino Cassese, 'Albert Venn Dicey e il diritto amministrativo', Quaderni Fiorentini per la storia del pensiero giuridico moderno 19 (1990), 5 ff., who also analyses the nuancing of Dicey's position in later editions of his book; Spyridon Flogaïtis, *Administrative Law et Droit Administratif* (1986), 33 ff.; Oliver Lepsius, 'Der britische Verfassungswandel als Erkenntnisproblem. Zur andauernden Bedeutung von A. V. Dicey im britischen Verfassungsrecht', JöR new version 57 (2009), 559, 579 ff.; Oliver Lepsius, 'Die Begründung der Verfassungsrechtswissenschaft in Großbritannien durch A. V. Dicey', ZNR 29 (2007), 47 ff.

163 Providing a summary of this issue, John David Bowden Mitchell, 'The Causes and Effects of the Absence of a System of Public Law in the United Kingdom', Public Law (1965), 95 ff.

self-portrait.[164] In doing so, he ignored the *Conseil d'État*'s fundamental liberalisation of French administrative law in the first decades of the Third Republic.[165] His description obscured the fact that contemporary England also had an administrative law in the sense of the administration's specific rules and privileges and that the administration was not simply, like a private person, subject to general common law.[166] In focusing on the lack of a separate administrative jurisdiction and independent public liability law in Great Britain, Dicey ignored the British administration's specific substantive power to act.[167] Continental European scholars later adopted Dicey's 'myth of an administration without administrative law' (Cassese) for some time,[168] thus initially thwarting a more differentiated engagement with the particularities of administrative law in Great Britain. As a result, emerging British administrative law, which gained clearer contours at the end of the 19th century with the transition to an intervention state,[169] hardly

164 Alexis de Tocqueville, 'Rapport fait à l'Académie des Sciences Morales et Politiques sur le livre de M. Macarel, intitulé "Cours de droit administrative" (1846)' in: Alexis de Tocqueville, *Oeuvres Complètes, vol. 16: Mélanges* (1989), 185, 191 ff. On Tocqueville's criticism of French administrative law and Dicey's reception of Tocqueville, in detail Cassese (n. 162166), 45 ff.; cf. also Françoise Mélonio, *Tocqueville et les Français* (1993), 198 ff.; Lucien Jaume, *Tocqueville. Les sources aristocratiques de la liberté* (2008), 369 ff.

165 On this Rivero (n. 75), 158; Mario Chiti, 'Diritto amministrativo comparato' in: Rodolfo Sacco (ed.), *Digesto delle Discipline Pubblicistiche*, vol. 5 (1990), 206, 209.

166 On this Sabino Cassese, 'Il problema della convergenza di diritti amministrativi: verso un modello amministrativo europeo', Rivista italiana di diritto pubblico comunitario (1992), 23, 26 ff., who emphasises that Dicey fails to mention illiberal traits of British law at the time such as the generous exemption from liability of the Crown and its broadly conceived servants.

167 Detailed critical analysis in Rivero (n. 75), 151 ff.

168 One example in Josef Redlich, *Englische Lokalverwaltung. Darstellung der inneren Verwaltung Englands in ihrer geschichtlichen Entwicklung und gegenwärtigen Gestalt* (1901), 470 ff. and 723 ff.; contemporary criticism of this already in Ernst Schuster, 'Zum Stand der Lehre von der englischen Lokalverwaltung', AöR 19 (1905) 169, 182 f. On the Continental reception of Dicey overall, in detail Sabino Cassese, 'La Ricezione di Dicey in Italia e in Francia. Contributo allo studio del mito dell'amministrazione senza diritto amministrativo', Materiali per una storia della cultura giuridica 25 (1995), 107 ff.

169 Cf. on this Martin Loughlin, 'Großbritannien' in: von Bogdandy, Cassese and Huber (n.73), mn. 55 ff.; Thomas Poole, 'Großbritannien (England und Wales)' in: von Bogdandy, Cassese and Huber (n. 55), mn. 8 ff.

received any attention.[170] This only began to change noticeably during the period between the World Wars, when the serious comparative engagement with the administrative law of the common law world provided numerous insights into the uniqueness of the Continental European administrative law traditions.[171] It is no coincidence that to this day, general studies on comparative administrative law often begin by comparing the ideal types of France and Great Britain.[172]

5. Legal Positivism and the Fading of Comparative Administrative Law

With the rise of legal positivism towards the end of the second third of the 19th century, the comparative engagement with the legal systems of other states initially faded into the background in many European countries, especially in Germany and Italy. Non-binding foreign law was legally irrelevant to constitutional positivism, which also had little use for comparative law, because it held that legal concepts were scientifically productive in their own right.[173] While a comparative approach had still been self-evident for Gneist or Stein a few decades earlier – whose ideas had also been shaped more strongly by politics, history and empirical analyses –, comparatism now often came to be seen as an expendable complement. In the age of legal

170 But already shortly after the turn of the century, Julius Hatschek and above all Otto Koellreutter examined English administrative law from a novel perspective; cf. on this in detail below, D6.

171 Cf. for ex. James W. Garner, 'La conception anglo-américaine du droit administratif' in: *Mélanges Maurice Hauriou* (1929), 335 ff.; Bernard Schwartz, *French Administrative Law and the Common-Law World* (1954).

172 Cf. for ex. Flogaïtis (n. 162), 33 ff.; D'Alberti (n. 41); Cassese (n. 33); on the history of administrations: Erk Volkmar Heyen (ed.), *Verwaltung und Verwaltungsrecht in Frankreich und England (18./19. Jh.)*, *Jahrbuch für Europäische Verwaltungsgeschichte* (1996); with greater emphasis on political science: Françoise Dreyfus, *L'invention de la bureaucratie. Servir l'Etat en France, en Grande-Bretagne et aux Etats-Unis (XVIIIe-XXe siècle)*, (2000). On the contrasting of the 'two models' France and Great Britain, cf. also Sabino Cassese, 'Die Entfaltung des Verwaltungsstaates in Europa' in: von Bogdandy, Cassese and Huber (n. 73), mn. 8 ff.; Fromont (n. 73), mn. 23 ff. and 61 ff.

173 For instance, Ernst Rudolf Bierling expressly held that comparative law was dispensable in developing a formal general theory of law: *Juristische Prinzipienlehre*, vol. 1 (1894), 32 ff.; in the Weimar discussion, Hans Nawiasky still argued that one should not 'draw conclusions from historically distant or nationally separate conditions of law for the interpretation of German positive law': 'Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung', VVDStRL 3 (1927), 25, 26 f.

positivism, the objective was the construction of an autonomous scholarly system of national administrative law. For Germany and Italy, moreover, this task coincided with a 'late' process of nation-building, so that administrative law had to contribute to a huge effort of national integration. The constant expansion and differentiation of administrative law legislation and jurisprudence also contributed to this fading of comparative administrative law. Throughout the 19th century, comparative law had occupied a central position in the attempt to conceptualise and develop administrative law as an independent area of law. The constant confrontation with other administrative legal systems, be they similar or entirely different, had enabled the academic discipline of administrative law to emerge in the first place. As the nation-states consolidated their administrative legal systems at the end of the 19th century, comparative law lost its prior status as the natural foundation for a theory of administrative law.[174] Inside academia, too, comparative administrative law scholarship retreated into a niche for a small number of experts. It is a sign of this increasing self-isolation that Otto Mayer, who had still dedicated an appendix on 'international and federal administrative law' to the phenomenon of the plurality of state administrative law systems in the first edition of his textbook in 1895,[175] simply omitted this segment in later editions.[176]

The general debate on comparative law, shaped strongly by private law, had in any event hardly acknowledged comparative administrative law yet at the time. In the liberal era, private law and constitutional law seemed to be the natural general legal disciplines, while there was little awareness of the law of bureaucratic state intervention.[177] Thus, at the Parisian World Congress of 1900, which was fundamental for modern comparative law, some presentations were dedicated to comparative constitutional law, but none focused on comparative approaches to administrative law. Only Ferdinand Larnaude discussed comparative administrative law in his

174 Chiti (n. 165), 207 f.

175 Mayer (n. 154), vol. 1, appendix: § 62. Internationales und bundesstaatliches Verwaltungsrecht, 453 ff.

176 Positioning this process in the contemporary discussion, in which international administrative law, too, narrowed to become a system of purely national rules on conflict of laws, above all in German and Italian scholarship: Hartwig Bülck, 'Zur Dogmengeschichte des europäischen Verwaltungsrechts' in: Göttinger Arbeitskreis (ed.), *Recht im Dienste der Menschenwürde – Festschrift für Herbert Kraus* (1964), 29, 55 ff.

177 Vividly on this Rivero (n. 75), 15; Strömholm (n. 16), 615 f.

presentation on legislation and comparative public law.[178] He emphasised that contrasting national law with foreign law offered the advantage of clarifying theoretical issues. At the same time, he urged caution with legal imports, because transplants into foreign soil were based on certain requirements and therefore very demanding. But at the same time, he pointed out that novel legal developments in foreign administrative law often expressed socio-economic processes of change that would soon be confronted domestically as well. In such cases, carefully considered comparison could, in his view, help to prepare useful legal changes.

6. Early 20th Century Comparative Administrative Law

Yet even when legal positivism predominated – although it never absolutely prevailed –, the traditional comparative interest in foreign administrative law never disappeared entirely.[179] Thus, when legal positivism as a theoretical system proved to be less and less convincing around 1900, the desire for alternative approaches also expressed itself in the rediscovery of comparative public law.[180] Josef Redlich, for instance, emphasised in 1903 that 'even for the scholarship of positive German constitutional law, this creation of constitutional concepts by legal doctrine alone did not entirely suffice' and posed the question whether 'the juridical ascertainment of the legal material must not only pay insistent attention to the historico-political character of state legal institutions but also recognise foreign constitutional conceptions and principles, which the Germans have received from the outside

178 Ferdinand Larnaude, 'Législation comparée et droit public' in: *Congrès International de Droit Comparé, tenu à Paris du 31 juillet au 4 août 1900, Procès-Verbaux des Séances et Documents*, vol. 1 (1905), 364 ff.

179 Cf. for ex. Erk Volkmar Heyen, 'Ausländisches Verwaltungsrecht im "Archiv für Öffentliches Recht" und in der "Revue du droit public" vor dem Ersten Weltkrieg', Jahrbuch für Europäische Verwaltungsgeschichte 2 (1990), 213 ff; Wieser and Kante (n. 136), 263 ff. and 273 ff.; on the intensity of scholarly exchange between Germany and France in the pre-war period, cf. in general: Olivier Beaud and Erk Volkmar Heyen (eds), *Eine deutsch-französische Rechtswissenschaft?* (1999) (for comparative law, see there in particular the contributions of Gérard Marcou and Erk Volkmar Heyen).

180 On this for Germany, using the example of Julius Hatschek, Fulco Lanchester, *Alle origini di Weimar. Il dibattito costituzionalistico tedesco tra il 1900 et il 1918* (1985), 97 ff.; similarly for Italy Lanchester, 'Il metodo nel diritto costituzionale comparato: Luigi Rossi e i suoi successori', Rivista trimestrale di diritto pubblico 63 (1993), 959, 965 ff.

both in the area of the political development of ideas and in the field of law-making'.[181] Nonetheless, comparative law now increasingly became a matter for individual country experts.

In the area of comparative administrative law, it was above all the engagement with British administrative law that offered new possibilities. In Germany, Julius Hatschek and Otto Koellreutter no longer contented themselves with Dicey's powerful legend, while at the same time, Federico Cammeo in Italy also turned to the young administrative law of Great Britain and the United States.[182] Hatschek examined British administrative law within the framework of his comprehensive studies on English constitutional law and classified German administrative law comparatively as midway between British and French law.[183] Before the background of his comparative studies on Great Britain, Hatschek also offered innovative ideas concerning the tasks and methods of comparative public law. He was interested in using a comparative approach to deduce types of constitutional forms and functions and to recognise general structural rules, which

181 Josef Redlich, 'Zur Theorie und Kritik der Englischen Lokalverwaltung', Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart 30 (1903), 559, 684; cf. there – 684 f. – also the criticism of Georg Jellinek's general theory of the state, whose concepts are considered to be not much more than 'generalisations, taken too far, of individual manifestations of positive *German* constitutional law and the conception of the state that underlies them', whose speculative character could not be obscured 'even [by] the variously successful attempts to attribute individual concrete manifestations of English, French, or American constitutional law to the formulas it posits'.

182 Federico Cammeo, 'Il Diritto Amministrativo degli Stati Uniti d'America', Giurisprudenza Italiana 47 (1895), part 4, 82 ff. Cammeo also explicitly addressed issues of methodology and held that an international harmonisation of the law would certainly be promising in administrative law as well: Federico Cammeo, 'Il diritto comparato e l'unificazione legislativa nella Società delle Nazioni', Rivista del diritto commerciale e del diritto generale delle obbligazioni 17 (1919) 285 ff. In greater detail on him, Mario P. Chiti, 'Federico Cammeo comparatista', Quaderni Fiorentini per la storia del pensiero giuridico moderno 22 (1993), 531 ff., who emphasises that Cammeo analysed the emerging US and British administrative law unfazed by Dicey's claims.

183 Julius Hatschek, *Englisches Staatsrecht, vol. 2: Die Verwaltung* (1906), 658 ff.: 'German law lies midway between the French administrative legal order and English administrative routine. We too have done everything in our power to isolate the administration completely from the [ordinary, author's note] judiciary and therefore have an administrative *law*. But we did not accomplish this complete isolation as absolutely as the French' (659, italics in original). While Hatschek followed Dicey to a great extent in his estimation, he, in contrast to Dicey, already emphasised the independent meaning of bureaucratic practice, which he called 'administrative routine', and its recognition by the courts (649).

were supposed to enable a classification of the positive constitutional law materials in question. Comparative law was supposed to reveal paradigmatic functional contexts.[184] In 1912, Koellreutter published a comparative legal study on 'Administrative Law and Administrative Jurisprudence in Modern England',[185] which, from a British perspective, constitutes the primary work on British administrative law to this day.[186] He already perceived very clearly how British administrative law was changing – a development that Dicey mostly ignored – in the transition to an intervention state and, like Hatschek, Koellreutter assigned German administrative law development 'a middle position between the English and the French one'.[187] He offered a very modern-sounding, cautious observation of convergence:

> 'But if we examine the result of this fundamentally different development in England and Germany, then we arrive at the conclusion that both countries have indeed come closer to one another in the form and handling of administrative law. If we may discern a strong 'continentalisation' in the most recent English development in the area of administrative law, we must see the reason for this in the commonality of the tasks that

184 Julius Hatschek, 'Konventionalregeln oder über die Grenzen der naturwissenschaftlichen Begriffsbildung im öffentlichen Recht', Jahrbuch des öffentlichen Rechts 3 (1909), 1, 37 ff., esp. 59 ff.; Hatschek, *Allgemeines Staatsrecht auf rechtsvergleichender Grundlage*, vol. 1 (1909), 13 ff.; Hatschek, *Englisches Staatsrecht, vol. 1: Die Verfassung*, (1905), 27 f. and 33 ff.; Hatschek (n. 132), 403, 408 f. and 411 f. On Hatschek's understanding of comparative public law: Andreas Sattler, 'Julius Hatschek (1872-1926). Staatsrecht am Anfang der Weimarer Republik' in: Fritz Loos (ed.), *Göttinger Juristen aus 250 Jahren* (1987), 365, 369 ff.; Lanchester (n. 180), 97 ff.; Ottobert L. Brintzinger, 'Julius Hatschek', NDB 8 (1969), 57 f., who even considers Hatschek 'the true founder of a modern comparative public law', because he – unlike von Gneist before him – taught others 'to understand foreign (here especially English) law on the basis of its specific legal concepts and social conditions' (57).

185 Otto Koellreutter, *Verwaltungsrecht und Verwaltungsrechtsprechung im modernen England: Eine rechtsvergleichende Studie* (1912); cf. also Koellreutter, *Verwaltungsgerichtsbarkeit, Die Geisteswissenschaften* (1913/14), 800 ff.; Koellreutter, 'Staat und Richterrecht in England und Deutschland', Der Rechtsgang 2 (1916), 241 ff. Already in his dissertation, Koellreutter had examined English law: *Richter und Master. Ein Beitrag zur Würdigung des englischen Zivilprozesses* (1908). Unfortunately, there are no detailed studies on Koellreutters comparative law involving English law; only cursory references in Jörg Schmidt, *Otto Koellreutter (1883-1972)* (1995), 3 and 5.

186 Bell (n. 28), 1260 (n. 1): 'It is interesting to note that the first book on English administrative law was written by a German [referring to Koellreutter's study]. In many ways, the English distinctive definition of the subject has come out of intense comparison with other jurisdictions.'.

187 Koellreutter (n. 185), 182 ff.; on the critical debate with Dicey, see ibid., 207 f.

> the modern civilized states have set themselves today, approximately in the same way and to the same extent, in the area of administration, and which have necessarily greatly expanded the domain of state intervention everywhere. Thus, it is comprehensible that a certain uniformity of means for achieving these tasks has emerged, albeit in different ways.'[188]

Despite the great quality of this scholarship, both before the First World War and in the subsequent period between the wars,[189] these efforts remained limited to individual scholars, who no longer strongly shaped or influenced the increasingly national scholarship of administrative law. Administrative law was now considered above all an instrument and expression of each nation's state-building process, especially since national legislation increasingly emerged as the central legal source in this area as well.[190] The nation-states' confrontation in the two World Wars reinforced this inward turn of administrative law scholarship and the mutual self-isolation of national scholars.

7. Comparative Administrative Law since 1945

Even after 1945, this situation did not change fundamentally at first. National scholarship of administrative law remained strongly introverted, and comparative administrative law lingered in a marginal position.[191] France, for instance, demonstrated its complacent belief in its traditional role as exporter of its own administrative law. Comparison with foreign administrative law systems that were perceived as less developed was intended at

188 Koellreutter (n. 185), 224.

189 Remarkable for ex. in France Roger Bonnard, *Le contrôle juridictionnel de l'administration. Étude de droit administratif comparé* (1934, reprint 2006) (comparative analysis of administrative jurisdiction); cf. already Bonnard, *De la responsabilité civile des personnes publiques et de leurs agents en Angleterre, aux États-Unis et en Allemagne* (1914) (comparative analysis of state liability).

190 On this Roberto Scarciglia, *Introduzione al diritto pubblico comparato* (2006), 115 f.

191 Instructive in this context are the – mostly sobering – reports on the status of comparative administrative law in individual European countries (Germany, Belgium, Greece, Hungary, Italy, Great Britain, Switzerland, France) at the Paris Conference on Comparative Administrative Law of April 1989: 'Le Droit Administratif Comparé. Journée d'étude organisée par le Centre français de droit comparé, Paris, 26 avril 1989', Revue internationale de droit comparé (1989), 849 ff.

most to extol the worldwide impact of French administrative law.[192] In Germany, by contrast, the post-war decades saw the progressive establishing of an administrative law system that was uniquely dependent, in European comparison, on the new Basic Law. This strong inward orientation made a comparative view of other administrative law systems appear secondary.[193] Very generally, the conviction was still widespread that comparative administrative law had little to offer, because other states lacked comparable institutions and principles or even a corresponding field of law.[194]

Nonetheless, actual developments after the Second World War – the expansion of the intervention state, the challenge that administrations faced with similar substantive issues, and not least the gradual emergence of European and international administrative structures – strongly suggested the greater significance of comparative law.[195] This initially became apparent in the academic fields with a strong empirical orientation, namely the *theory and scholarship of administration.* Here, particularly in the United States, the comparison of administrative forms and administrative cultures, the area of 'comparative public administration', was one of the self-evident methodological tools.[196] In the field of comparative administrative law, the true pioneer of the post-war period was the French professor Jean Rivéro (1910-2001), who brought about a fresh start for scholarship on comparative administrative law beginning in the 1950s. In a foundational Parisian lecture[197] and a series of inspiring essays, which are still exemplary

192 Fabrice Melleray, 'Les trois âges du droit administratif comparé ou comment l'argument de droit comparé a changé de sens en droit administratif français' in: Melleray (n. 12), 13, 18 ff.

193 Christoph Schönberger, '"Verwaltungsrecht als konkretisiertes Verfassungsrecht". Die Entstehung eines grundgesetzabhängigen Verwaltungsrechts in der frühen Bundesrepublik' in: Michael Stolleis (ed.), *Das Bonner Grundgesetz. Altes Recht und neue Verfassung in den ersten Jahrzehnten der Bundesrepublik Deutschland (1949-1969)* (2006), 53 ff.

194 On this Chiti (n. 165), 212.

195 Rivero (n. 75), 15; cf. also Neidhardt (n. 12), 25.

196 Overview on this in Roman Schnur, 'Über Vergleichende Verwaltungswissenschaft', Verwaltungsarchiv 52 (1961), 1 ff. On the current discussion, for instance Werner Jann, 'Verwaltungskulturen im internationalen Vergleich: Ein Überblick über den Stand der Forschung', Die Verwaltung 33 (2000), 325 ff.; Jacques Ziller, *Administrations comparées. Les systèmes politico-administratifs de l'Europe des Douze* (1993).

197 Jean Rivero, *Cours de Droit Administratif Comparé, rédigé d'après les notes et avec l'autorisation de M. Rivero, Les Cours de Droit, Diplôme d'Études Supérieures de Droit Public* (1956/1957) (transcript of the lecture authorised for publication).

today,[198] he covered the fundamental methodological and substantive issues of comparative administrative law and also addressed their significance for the incipient European integration.[199] A stronger interest in a comparative approach to the administrative jurisdiction now began to arise as well.[200] More than the multi-layered law of administrative organisation, but also more than substantive administrative law itself, which was difficult to access due to its low level of codification, the administrative courts lent themselves to comparative analysis.[201]

With the increased awareness of *European integration*'s significance for administrative law, the renaissance of comparative administrative law began in the late 1970s and continues to this day. Once again, Rivéro gave impetus to this process, with his essay 'Towards a Common European Law: New Perspectives on Administrative Law', written for one of the first research projects of this kind at the European University Institute in Florence.[202] There was greater interest in comparative law because the law of the European communities and later on the European Union was increasingly superimposed on the national administrative law systems.[203] Since the 1990s, the experience of increased *globalisation* has played a role as well. The inherent challenge for national traditions of administrative law is felt in a strong way in French administrative law in particular, which exercised hegemony in continental Europe for a long time.[204] Far beyond

198 Rivero (n. 134); Rivero (n. 49); Rivero (n. 149); Rivero (n. 40); Rivero (n. 17); Rivero (n. 41).

199 Jean Rivero, 'Le problème de l'influence des droits internes sur la Cour de Justice de la C.E.C.A.', Annuaire Français de Droit International 4 (1958), 295 ff.

200 Cf. in particular Hermann Mosler (ed.), *Gerichtsschutz gegen die Exekutive – Judicial Protection against the Executive – La protection juridictionnelle contre l'exécutif*, 3 vols (1969-1971). Roger Bonnard had already offered a foundational analysis of this issue in the period between the wars (n. 189).

201 Chiti (n. 165), 213 f.

202 Jean Rivero, 'Vers un droit commun européen: Nouvelles perspectives en droit administratif' in: Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe. Nouvelles Perspectives d'un droit commun de l'Europe* (1978), 389 ff.

203 Jürgen Schwarze (ed.), *Europäisches Verwaltungsrecht im Werden* (1982); Jürgen Schwarze, *Europäisches Verwaltungsrecht* (1988, 2005). More recently, the number of monographs on comparative administrative law has clearly increased in Germany; cf. for instance Ralf Brinktrine, *Verwaltungsermessen in Deutschland und England* (1998); Clemens Ladenburger, *Verfahrensfehlerfolgen im französischen und im deutschen Verwaltungsrecht* (1999); Lepsius (n. 70); Gernot Sydow and Stephan Neidhardt, *Verwaltungsinterner Rechtsschutz* (2007); Neidhardt (n. 12).

204 Jean-Bernard Auby, *La globalisation, le droit et l'État* (2003); Melleray (n. 88), 1228 f.; cf. also Frédéric Rouvillois (ed.), *Le modèle juridique français: un obstacle*

the issue of European integration, globalisation raises the question to what extent national legal systems are a supporting or retarding factor in the global competition of the national economies. Therefore, there are now attempts in the context of the World Bank, for instance, to develop criteria for evaluating the performance of national legal systems from an economic perspective and with quantifying methods of comparative law.[205] What is more, globalisation draws greater attention to the hybrid character of the individual national administrative law systems,[206] which can be understood less than ever as closed structures.

E. Comparative Administrative Law Beyond Methodological Nationalism and Convergence Euphoria

The increased comparison of administrative law systems in and beyond the European legal space fortunately breaks with the methodological nationalism that has impeded comparative administrative law all too often since the end of the 19th century. Yet as a result, scholarship on comparative administrative law today risks forfeiting its critical independence. The fundamental stance of undertaking comparative law with the aim of producing shared rules in legislation and jurisprudence, in other words foregrounding commonality vis-à-vis the differences in member state individual legislations,[207]

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au développement économique? (2005) (French reactions to the World Bank's 2004 'Doing Business' report).

205 On the methodological problems of this quantifying comparison based on the standard of economic efficiency: Holger Spamann, 'Large Sample, Quantitative Research Designs for Comparative Law?', American Journal of Comparative Law 57 (2009), 797 ff.; cf. on this also Rouvillois (n. 204); on the background in general Theobald (n. 92).

206 Marie-Claire Ponthoreau, '"L'argument de droit compare" et les processus d'hybridation des droits. Les réformes en droit administratif français' in: Melleray (n. 12), 23 ff.; Esin Örücü, 'Public Law in Mixed Legal Systems and Public Law as a "Mixed System"', Electronic Journal of Comparative Law 5.2 (2001), available at: http://www.ejcl.org/52/art52-2.html.

207 Cf. on this already for the European Coal and Steel Community, early on Maurice Lagrange, 'L'ordre juridique de la C.E.C.A. vu à travers la jurisprudence de sa Cour de Justice', Revue de droit public et de science politique 74 (1958), 841, 851 f. and 856 ff.; from the extensive literature, Hans-Wolfram Daig, 'Zu Rechtsvergleichung und Methodenlehre im Europäischen Gemeinschaftsrecht' in: Herbert Bernstein, Ulrich Drobnig and Hein Kötz (eds), *Festschrift für Konrad Zweigert* (1981), 395 ff.; Meinhard Hilf, 'The Role of Comparative Law in the Jurisprudence of the Court

is self-evident for the practice of the European institutions and certainly also legitimate. This is a basic stance that is encouraged by the permanent atmosphere of comparative law, the 'personalised comparative law'[208] within these institutions and courts, and it increasingly characterises comparative administrative scholarship as a whole. Scholarship now often strives primarily to prepare legal harmonisation by means of a comparative analysis of commonalities or at least to support manifold forms of convergence processes.[209] As legitimate as this scholarly support of the practical task of harmonisation may be, scholarship ought not limit itself to that alone. It is all the more important that scholarship on comparative administrative law also preserves the possibility of a theoretical, critically distanced observer's perspective.[210] This holds true all the more because the superimposition of European Union law heightens the awareness of many persisting differences between the national administrative law systems, so that the harmonisation process in fact paradoxically calls findings of convergence increasingly into question again.[211]

Scholarly comparative administrative law in the European legal space therefore faces a major challenge. It must guard against methodological

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of Justice of the European Communities' in: Armand de Mestral et al. (eds), *The Limitation of Human Rights in Comparative Constitutional Law* (1986), 549 ff.; newer detailed analysis in Koen Lenaerts, 'Le droit comparé dans le travail du juge communautaire', Revue trimestrielle de droit européen 37 (2001), 487 ff.

208 Gottfried Zieger, 'Die Rechtsprechung des Europäischen Gerichtshofs. Eine Untersuchung der allgemeinen Rechtsgrundsätze', Jahrbuch des öffentlichen Rechts 22 (1973), 299, 354, there with regard to the ECJ's judges, who come from different national legal systems.

209 Schwarze, *Europäisches Verwaltungsrecht* (n. 203).

210 On the similar tension between large parts of international law scholarship and a comparative law sensitive to cultural specificity, David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance', Utah Law Review (1997), 545 ff.

211 Cf. on this for instance Ian Ward, 'The Limits of Comparativism: Lessons from UK-EC Integration', MJ 2 (1995), 23 ff.; Knill and Becker (n. 112). From the rich debate on convergence and divergence of the European administrative law orders, cf. representatively John Bell, 'Convergences and Divergences in European Administrative Law', Rivista italiana di diritto pubblico communitario (1992), 3 ff.; Sabino Cassese, 'Le problème de la convergence des droits administratifs. Vers un modèle administratif européen?' in: *L'État de Droit. Mélanges en l'honneur de Guy Braibant* (1996), 47 ff.; Jürgen Schwarze, 'Konvergenz im Verwaltungsrecht der EU-Mitgliedstaaten', DVBl (1996), 881 ff.; Chris Himsworth, 'Convergence and Divergence in Administrative Law' in: Paul Beaumont et al. (eds), *Convergence and Divergence in European Public Law* (2002), 99 ff.

nationalism just as much as against trite convergence euphoria. Instead, its current task is to examine the national administrative law traditions and cultures in nuanced historico-systematic individual studies. In doing so, it must not lose sight of the manifold exchange processes that have always been characteristic of administrative law. Nor should scholarship fail to recognise that shared challenges of Member States and their link in the European Union produce a convergence of the relevant structures and tools. Comparative law today can no longer mean merely contrasting administrative legal systems or individual institutions, which would be understood as the expression of a homogeneous and enclosed national legal space.[212] But it is just as impossible to overlook the fact that more recent processes of convergence and harmonisation often do not entirely replace older and deeper layers of national administrative law systems but only supplement them or amalgamate with them into new combinations. Today, the Member States' administrative law systems can only be understood as hybrid mixtures, in which the different strata of various ages do not always coexist harmoniously and the contemporaneousness of the uncontemporary becomes the rule. Neither an ideology of similarity nor a diametrically opposed ideology of difference is ultimately useful in this situation. Instead, the continuing central issue will involve the challenging task of attending *simultaneously* to the differences and commonalities of European administrative law systems.

Related to this, Europeanisation and internationalisation also create a new task for comparative administrative law, which has hardly been adequately discussed to date. In addition to the traditional horizontal comparison between different national administrative legislations, there must be an increasing *vertical comparison* between the administrative law of the individual states and the administrative law emerging at the European and international level.[213] In particular the emergence of a 'global administrative law', within the framework of the consolidation processes of international law, raises the fundamental question whether it is even possible to adequately comprehend this global law with categories that were developed

212 On this Mario P. Chiti, 'Diritto amministrativo comparato' in: Sabino Cassese (ed.), *Dizionario di Diritto Pubblico*, vol. 3 (2006), 1928, 1930 f. and 1935.

213 The particular nature of this vertical comparative administrative law has hardly been examined yet, but cf. Zacher (n. 96); Wiener (n. 96); see also above, C3, on the vertical transfer within the framework of legal transplants.

for state administrative law.[214] The nascent administrative law at the international level faces many fundamental questions of state administrative law – such as the legal formalisation of agency decisions, requirements of reasoning and participation, the confines imposed by democratically legitimated legal norms or judicial review – in new and different ways. Vertical comparative administrative law seems to require discussions similar to those conducted in horizontal comparison at the end of the 19th century on the existence and specific nature of English administrative law. The issue at that time was freeing the categories of administrative law from their fixation on French and continental European statehood and administrative jurisdiction thereby allowing a newly differentiated understanding of administrative law. Vertical comparative law must embark on a similar path today. It, too, will have to diversify the legal categories for administration in scholarship in a new way, freeing them from statist reductions and capturing the specificity of administration beyond the states in the framework of a comparative typology.[215] Yet vertical comparison encounters particular problems because the compared administrative law systems, unlike in traditional horizontal comparative law between states, are not independent from one another, but rather interwoven from the outset.[216] But as in any comparative approach, here, too, the trite extremes of the thesis of similarity – international administration is like state administration – and the thesis of difference – international administration has nothing in common with state administration – are not ultimately helpful. A new form of comparative typology must take their place, which accounts for the experience that administrative law exists not only beyond borders but also beyond states.

214 Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law', Law and Contemporary Problems 68 (2005), 15 ff.; Richard B. Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', Law and Contemporary Problems 68 (2005), 63 ff.

215 This can only be accomplished by including the particular characteristics of federal administration and administrative law in the federal states. A good example of such an analysis is Stein and Vining's comparative study on the remedies of administrative law in the European Community and in the US-American federate state: Eric Stein and G. Joseph Vining, 'Citizen Access to Judicial Review of Administrative Action in a Federal and Transnational Context', American Journal of International Law 70 (1976), 219 ff., reprinted with additional contextualisation in: Eric Stein, *Thoughts from a Bridge. A Retrospective of Writings on New Europe and American Federalism* (2000), 161 ff.

216 Pursuing this further, Zacher (n. 96), 385 ff., 393 ff. and 404 ff.

Comparative Administrative Law: Concepts and Topics

Eberhard Schmidt-Aßmann[*]

Keywords: administration, cultural comparison, comparative administrative law history; contextualisation, administrative cultures, administrative science, governance, independent agencies, internationalization, information, legal transplants, shared learning

A. Introduction

As in other areas of legal studies, comparative law must be counted among the centrally important sources of knowledge for scientifically thorough work in administrative law too.[1] Comparative administrative law is not a new field.[2] Its

* Eberhard Schmidt-Aßmann is Emeritus Professor of Public Law at the University of Heidelberg. This contribution is a revised version of an article on comparative administrative law ('Zum Standort der Rechtsvergleichung im Verwaltungsrecht') that was published in: ZaöRV 78 (2018), 807-862. I thank Mr. Kanad Bagchi for his advice and assistance in drafting the new version. In the footnotes, numericals such as [No. 1] refer to the chapters of this edited collection.

1 Eberhard Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik* (2nd edn 2023), 27 ff. For private law, concordantly Marc-Philipp Weller, 'Zukunftsperspektiven der Rechtsvergleichung im IPR und Unternehmensrecht' in: Reinhard Zimmermann (ed.), *Zukunftsperspektiven der Rechtsvergleichung* (2016), 191 (217 with references in n. 167): 'discipline directrice of legal science'. After the great career of constitutional comparison, now administrative law is said to be developing into the most interesting reference area of comparative research in public law; according to Janina Boughey, 'Administrative Law: The Next Frontier for Comparative Law', ICLQ 62 (2013), 55 ff.

2 Thus John S. Bell, 'Comparative Administrative Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), 1259 (1260): 'Comparative administrative law is a long-standing discipline.' See Klaus-Peter Sommermann, 'The Germanic Tradition of Comparative Administrative Law' (this vol.). Preliminary stages are already discernible in the Ius Publicum Universale and in the concept of political science, as they shaped public law of the 17th and 18th century. On this in general Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, vol. 1* (1988), 291 ff. and 334 ff.

development reaches back to the 19th century.[3] The 'Critical Journal for Legal Science and Legislation Abroad' (*Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*), founded in 1829 by Carl Joseph Anton Mittermaier and Karl Salomo Zachariä, offers proof of this. Taking up these volumes, one immediately comes across contributions on administrative law: already in vol. 1, a contribution on French administrative jurisdiction,[4] and in vol. 2, a report on the conditions in the English police system.[5] Vol. 7 then includes a review by Robert von Mohl of the leading commentary on the American federal constitution.[6] This review and an American response to it are said to constitute the first appearance of the concept 'administrative law' in the USA.[7] Later, Frank Goodnow and Ernst Freund drew on their insights gained in Germany and applied it to their work on American administrative law.[8] Goodnow had studied under Rudolf von Gneist in Berlin. Gneist, in turn, was an expert on English administration and was particularly fascinated by the idea of self-government there.[9]

3 Cf. Erk V. Heyen (ed.), *Geschichte der Verwaltungsrechtswissenschaft in Europa* (1982); Christoph Schönberger, 'Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber (eds.), *Handbuch Ius Publicum Europaeum* (hereafter IPE), vol. 4 (2011), § 71, mn. 31 ff. See Christoph Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.); Giulio Napolitano, 'The Transformation of Comparative Administrative Law', Riv. Trimestr. Dir. Pubbl. 64 (2017), 997 ff.

4 Charles Guenoux, 'Ueber Administrativ-Justiz in Frankreich', Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 1 (1829), 233 ff.

5 Georg Phillips, 'Zustand der Polizei und der Verbrechen in England', Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 2 (1830), 361 ff.

6 Robert von Mohl, 'Nordamerikanisches Staatsrecht. J. Story, Commentaries on the Constitution of the United States, vol. I-III, 1833', Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 7 (1835), 1 ff. Mohl had successfully completed his habilitation in 1824 in Tübingen with a study on US federal constitutional law.

7 Jerry Mashaw, *Creating the Administrative Constitution. The lost one hundred years of American Administrative Law* (2012), 413, n. 67: Impressed by Mohl's subtle understanding of American law, the editors of the American Jurist and Law Magazine printed this review in English, together with their own counterstatement, American Jurist and Law Magazine 14 (1835), 330 ff., and in the process dealt with Mohl's criticism that Story's commentary lacked a section on administrative law.

8 On Goodnow and on Ernst Freund, two formative representatives of the field of administrative legal development in the USA, and their relations to German legal thought, see Oliver Lepsius, *Verwaltungsrecht unter dem Common Law: Amerikanische Entwicklungen bis zum New Deal* (1997), esp. 259 ff.; Eberhard Schmidt-Aßmann, *Das Verwaltungsrecht der Vereinigten Staaten von Amerika* (2021), 29 ff.

9 Cf. Stolleis (n. 2), vol. 2 (1992), 385 ff.: 'Gneists wissenschaftliche Hinwendung zu England war von tiefer Sympathie für eine bürgerlich-liberale, organische Entwicklung getragen'.

Subsequently, legislative and administrative practice has again and again oriented itself towards other countries' solutions, for instance when regulating legal protection and administrative procedural law, and so has been encouraged to adopt legislation.[10] By contrast, administrative jurisprudence offers an ambivalent picture: It has gone through phases of great openness but also through phases of closure.[11] The perception of the other legal system was not always accepted without contestation. Deliberate distancing and sharp criticism were also part of the historical development of comparative administrative law. For example, A. V. Dicey's disapproval of the French concept of administrative law and the need to confront it has had a long-lasting effect.[12] At any rate, its 'belle époque', the time when it constituted itself as a science, was a time of comparative law.[13] The discipline's great theorists were also scholars of comparative law. The representative names in Germany include Robert von Mohl, Lorenz von Stein, Rudolf von Gneist, Otto Mayer, and Julius Hatschek. In France, there are Edouard Laferrière, Léon Duguit, Maurice Hauriou and Gaston Jèze, and in Italy, Vittorio Emmanuele Orlando. The development was not restricted to Europe. In the USA, Frank Goodnow's 'Comparative Administrative Law', the

With reference to legal comparison cf. further Peter Cane, 'An Anglo-American Tradition' in: Peter Cane, Herwig C. H. Hofman, Eric. C. Ip and Peter L. Lindseth, *The Oxford Handbook of Comparative Administrative Law* (2020), 3, 10 f.: 'His work witnesses the emergence of the modern distinction between constitutional and administrative law'.

10 Schönberger 2011 (n. 3), mn. 1. See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.) (n. 3): 'the phenomena of exchange that have always been characteristic of administrative law'. On this below, under G. 3. Legal Transplants.

11 Comparative administrative law confirms such a general observation on the development of comparative law; (somewhat exaggeratedly) Konrad Zweigert and Hein Kötz, Einführung in die Rechtsvergleichung, (3rd edn, 1996), § 4 under III., 51: 'The unbroken continuity of legislative practice confronts hesitation, rejection, and then again phases of excessive optimism in scholarship.'.

12 On Dicey's influence cf. Thomas Poole, 'Großbritannien' in: *IPE*, vol. 4 (n. 3), § 60 mn. 7 ff.; Cane (n. 9), 12 ff.

13 Oliver Jouanjan, 'Die Belle époque des Verwaltungsrechts: Zur Entstehung der modernen Verwaltungsrechtswissenschaft in Europa (1880-1920)' in: *IPE* vol. 4 (n. 3), § 69, mn. 6 ff. and 47 ff.; Michael Stolleis, 'Entwicklungsstufen der Verwaltungsrechtswissenschaft' in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts* (hereafter GVwR), vol. 1 (2nd edn, 2012), § 3 mn. 59.

first work that systematically compared the administrative legal orders of four countries (USA, England, France, and Prussia), appeared in 1893.[14]

That the comparatist interest came to a standstill in the first half of the 20th century with its catastrophes has much to do with the political character of public law.[15] Even after 1945, the development only began sluggishly.[16] Rightfully criticism has pointed out that German administrative law at the time was too concentrated on the new constitution – the Grundgesetz (1949) – ('administrative law as concretized constitutional law').[17]

But the meager years have long since been overcome. In addition to the works already named, other, more broadly conceived studies[18] and a variety of monographs on individual questions prove this fact: From the European perspective, European unification, Union law, and the Human Rights Convention have led to a certain concentration on inner-European comparative law. But comparative law examining the Anglo-American administrative legal orders also has its own long and established tradition, which must

14 Frank Goodnow, *Comparative Administrative Law. An Analysis of the Administrative Systems National and Local, of the United States, England, France and Germany, vol. 1: Organization, vol. 2: Legal Relations* (in one volume) (1893).

15 Specifically for France Pascale Gonod, 'Über den Rechtsexport des deutschen Verwaltungsrechts aus französischer Sicht', Die Verwaltung 48 (2015), 337 (340).

16 Schönberger (n. 3), mn. 47 f. See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.).

17 Schönberger (n. 3); See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.); there also on the 'complacency' of French literature; similarly Gonod (n. 15), 354. Generally, on the tendency of those legal systems that are often consulted by other states not to be especially interested in comparisons themselves, Christoph Möllers, Methoden in: *GVwR* (n. 13), vol. 1, § 3, mn. 40: 'German administrative law traditionally compares less than it is compared. Successful legal systems always act introvertedly; they are under less pressure to conform from outside.'.

18 Alongside the already cited works (Ius Publicum Europaeum und The Oxford Handbook of Comparative Administrative Law) cf. Marco d'Alberti, *Diritto amministrativo comparato. Trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia* (1992); Michel Fromont, *Droit administratif des États européens* (2006); Giulio Napolitano (ed.), *Diritto Amministrativo Comparato* (2007); Jens-Peter Schneider (ed.), *Verwaltungsrecht in Europa* (vol. 1, 2007 and vol. 2, 2009); Matthias Ruffert (ed.), *Administrative Law in Europe: Between Common Principles and National Traditions* (2013); Susan Rose-Ackerman, Peter Lindseth and Blake Emerson (eds.), *Comparative Administrative Law* (2nd edn, 2017); Nikolaus Marsch, 'Rechtsvergleichung' in: Andreas Voßkuhle, Martin Eifert and Christoph Möllers (eds.), *Grundlagen des Verwaltungsrechts* (3rd edn, 2021), § 3.

not be overlooked.[19] Here, US administrative law deserves special comparative attention, because it is the first administrative law conceived to be democratic from the start.[20]

The comparison between administrative legal orders of states from other regions of the world still seems insufficiently developed.[21] It is true that individual comparative relations, for example between Germany and Japan or between Spain and South American countries, have been the subject of comparative research for some time now.[22] But comparative administrative law does not offer a systematic treatment to date. Beyond the (horizontal) comparison of states' legal systems, the (vertical) comparison between national and inter- or supranational administrative legal orders is rightfully demanded today as well.[23]

B. On the Concept of 'Administrative Law'

The first task at hand is to call attention to the danger of possible distortions, which can already result from the different uses of the concept '*Verwaltungsrecht*', 'administrative law', '*droit administratif*', '*diritto ammin-*

19 More recently, cf. on this issue only Michael Taggart (ed.), *The Province of Administrative Law* (1997); Peter Cane, *Controlling Administrative Power* (2016).

20 On the intellectual history Elisabeth Zoller, *Introduction au droit public* (2nd edn 2013); Engl. trans. of the 1st edn: *Introduction to Public Law. A Comparative Study* (2008) (comparison of France, Germany, England, and USA). On the development Lepsius (n. 8).

21 Generally on comparative law in the contexts of African, Asian, and Islamic law Uwe Kischel, *Rechtsvergleichung* (2015), §§ 8-10; Zentaro Kitagawa, 'Development of Comparative Law in East Asia' in: Reimann and Zimmermann (n. 2), 237 ff. and 261 ff.; Albert H. Y. Chen, 'The Chinese Tradition' in: Cane, Hofmann, Ip and Lindseth (n. 9), 79 ff. and Chibli Mallat, 'A Middle Eastern Tradition' in : idem, from 97 ff.

22 On Japan: evidence in Ryuji Yamamoto, 'Einführung in das Allgemeine japanische Verwaltungsrecht', VerwArch 109 (2018), 190 ff. On South America: Jan Kleinheisterkamp, 'Development of Comparative Law in Latin America' in: Reimann and Zimmermann (n. 2), 261 ff.

23 Schmidt-Aßmann (n. 1), 26; Napolitano (n. 3), 1010 f.; structuring considerations on this in Christoph Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (2005) (on Germany, USA, EU, ILO, and WTO). Generally on transnational comparative law Kischel (n. 21), § 11; Mathias Siems, *Comparative Law* (2014), 249 ff.

istrativo' (1) and from the different 'conceptual ideas' (2) bound up with them.[24]

I. The Varying Breadth of Conceptual Understanding

In Germany, all legal regulations specifically directed towards the administration belong to administrative law.[25] This includes both the general theories and all of the specific administrative disciplines, in other words police, construction, environmental, tax, and social administrative law, which together operate under the name of 'special administrative law'.[26] It has not been conclusively decided whether, beyond this scope, the private law used by the administration also belongs to the concept of administrative law. In any event, the textbooks on administrative law treat the subject of 'administrative private law' as well.

In the Anglo-Saxon countries, only those matters are regularly treated as administrative law that are termed 'general' administrative law in Germany (constitutional foundations, organization, proceedings, principles, forms of action, and legal protection). In the cases discussed, individual questions of specialized administrative law can also play a role. However, they are not regarded as part of administrative law, but rather as 'tax law', 'environmental law', 'police law'. The leading textbooks in the USA usually deal in greater detail only with the laws of administrative and judicial procedure of the federal agencies.[27]

In countries like France, which developed an independent administrative jurisdiction early on, conceptualization takes yet another form. Here, '*droit administratif*' refers only to the law that falls within the jurisdiction of these courts, while other legal areas, in which the ordinary courts decide disputes

24 On what follows (also in historical comparison) Diana Zacharias, 'Der Begriff des Verwaltungsrechts in Europa' in: IPE (n. 3), vol. 4, § 72.

25 Dirk Ehlers, in: Dirk Ehlers and Hermann Pünder (eds), *Allgemeines Verwaltungsrecht* (15th edn, 2016), § 3 mn. 1 ff. and mn. 80 ff.; Hartmut Maurer and Christian Waldhoff, *Allgemeines Verwaltungsrecht* (19th edn, 2018), § 3 mn. 1 ff. and 18 ff.

26 On the division into a 'general' and a 'special' administrative law, Thomas Groß, 'Die Beziehungen zwischen dem Allgemeinen und dem Besonderen Verwaltungsrecht', Die Wissenschaft vom Verwaltungsrecht: Die Verwaltung Beiheft 25 (1999), 57 ff.

27 Schmidt-Aßmann (n. 8), 26.

with the administration, are referred to as '*droit de l'administration*', '*diritto dell'amministrazione pubblica*'.[28]

For comparative administrative law, the differences in the scope of the concept of 'administrative law' mean that the area of examination must be defined as broadly as possible. Thus, for instance, the areas in which the administration uses forms of action derived from private law cannot be excluded even in those cases where they are not covered by the concept of administrative law. Otherwise, the work that administrations do and how they are legally bound appears in a distorted perspective, compared to the countries that do not distinguish between private and public law.

A broad definition of scope is rooted in the subject itself: if the intended issues at hand in administrative law are the administration's particular ties and particular powers, then individual legal delimitations or agencies' efforts to escape certain bonds cannot entail reducing the regulatory task of administrative law. This also establishes the basis for a functional determination of administrative law's substantive scope.

2. Different 'Conceptual Ideas'

In a second respect, too, one must examine more closely from the outset whether the comparative perspective is right in comparative administrative law: namely in the conceptions about what typical situations are linked to the term 'administrative law'. Here, the influence of *academic discourses* appears even more strongly than in definition (1): The conceptual world encompasses what textbooks, specialist journals, and pertinent discussions designate under the title 'administrative law'. The German-American comparison demonstrates the significance of this issue especially well:[29]

28 Jean-Louis Mestre, 'Frankreich' in: IPE (n. 3), vol. 3, § 41, mn. 51: 'The justification of the special position of administrative law is bound to the determination of the administrative jurisdiction's area of competence.'.

29 The shaping influence of academic work on the conceptual world of 'administrative law' in the USA is clearly elaborated by Lepsius (n. 8), esp. 217 ff.; Thomas Henne, 'Die kontinentaleuropäischen Wurzeln des amerikanischen Verwaltungsrechts', Ius Commune – Zeitschrift für Europäische Rechtsgeschichte 25 (1998), 367 (383 ff.); vgl. ferner Schmidt-Aßmann (n. 8), 27 and 370 ff.

In the USA, *regulatory activities (pertaining to the economy)* dominate this conceptual world to a large extent.[30] Regulatory tasks have a very own, complex case structure: the relevant laws consistently provide only a broad framework. The responsible authorities have a broad margin of discretion. Regulatory administration is political administration, for which the instrument of rulemaking is especially interesting. Of course, in the USA, too, there are many other administrative tasks, such as those of spatial planning or social benefits. But for reasons of distributing constitutional powers, they are performed not by federal authorities but by the authorities of the individual states and communes, for which administrative law scholarship shows little interest.[31]

In Germany, by contrast, state and local administrative tasks are consistently the focus. Here, instead of wide-ranging regulatory concepts, events from citizens' *daily lives* – i.e. individual decisions taken both at the state and local levels acquire priority. Of course, in Germany, a law of regulatory tasks (in the larger sense) exists as well, in which the competent authorities, make decisions primarily based on their own discretion. But in the textbooks, this part of administrative law tends to play a minor role.

To put it succinctly: the politically acting administration shapes the concept of American administrative law. The central issue is this administration's bond to the democratic public ('accountability').[32] By contrast, compliance with and implementation of legal commitments defines the concept of German administrative law ('effective legal protection').

Both legal systems – more precisely: the respective academic conceptual ideas – thus examine different aspects of administrative actions. If distortions are to be avoided, this 'spectral shift' in determining *comparative parameters* must be considered from the start. Beyond this, insight into the partial nature of the national conceptual world can encourage *mutual*

30 Elaborated in precise terms by Francesca Bignami, 'Introduction: A New Field of Comparative Law and Regulation' in: Francesca Bignami and David Zaring (eds), *Comparative Law and Regulation* (2016), 1 (6): 'In the United States, administration is largely synonymous with regulation.' (italics in original).

31 Criticism of this in David H. Rosenbloom, 'Administrative Law and Regulation' in: Jack Rabin, W. Bartley Hildreth and Gerald J. Miller (eds), *Handbook of Public Administration* (3rd edition, 2007), 635 (636): 'These texts and accompanying law-review-literature concentrate very heavily on regulatory commissions, thereby paying little attention to the bulk of contemporary public administrative decision-making and other activity.' Similarly, critical appraisal already in Bernard Schwartz, *Administrative Law* (3rd edn, 1991), § 1.15, 35.

32 Bignami (n. 30), 8 ff. (with fig. 9 and 11) on phases and actors of regulation.

learning, which should generally constitute an objective of modern comparative administrative law. The work of self-reflection, to which anyone who deals seriously with comparative law is always bound,[33] begins with the comparative observation of which case structures determine the 'province of administrative law'.[34]

C. The Particularities of Comparative Administrative Law

Today, it is no longer necessary to demonstrate the existence of comparative administrative law. Instead, the objective must be to highlight its *particularities*.[35] Two points define these particularities: the connection to the administration as an institution (1) and a specific orientation towards norms (2).[36]

1. Connection to the Administration as an Institution

The connection to institutions is central to comparative administrative law.[37] Administrative law is not law that applies to everyone but rather the law of a particular institution: the administration. However, one may assess the administration's strength and influence in the social interplay of forces – for comparative administrative law, it is the primary point of reference, as it is the primary addressee of all administrative regulations. Without

33 On this Anne Peters and Heiner Schwenke, 'Comparative Law beyond Post-Modernism', ICLQ 49 (2000), 800 (829 ff.). Alternatively, see Anne Peters and Heiner Schwenke, 'Comparative Law Beyond Post-Modernism' (this vol.).

34 Concept in Taggart (n. 19).

35 Schönberger (n. 3), § 71, mn. 1 ff; See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.).

36 A similar approach in Cane (n. 19), 2: 'three main components': 'a set of institutions', 'a set of norms' and 'a set of practices'.

37 Bell (n. 2), 1260 and 1264: 'institutional context'; Schönberger (n. 3), § 71 mn. 10; See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.): 'Its connection to the state ties it to specific organizational and institutional contexts more strongly than private law.' Möllers (n. 17), § 3 mn. 40 'institutional contexts'. Similarly already Rudolf Bernhardt, 'Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 431 (432): 'essential construction elements of the state'. Georgios Trantas, *Die Anwendung der Rechtsvergleichung bei der Untersuchung des öffentlichen Rechts* (1998), 64 ff.

connection to this institution, comparative administrative law loses its focus and thus its specificity.

The connection to institutions first emerges in the significance of administrative organizations, their legal forms, and their internal processes. But it also appears in the importance of the relationships to other institutions, in particular the 'neighbouring' institutions of the legislature and judiciary. In order to adequately comprehend and compare the classic themes of administrative law (legal structures, procedures, doctrines of discretion), the organization and the competences of the acting subjects must be examined as well.[38] Emphasizing their connection to institutions does not mean committing comparative administrative law to an unidimensionalor static study. To the contrary: institutions are flexible actors. They open up a broad methodological approach for comparative work (cf. under E).

The connection to institutions is not specific to continental comparative law. It also manifests itself in the US approach to administrative law. There, unlike in Europe, administration and administrative law were not a given but had to be developed out of the 1787 constitution and the play of political forces established therein after the founding of the state. American comparative studies often begin with explanations of the presidential system and the administrative agencies' link to the political system, which differs from the one in parliamentary systems.[39] A description follows of the agencies' internal structures, their relationships to the Congressional committees, to the White House, and to the Courts – authorities that by no means see themselves as mere executive instances of presidential guidelines but rather pursue their own political aims, enter into alliances with different political forces to do so, and are perceived as entirely independent actors in the media. The questions regarding the preservation of accountability, which are important for a democratic administration, can only be answered if one examines the respective institutional arrangements.

'Organization matters!' The comparative field is related to institutions. In this, comparative administrative law differs from large parts of comparative

38 A lucid examination of these components Martin Burgi, 'Verwaltungsorganisationsrecht' in: Ehlers and Pünder (n. 25), § 7, mn. 1-19.

39 Peter Strauss, 'Politics and Agencies in the Administrative State' in: Rose-Ackerman, Lindseth and Emerson (n. 18), 44 ff.; Schmidt-Aßmann (n. 8), 63 ff.; Bruce Ackerman, 'The New Separation of Powers', Harvard Law Review 113 (2000), 633, 643 ff.

private law, but also from comparative constitutional law, inasmuch as the latter deals primarily with the protection of human rights.[40]

2. Specific Orientation Towards Norms

The second particularity of comparative administrative law is its specific orientation towards norms. This does not signify that it is restricted to a comparison of legal provisions alone. Instead, orientation towards norms means that the comparative observations are conceptualized from and towards norms. The focus is on legal norms, legal positions, legal principles, legal institutions, rules of legal application, and legal effects. What do they express, what objectives do they serve, and how do they unfold their claim to validity in social reality?

These are central questions of comparative law in the field of administrative law. They mirror law's prominent role for the administration, for which it provides not only the framework – as it does in private law – but also a legitimizing reason and limit to its actions.[41] For constitutional states, as different as their political systems may otherwise be, the executive's obligation to abide by the rule of law, the *principle of legality*, is self-evident. But also states with only poorly developed rule-of-law guarantees regularly subject their administrations to special bonds, which can be called normative in a technical sense. Preserving and reviewing these bonds are the key issues of most administrative legal orders.[42]

But the concept of norms must be broadly conceived. It encompasses statutory as well as judge-made law, national as well as international law. The general legal principles play an important role. This also includes the law laid down by the administration itself (regulations, statutes, decrees) as well as the acknowledged rules of good government and what is referred

40 Möllers (n. 17), § 3, mn. 40.

41 Accordingly, knowledge of the law is a basic requirement of those who work in the administration, and not only in 'legalistic' administrative cultures. For the USA, cf. 457 U.S. 800, 819 (1982) *Harlow v. Fitzgerald*: '[A] reasonably competent public official should know the law governing his conduct.'.

42 This more or less coincides with what can be termed a paradigm of public law; on this Bignami (n. 30), 16 f.: 'legal certainty, rules, and independent policing of the rules by courts', and which is wide-spread, 'it operates as the primary form of judicial oversight in certain newer or transitional democracies and even in certain authoritarian systems'.

to as soft law.[43] Furthermore, it encompasses functional equivalents such as the establishment of private rules and standards. On the whole, comparative administrative law engages a broader inventory of legal sources than comparative private law. When it comes to problems of 'legal pluralism', administrative law is a good area of reference.[44]

As is well-known, the relevance and rank assigned to the individual types of norms and legal standards vary from country to country. The same applies to the interpretive methods and the concretization of norms. Traditions of common law and civil law prefer different approaches here.[45] Japan in turn is a legislative state in the Continental tradition, but informal practices, go hand in hand with law enforcement. All of this must be considered, and it can be described comparatively using a norm-oriented approach. The orientation towards norms is not to be confused with formal legalism.

Yet with these questions, too, one must keep in mind some particularities of comparative administrative law. Even countries that are oriented towards judge-made law in private law, for instance, cannot avoid granting *statutory law* and its reliance on fixed elements an important position in administrative law. Environmental law, social law, tax law, and urban planning law are difficult to capture in case law but instead first need abstract legal foundations. Countries that are usually assigned to the common law sphere follow this understanding too. The legislation in administrative matters is much broader in the USA than in Germany.[46] Some scholars argue that lawyers trained in common law must learn, in administrative law, to be guided first by the text of the relevant laws.[47] On the other hand, comparative studies in

43 So also Cane (n. 19), 2 ('norms both, hard and soft').

44 Generally on legal pluralism Gunnar Folke Schuppert, *Governance und Rechtsetzung* (2011), 133 ff.; Gunnar Folke Schuppert, 'Das Recht des Rechtspluralismus', AöR 142 (2017), 615 ff.; Klaus Günther, 'Normativer Rechtspluralismus' in: Thorsten Moos, Magnus Schlette and Hans Diefenbacher (eds), *Das Recht im Blick der Anderen* (2016), 43 ff.; furthermore in Paul Schiff Berman and Ralf Michaels (eds.) *The Oxford Handbook of Global Legal Pluralism* (2020).

45 Cf. on this only Kischel (n. 21), § 5, mn. 33 ff.; Lepsius (n. 8), 31 ff.

46 But this circumstance is often obscured by the fact that these fields are identified not as administrative law but as 'environmental law', 'tax law' etc.

47 Peter Strauss, *Legal Methods* (3rd edn, 2014), 61: 'They are tempted to handle statutes with the freedom of paraphrase that they are encouraged to use in stating case law principles. Of course statutes may leave issues in doubt. Yet one must begin with the authoritative text.'.

the German tradition must not define the sphere of norms and the methods of their application too narrowly.

D. Establishing a 'Descriptive Framework'

Legal comparison needs a 'descriptive framework' (Möllers) broad enough to encompass the similarities and differences of as many administrative legal orders as possible. Yet the framework's contours must also be sharp enough to allow the *tertium comparationis* and the individual parameters of comparison to emerge.[48] This prepares what Zweigert and Kötz call 'the formation of systematics' as a further step in the comparative process.[49]

Establishing such a framework is difficult. It can only be understood as an ongoing process.[50] It must begin with the question: Is there such a thing as an overarching paradigmatic concept of administration and administrative law that can guide comparative work? References to comparative private law with its overarching emphasis on individuals and free exchange does not suffice. For comparative administrative law, the many country-specific particularities, the differences in administrative traditions and in administrative organization, could call into question whether it is even possible to develop a uniform framework.

But it is the institutional access of comparative administrative law described above that enables a step-by-step unfolding of a *basic comparative constellation*, by first demonstrating a fundamental structure (1), in which certain values are then entered (2). These are not mechanical processes following rigid rules. Instead, experience, reflexivity and creativity are required.

48 Following Möllers (n. 17), § 3 mn. 40: 'Beschreibungsrahmen'.

49 Zweigertand Kötz (n. 11), § 3 under VI., 43: 'Entire systems of comparative law, but also comparative examinations of special issues, will not be able to avoid developing their own systematics and their own concepts of a system. The system must be loose, so that it brings institutions that are heterogeneous but comparable in their function together under broad superordinate terms.' Similarly, Trantas (n. 37), 87 ff.: 'Comparative law's relation to systems in the area of public law.'.

50 A similar approach in the two-phase model, developed for comparative law in general by Oliver Brand, 'Conceptual Comparison – Towards a Coherent Methodology of Comparative Legal Studies', Brooklyn Journal of International Law 32 (2007), 405 ff.; Presentation and critique in Kischel (n. 21), § 3, mn. 97 ff.

I. Basic Structure

To put it in very general terms and unconnected to a specific legal system, the administration is the organization that is supposed to perform concrete tasks in direct daily contact with people, following certain political guidelines. This may include further tasks and forms of action such as legislation and planning; that is not yet decisive at this point. What characterizes the appearance of 'the' public administration is its actions 'on site', which deal with the individual case. The triad 'guidelines', 'tasks', and 'concrete action' are the three general characteristics that constitute the image of administration beyond the borders of states and regions.

It initially remains open what other aspects complete these key concepts: Not yet decided are the questions of *who* makes the political guidelines (a parliament, a party, an autocrat), *what* tasks are at stake, and which *norms* (laws, orders, soft law, or customary rules) are applied. All of these issues are settled only once the systems to be compared have been determined more precisely. But there are three 'fields of interest', which administrative law (in the broader sense) must address:

- the relationship of administration to politics
- the relationship of administration to the administered parties
- assuring effective task fulfilment.

The focus of these three fields of attention is the administration, as an institution delimited from its surroundings, which must define itself independently in view of the expectations directed towards it.[51] This promotes the formation of bureaucratic patterns of behavior.

Within this broadly conceived framework and by asking the question, by what means and how successfully these typical administrative fields of tension are handled, the administrative legal orders of different political systems can be put into relation with one another by working out a basic inventory of comparative parameters.[52]

51 On this Klaus König, *Moderne öffentliche Verwaltung* (2008), 8 ff.

52 On the necessity of keeping administrative scholarship open for models other than Western ones, cf. Wolfgang Drechsler, Paradigms of Non-Western Public Administration and Governance, in: Andrew Massey and Karen Johnston (eds), *The International Handbook of Public Administration and Governance* (2015), 104 ff.

2. Values

In most legal systems, however, administrative law is not restricted to the function of such a purely technical law of execution but also expresses something of the self-understanding and the value orientations of the society whose subsystem it is. In order to establish the descriptive framework, the task is to find shared values of the legal systems to be examined. Here, too, the approach must be as broad as possible initially, so as then to arrive at a concrete representation step by step. Insights from comparative constitutional law can be helpful in this process,[53] yet without calling into question the independent regulatory objectives and regulatory techniques of administrative law.[54] Here, the key words 'constitutionalism', 'human rights discourse', and 'discourse on democracy' come into play.

Two United Nations (UN) human rights treaties, adopted in 1966, express values to which many states have committed.[55] Almost all states in the world have joined the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Both Covenants describe the rights they guarantee with rather broad and often not clearly graspable elements. As a result, they are not interpreted uniformly in the different regions of the world. But they do provide a number of material points of orientation for the state-citizen relationship and so for tensions typical of the administration. These tensions can claim practically worldwide attention, and a comparison based on them does not have to face the reproach of 'Eurocentrism'.

Questions of value can be answered much more concretely when the states whose administrative legal orders are to be compared with one another see themselves as *constitutional states*.[56] Today, their sphere extends far beyond Western Europe and North America. As different as the guarantees are individually, for administrative law, constitutionalism prescribes

53 Cf. Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012).

54 On this only Tom Ginsburg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' in: Rose-Ackerman, Lindseth and Emerson (n. 18), 60 ff.

55 Cf. also Kischel (n. 21), § 1, mn. 81 ff.; Siems (n. 23), 214 ff.; zur Rechtsstellung des Individuums im Völkerrecht weiterhin Anne Peters, *Jenseits der Menschenrechte* (2014).

56 On this Klaus Stern, *Grundideen europäisch-amerikanischer Verfassungsstaatlichkeit* (1984); Martin Morlok (ed.), *Die Welt des Verfassungsstaates* (2001); Rainer Grote, 'Rechtskreise im öffentlichen Recht', AöR 126 (2001), 1 (39 ff.); on 'values common to liberal states' Bell (n. 2), 1271 f.

statehood under democracy, the rule of law (*Rechtsstaatlichkeit* and *Gesetzesbindung*), and the executive power's subjection to review.

For the member states of the European Union and the Convention States of the European Convention on Human Rights, these treaties contribute to further refining administrative legal measures. Today, an inventory of shared elements of guarantee emerges here. The 'right to good administration' under art. 41 of the Fundamental Rights Charter of the European Union (EU) and a number of recommendations, which the Ministerial Committee of the European Council has passed on standard topics of administrative law, make these elements more precise. Taken together, this constitutes a set of values, a 'common code',[57] which provides a usable framework for comparing the administrative legal orders of the states in question.[58]

Overall, it can be concluded that there may not be any 'anthropological elementary constellation' upon which comparative administrative law could base itself.[59] But on the basis of the administration's typical tasks as an authority entrusted with concrete execution, it is possible to develop a framework, which, depending on the closeness of the legal systems being compared, can be filled with shared substantive guidelines.[60] The question about an overarching 'descriptive framework', that is to say, a shared comparative fundamental constellation, is thus answered *relatively*, according to which states are intended to be included in the comparison.

57 On this Eberhard Schmidt-Aßmann, in: Ruffert (n. 18), 1 (7 f.).

58 A discussion of the 'shared substrata' of national administrative laws in Europe in Sabino Cassese, 'Die Entfaltung des Verwaltungsstaates in Europa', in: IPE (n. 3), vol. 3, §41, mn. 2. On the 'genetic code' of European administrative legal orders Schmidt-Aßmann (n. 18), 3 (7f.).

59 Concept in Schönberger (n. 3), § 71 mn. 9; see Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.), who refers to Constantinesco's concept of a 'universal archetypology' at this point. Tending against the assumption of administrative law's 'generic social function' Bell (n. 2), 1268 f.

60 Cf. also Bignami (n. 30), 16 ff. The four 'paradigms of public law' discussed here have another systematic approach; the typification can also be read in the sense of a gradual process of concretizing the treated values: (1) the 'rule-by-law paradigm' as standard model, which encompasses states with constitutional traditions in which the rule of law and democracy are poorly developed as well as the states listed under (2) – (4); (2) the 'fundamental rights paradigm' characteristic of the EU member states and (3) the 'ballot-box democracy paradigm' characteristic of the USA, two models of advanced constitutionalism with parallel standing; finally (4) the 'transformative democracy paradigm' as the model that goes beyond (1) and that employs courts and other institutions to enforce political and social rights in particular, in the face of weak administrations.

E. Methodological Questions: 'Heightened' Contextualization

Its connection to institutions has specific methodological consequences for comparative administrative law. Institutions are complex phenomena. They can only be understood in the context of their historical development and the conditions of their social framework. If the literature on comparative law today generally emphasizes the significance of *contextualization*,[61] then this applies to an even greater extent to comparative administrative law. Consequently, comparative work in administrative law especially depends on the insights of other disciplines: history of administration, economy of administration and finance, organizational theory, bureaucracy theory, and management concepts.[62] The mandated contextualization is reflected in an especially dense research program and must be treated in particular detail here, in the form of a *heightened contextualization*.[63]

1. Comparative Law – Not Cultural Comparison

Yet the necessary contextualization also entails the danger of an excessive challenge. While interdisciplinary openness is indispensable,[64] the material must remain manageable.[65] That is self-evident for the work of comparative

61 Kischel (n. 21), § 3, mn. 200, in further developing the concept of functional comparative law: 'A consideration of context makes up the core of comparative law: what is at stake is contextual comparative law' (emphasis in original). Cf. Uwe Kischel, 'Methods in Comparative Law – The Contextual Approach' (this vol.). Reporting the criticism of more recent streams of traditional comparative law, ultimately similar to the statement of Siems (n. 23), 40: 'Most importantly, many points of criticism highlight the relevance of context and interdisciplinarity of comparative legal research.'. Cf. still Carl-David von Busse, *Methoden der Rechtsvergleichung im öffentlichen Recht als Instrument der Interpretation von nationalem Recht* (2015), 327 ff.; Trantas (n. 37), 72 ff.

62 The administration's working methods also play an important role, today primarily electronic government; cf. on this only Martin Eifert, *Electronic Government* (2006).

63 Similarly Napolitano (n. 3), 1020 ff.: history, constitutional and political system, economic development, relations between society and government, legal culture.

64 Peters and Schwenke (n. 33), 862 ff.; alternatively see Anne Peters and Heiner Schwenke, 'Comparative Law Beyond Post-Modernism' (this vol.).

65 A dilemma aptly described by Jerry Mashaw, 'Explaining Administrative Law: Reflections on Federal Administrative Law in Nineteenth Century America' in: Susan Rose-Ackerman and Peter Lindseth, *Comparative Administrative Law* (1st edn, 2010), 37 (44): 'A detailed understanding of macro- and micro-institutional factors; political, ideological, economic and social environments; path-dependent commitments and

law in judicial or legislative practice, for the reason alone that it is regularly subject to extreme time constraints. But it also applies to the work of *legal scholarship*. It should not be based on unrealistic standards.[66] Comparative law must not become general cultural comparison.[67]

The boundaries between the two are drawn differently, however. In countries where economic, sociological, or statistical considerations already belong to the usual forms of argumentation in legal work, as they do in US administrative law, it seems evident that especially studies in comparative administrative law may choose a broad scope.[68] German administrative law, by contrast, includes such considerations in its normal work only if the pertinent normative decision premises provide a starting point for doing so.[69] The question of what constitutes administrative law is investigated here as reflected in the pertinent norms, which do not exclude but 'filter' the influences of arguments from economics, sociology, or political science.

Given its task of contextualization, *comparative administrative law* must reach beyond issues of legal dogma. But the observable differences between the ways in which the USA and Germany evaluate to what extent norms can truly bind the administration show effects at the *meta-level*, that is to say, for the concept of comparative law. As a result, one must expect different *cultures of comparative administrative law.* If comparative studies are to be comparable in turn, then these differences in the comparative culture must first be made explicit. Furthermore, *all* participants are expected to

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inertias; and technical legal issues across multiple legal systems, seems overwhelming.'

66 Aptly Siems (n. 23), 103: 'At a practical level, it may be difficult for a comparatist to be fully familiar with the entire culture of each of the country's legal systems that she aims to examine. Thus, there is the risk of imposing unrealistic standards, a problem that can also rise for other variants of postmodern comparative legal research.'

67 Similarly Kischel (n. 21), § 3, mn. 162: 'Comparative law is a part of legal science. Its methodological point of orientation is legal science rather than sociology, political science, or economics.' Matthias Ruffert, 'Rechtsvergleichung als Perspektivenerweiterung' in: Martin Burgi (ed.), Zur Lage der Verwaltungsrechtswissenschaft, Die Verwaltung Beiheft 12 (2017), 165 (175): 'Comparative administrative law as a genuinely juridical research approach'.

68 For comparative constitutional law, cf. the debate between Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (2014), esp. 151 ff. ('from comparative constitutional law to comparative constitutional studies': focus on comparative political science) and Armin von Bogdandy, 'Die sozialwissenschaftliche Runderneuerung der Verfassungsvergleichung', Der Staat 55 (2016), 103 (108 ff., 115 f.: Betonung des eigenständigen Wertes der hermeneutischen Methode).

69 Cf. only Schmidt-Aßmann (n. 1), 27 ff.

engage the other side's perspective to a certain extent. Otherwise, a transatlantic exchange in matters of 'comparative administrative law' cannot work. There is no monopoly of defining the sole correct form of comparative administrate law. Recognized differences should be utilized to enrich comparative perspectives.[70]

2. Networks as Forms of Reception

Nevertheless, the question remains how to further methodologically illuminate contextualization, in its enhanced form for comparative administrative law. This is a balancing act between an overly narrow and an overly broad research framework. To find the appropriate middle ground, it can be helpful to think in networks, as recommended in more recent American scholarship.[71]

In her study 'From Expert Administration to Accountability Network', published in 2011, Francesca Bignami first reveals the restrictions of outmoded comparative administrative law: she explains that it is not enough to deal only with the forms of administrative actions and with judicial legal protection.[72] Her criticism, inspired by governance research, is based on the observation that the administration can no longer be viewed as the sole guiding authority, because other institutions have long since established themselves in its classic fields of activity, bringing about a change in power relations.[73] Examples include forms of self-regulation, panels of experts from various backgrounds, and public-private management.

If administrative legal orders are to be compared today, then – so the argument continues – the comparative framework requires a different format: for what is at stake is examining the administration in its relations to other actors, while analyzing and comparing the relevant networks.

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70 Similarly von Bogdandy (n. 68), 114 f.; for 'diversity in legal culture' and against tendencies of 'discursive imperialism'; Uwe Kischel, 'Diskursvergleich im internationalen und nationalen Recht', VVDStRL 77 (2018), 285 (312); also Christoph A. Kern, 'In der Zange der Zahlen: Rechtsvergleichung und wissenschaftlicher Zeitgeist', ZVglRWiss 116 (2017), 435.

71 Francesca Bignami, 'From Expert Administration to Accountability Network: A New Paradigm of Comparative Administrative Law', American Journal of Comparative Law 59 (2011), 859 ff.

72 Bignami (n. 71), 862, 871 (criticism 'of the persistence of this two-fold scheme of administrative organization and judicial review').

73 The discussion refers to a 'changed administrative landscape', Bignami (n. 71), 905.

The focus lies on four such ties in particular:[74] the administration's relationship (1.) to the elected representatives of politics, (2.) to organized interests, (3.) to courts, and (4.) to the general public. These relationships are identified as 'accountability relationships'. They have a normative connotation but outline a field of analysis that is governed not only by normative concepts: The subjects of comparison are legal provisions, which regulate these relationships and allow the actors to introduce their own logics of action to the respective administrative proceedings.

At stake here are the actors' different rationalities of acting in enmeshed relationships, which are not necessarily aligned hierarchically but interact in different ways. It is the recognition of *plurality*, of *complexity*, and of *dynamics* that differentiates the new network concept from the outmoded form of comparative administrative law.

To grasp this interplay of powers, this study will refer to the social-science scholarship on administration, which contains rich empirical material, in addition to insights from history and state theory.[75] The rights to give instructions and other possibilities of control, which the political leadership usually possesses vis-à-vis administrations, serve to explicate the importance of the administrative sciences. This arsenal cannot be grasped only by comparing relevant law. Instead, it is necessary first to work out the different dynamics that are typical of a presidential system like that of the USA and of a parliamentary system like that of most European states.[76]

A further field of examination in which comparative administrative law depends on the administrative research of the social sciences is the administration's relationship to organized interests. How political science differentiates between a pluralistic-competitive and a neo-corporatist representational model when analysing legal provisions can sharpen the gaze here for the underlying different state and societal perceptions.[77] Thus, the American conception that the state should involve itself as little as possible in the self-organization of societal interests may explain the open, broad participation of the notice-and-comment procedure. By contrast, in the neo-corporatist model towards which the European countries and the EU incline, statehood is an essential point of reference. Such different

74 Bignami (n. 71), 872 ff.
75 Bignami (n. 71), 874 f.
76 Bignami (n. 71), 875 and 880 ff.
77 Bignami (n. 71), 887 f.

underlying ideas must be taken into account when comparing procedures of administrative law-making.[78]

Despite including insights from other disciplines, the network model does not mutate into a general cultural comparison. Instead, it continues to focus on the *law*. This normative point of departure and this goal determine the comparative parameters. Rather than simply dismissing the perspective of outmoded comparative administrative law, this process expands it.[79] Yet this happens not in a merely additive but in an integrative way. The new paradigm that Francesca Bignami evokes in the title of her work involves integrating a changed administrative reality, which necessarily has consequences for the method. Precisely in its open but nevertheless norm-oriented reception, the network model underlines and intensifies the heightened contextualization necessary in comparative administrative law. As a model, its application is variable enough to contain the differences between the comparative cultures listed above and to bridge a gaping trans-Atlantic trench in comparative administrative law.

3. Tools for a Rough Orientation: 'Legal Families' and 'Administrative Cultures'

The flood of information that comparative administrative law must handle requires orientation: what should be considered? According to what aspects should the information be summarized and categorized? The answers to these questions depend first and foremost on the epistemological interest that the concrete comparative legal project is supposed to serve. The preconceptions of the comparative legal scholar in question must necessarily be accorded a certain influence too, yet this is bound up with the duty of continued self-observation, so as to prevent the danger of narrowing the perspective. In addition, comparative legal literature offers some aids for orientation: the theory of legal families (a), the differentiation between

78 On this in detail Bignami (n. 30), 20 ff. as well as the contributions of Wendy Wagner, 'Participation in the U.S. Administrative Process' in: Bignami and Zaring (n. 30), 109 ff. and Stijn Smismans, 'Regulatory Procedure and Participation in the EU' in: Bignami and Zaring (n. 30), 129 ff. On this below under G. 3. a.).

79 Bignami (n. 71), 873: 'The conceptual shift from a vertically organized administration to a plural accountability network of government bureaucrats and public and private actors broadens the horizons of comparative analysis and enables a more productive exchange with good governance debates in a number of ways.'

common-law and civil-law legal systems (b), and the typologies of certain administrative cultures (c).

(a) It is possible to refer to *'legal families'* in the sense of genealogy and evolution or in the sense of legal structure.[80] That the theory was developed from comparative private law[81] does not yet speak against it. Of course, for public law, it must be shifted to other indicators that determine family.[82] Thus, for instance, Michel Fromont emphasizes the two criteria of organization and the state-citizen relationship and on this basis distinguishes between a French, a German, and a British administrative legal model within Europe.[83] He then assigns other European states to these models. Before this background, one can observe the development of the models themselves and of their variants. Convergences as well as retained autonomies appear. Information is bundled and fields of attention are suggested.

There is continued criticism that the theory is too closely related to European legal thinking.[84] Yet this criticism is relativized by the fact that nowadays, constitutional elements can be found in the administrative legal orders of many non-European countries as well.[85] Consequently, legal families may be used to clarify the aforementioned 'descriptive framework', the 'comparative basic constellation'. Fromont emphasizes that this offers only a rough orientation.[86] Thus, he confirms the assessment for comparative administrative law that the theory of legal spheres has otherwise encountered as well: 'their reduction of complexity allows for a first quick access'.[87]

80 On the following Grote (n. 56), 11 ff.; furthermore H. Patrick Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in: Reimann and Zimmermann (n. 2), 421 ff. (for a focus on traditions, not on families).

81 Cf. only Zweigert and Kötz (n. 11), 62 ff.

82 Similarly Bell (n. 2), 1266; in detail Grote (n. 56), 26 ff.: basic rights, separation of powers, principle of the rule of law, and democracy principle as 'structural principles that shape the system'; von Busse (n. 61), 292 ff.

83 Fromont (n. 18), 13 ff.; Michel Fromont, 'Typen staatlichen Verwaltungsrechts in Europa' in: *IPE* (n. 3), vol. 3, § 55.

84 Weighing these issues: Glenn (n. 80), 434 ff.

85 Grote (n. 56), 37 ff.

86 Fromont (n. 83), § 55, mn. 76.

87 Thus accurately Kern (n. 70), 434; similarly Kischel (n. 21), § 4, mn. 10 ff. and 25 f. ('primarily a didactic tool'); similarly Siems (n. 23), 72 ff., 92; Napolitano (n. 3), 1002 f.

(b) The *separation between common law and civil law* does not define the system in comparative administrative law.[88] This has several reasons: For one, administrative law is strongly determined by statutory law, also in the common law states.[89] The high degree of flexibility that is often said to be associated with judicially created common law, for example in private law,[90] can therefore find only limited expression in administrative law. Here, just like in the civil law states, the administration must first proceed from the text of the relevant laws, following the principle of legality.[91]

Additionally, the two main representatives of common law, the USA and the United Kingdom (UK), significantly diverge from one another, particularly on issues that are important for administrative law.[92] Peter Cane concludes his comparative work on the administrative legal orders of the USA, England, and Australia with the statement:

> 'However, our study has shown that the US concept of common law is significantly different from its Anglo-Australian counterpart.'[93]

Consequently, taken alone, it is not very meaningful whether a legal system is attributed to common law or civil law. Comparative administrative law must not be ensnared by the circumstances in private law. Individual fea-

88 Siems (n. 23), 41 ff., 64 ('may only have a limited explanatory value').

89 Cf. William J. Novak, 'The Administrative State in America' in: Armin von Bogdandy, Peter M. Huber and Sabino Cassese (eds), The administrative state (2017), 98 (110): 'By 1932, the common law tradition, that had shaped and ruled so much of public and private life through the early nineteenth century, had been displaced as a principle tool of American governance. And a regime of constitutional law, positive legislation, and administrative regulation assumed prominence.' Generally on the significance of statutory law for comparative administrative law cf. Napolitano (n. 3), 1025 f. This applies particularly to the areas of special administrative law, such as to environmental, regulatory, or tax law. If these areas are not treated as administrative law (such as in the USA, at any rate in academic discussions), then the importance of positive law and the role of the legislative power in comparative law run the risk of remaining underexplored.

90 Cf. on this (admittedly with nuances) Zweigert and Kötz (n. 11), § 18; similar in substance (albeit without reference to common law in particular) Mathias Reimann, 'The American Advantage in Global Lawyering', RabelsZ 78 (2014), 1 (9 ff.).

91 On this above under C. 2.

92 Zweigert and Kötz (n. 11), § 17, 233; similarly Cane (n. 19), 519: 'Judge-made law came to be understood as a category of rules supplementary to legislation rather than a qualitatively different mode of law-making.'

93 Cane (n. 19); emphasizing certain shared traditions more strongly Bell (n. 2), 1266 with reference to Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (1990).

tures borrowed from the outmoded comparison of common law and civil law can only ever be *one* argument in addition to others.

(c) Administrative science deals with *administrative cultures*.[94] This refers to 'fundamental interpretations, attitudes, perspectives, values [and] basic assumptions', which, in addition to administrative techniques and the administrative institutions, shape the image of the administration.[95] It is a typology that involves both historical developments and empirical examinations. For instance, there is a focus on a legalistic and a managerialistic administrative culture, as well as on one shaped by civil society. A European pluralistic administrative culture as a parallel independent type exists in rudimentary form at best.[96] The formation of further types is not precluded.[97]

The administrative cultures defined in this way can facilitate contextualization for comparative administrative law. They condense observations on the measures and motives that underlie administrations' actions. Systemically, there is a close connection to theories of bureaucracy. The law-oriented questions confronting comparative administrative law are illuminated by the fact that legalism is assigned its own type and the other 'cultures' are also described in relation to this orientation. Conversely, typology warns of according law an absolute value in comparative studies.

F. Topics and their Transformation in Comparative Administrative Law

Administrative law is the forum where the always precarious relationship between individual freedom and the concretely articulated demands of the public good must be balanced. This is its central *function* within the state legal system. Today, one must assume that administrative law has a

94 With its specific focus on the administration, the idea should encounter fewer concerns than the sociological topos of 'legal culture', which, given its breadth, meets with reservations in comparative law; on this Kischel (n. 21), § 4, mn. 27 ff.

95 Thus Klaus König, 'Verwaltungskultur – typologisch betrachtet' in: Klaus König, Sabine Kropp, Sabine Kuhlmann, Christoph Reichard, Karl-Peter Sommermann and Jan Ziekow (eds), *Grundmuster der Verwaltungskultur* (2014), 13; König (n. 51), 838 ff.

96 On this Sabine Kuhlmann, 'Verwaltungspluralität in Europa: Konvergenz, Divergenz oder Persistenz?' in: König, Kropp, Kuhlmann, Reichard, Sommermann and Ziekow (n. 95), 467 ff.

97 On the influence, for ex., of Confucianism as non-Occidental world view of administrative culture, cf. König (n. 51), 842 ff.

dual mission:[98] on the one hand to restrain public administration from interfering with individuals rights, and on the other (of equal importance), to enable it to fulfil its duties in the welfare state.

1. Classic Topics

We owe an early concrete examination of the major topics in comparative administrative law to Frank Goodnow. On the basis of his systematic comparative studies, Goodnow emphasized three criteria that an administrative legal order must satisfy.[99] It must firstly, be able to guarantee that political demands can be engaged; secondly, it must ensure that administrative tasks are fulfilled competently and efficiently; and it must (thirdly) respect citizens' individual rights.

The triad is accountability, efficiency, and judicial review. The classic topics of comparative administrative law assigned to these terms are:

- the rule of law, the subjection to instructions, parliamentary review, publicity of information;
- forms of administrative action; incentives for an efficient use of resources, reviews of economic viability;
- forms of organizing state and self-administration that are appropriate to the tasks;
- administrative procedures, judicial review, and state liability.

The textbooks of comparative administrative law focus on precisely these topics.[100] The topics are subdivided further and made more concrete, without distinguishing between a macro- and a micro-comparison. The major topic of judicial review for instance, is then structured into studies of the

98 Thus for German administrative law Eberhard Schmidt-Aßmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee* (2nd edn, 2004), 16 ff. For US administrative law similarly Julia Beckett, 'Five Great Issues of Public Law and Public Administration' in: Rabin, Bartley Hildreth and Miller (n. 31), 697 ff., in summary 715: 'In the checks and balances of democratic governance, laws do not obstruct, courts do not interfere, and regulation do not impede. Public law and public administration share concerns about practices, actions, procedures, and goals. The important theme in all the great issues is how to balance the shared concerns on law and administration in serving the public interest.'

99 Reporting: Mashaw (n. 65), 44 f.

100 Cf. Fromont (n. 18), (73 ff.), administrative jurisdiction (111 ff.) and administrative legal protection (163 ff.), rule of law (232 ff.); forms of action (209 ff., 285 ff., 297 ff.), state liability (325 ff.). Napolitano (n. 18): organization (61 ff.), procedure

court systems ('monism' or 'dualism'), legal standing, the scope of review, and the interim measures of legal protection, which are in turn incorporated in the relevant provisions of the constitution. This does not involve dwelling on external conceptualizations or mere textual comparisons of the relevant provisions but instead asks about the historical development and the functions of the instruments found in the legal systems examined, so that functional equivalents can be analysed as well.

2. Context-Sensitive Treatment: Inspiration From Administrative Science

Historical, political, economic, and technical frameworks of administration are necessary components of comparative administrative law. That is the core of the 'increased' dependence on context, which the issue demands. Administrative science is useful as a catalyst. For it consolidates and makes accessible insights from other disciplines and subjects, such as administrative economy, administrative sociology, administrative business management, or administrative psychology. In what follows, seven fields serve as examples, from which comparative administrative law derives ideas for its context-sensitive work:[101]

– *Administration and politics*:[102] The administration's positioning – within the constitutional system that separates the powers (law and budget as means of control) as well as within different governmental systems – and the role of bureaucracy, which pushes for independence, belong to the classic inventory of studies in administrative science. After the dismissal of the separation theory, the administration's policy-forming function has emerged more clearly as well. The political interplay of powers, in which the administration is involved, is diversified by the inclusion of associations and organized interests in general.

(107 ff.), administrative contracts (175 ff.), liability (265 ff.), administrative jurisdiction (283 ff.).

101 Cf. only Rabin, Bartley Hildreth and Miller (n. 31), section 2 (Organization Theory), section 3 (Budgeting and Financial Management), section 4 (Decision-Making), section 5 (Personal Management), section 6 (Public Policy), section 8 (Comparative and International Relations), section 11 (Information Technology).

102 König (n. 51), 8 ff.; Jörg Bogumil and Werner Jann, *Verwaltung und Verwaltungswissenschaft in Deutschland* (2nd edn, 2009), under 4.5; Renate Mayntz, *Soziologie der öffentlichen Verwaltung* (1978), 60 ff.

- *Administration and the public*:[103] This issue involves the administration's communication with the media, organizations of civil society, and the general public. Forms of structured communication, for ex. in certain administrative procedures, stand next to processes of spontaneous information and communication. The public's free access to administrative information and the administration's use of the internet are part of this issue as well.
- *Administrative organization*:[104] The diversity and the dynamics of organisation as one of the most important resources of control must be made clear here.[105] Organizational contexts and organizational maxims join the isolating examination of individual (legal) forms of organization. Usually, bureaucratic organizations are central.[106] Yet the significance of collegial, participatory, or self-administrating forms of organization should not be overlooked either. The differentiation of administrative organization that results from including private economic subjects and actors of civil society is its own topic.[107]
- *Administrative tasks*:[108] The inventory and criticism of tasks are classic topics of administrative science. This includes statements concerning the different ways of fulfilling administrative tasks as well as proposals of task reform, for ex. of lean management, task privatization and the experiences gained from it.
- *Administrative staff*:[109] The law of public service (including salary law and pension law) only makes up the external framework. It is filled with information on training courses and career patterns, on staff recruitment and staff management. Special forms such as volunteer work and undesirable developments such as the spoils system are also a part of this.

103 Arno Scherzberg, *Die Öffentlichkeit der Verwaltung* (2000), 23 ff., Hermann Hill (ed.), *Verwaltungskommunikation* (2013).

104 König (n. 51), 278 ff.: differentiation between an institutional, a structural, and a functional concept of organization; Bogumil and Jann (n. 102), under 3.2-3.5. In detail Gunnar Folke Schuppert *Verwaltungswissenschaft* (2000), 544 ff.

105 On this, the contributions in Eberhard Schmidt-Aßmann and Wolfgang Hoffmann-Riem (eds), *Verwaltungsorganisationsrecht als Steuerungsressource* (1994).

106 König (n. 51), 104 ff.; Bogumil and Jann (n. 102), under 4.1-4.2.

107 Extensively Schuppert (n. 104), 277 ff.: Public administration in the spectrum of collaboration to fulfill state and private tasks: findings (281 ff.), analyses (341 ff.), role of law (420 ff.).

108 On this König (n. 51), 183 ff.

109 König (n. 51), 490 ff.; Andreas Voßkuhle, 'Personal' in: *GVwR* (n. 13), vol. 3, § 43.

– *Administrative techniques*:[110] This includes information on purely practical work processes and recordkeeping, which may be important in order to comparatively evaluate certain types of administrative procedures. But above all, this category includes knowledge of the 'technical concepts' that characterize administration and administrative law, meaning the business of records and archives, e-government and digitalization: in practical terms, the epistemic, informational, and communicative prerequisites for all administrative action.
– *Decision processes in the administration*:[111] This category requires examining the administration's entire system of action. The forms of action, procedural law, and the doctrine of application of the law make up the legal side. Administrative science goes significantly beyond these issues. It examines the various forms of programming, of implementation and evaluation. It reveals and, if applicable, empirically proves deficits in execution and maps out differences between implementing and framing decisions (planning, regulating). In addition to the formal types of action, the informal ones are also of interest. The decision standards and techniques, such as management techniques, play an important role.
– *Checks on administration*:[112] This is a group of issues that has already been treated in descriptions of administrative law, taking the findings of administrative science into account. Reviews by supervisory authorities, courts, and audit offices make up the core. In addition, new authorities, such as the data protection officer and the ombudsman, as well as the check provided by an informed public are taken into consideration. It is important to have knowledge of the inner dynamics of the review processes that occur in these institutions.
– *Administrative reforms*:[113] The history of administration is a history of its reforms and attempted reforms. Administrative reforms have various manifestations, for ex. as functional reforms, territorial reforms, or ser-

110 On this only Rabin, Bartley Hildreth and Miller (n. 31), section 11 (information technology); Karl-Heinz Ladeur, 'Die Kommunikationsinfrastruktur der Verwaltung' in: *GVwR* (n. 13), vol. 2, § 21.

111 König (n. 51), 349 ff.; Bogumil and Jann (n. 102), under 4.3.

112 Linking the perspectives of administrative science and administrative law Simon Kempny, *Verwaltungskontrolle* (2017); Wolfgang Kahl, 'Begriff, Funktionen und Konzepte von Kontrolle' in: *GVwR* (n. 13), vol. 3, § 47; furthermore Fritz Morstein-Marx (ed.), *Verwaltung. Eine einführende Darstellung* (1965), (contributions no. 21-25) as well as Eberhard Schmidt-Aßmann and Wolfgang Hoffmann-Riem (eds), *Verwaltungskontrolle* (2001).

113 König (n. 51), 657 ff.; Bogumil and Jann (n. 102), under 5.2.

vice law reforms. They are meant to be implemented regularly (also) with the help of administrative law, and in turn, they have a retroactive effect on administrative law. The concept of New Public Management and the different ways in which individual administrative legal orders adopt it in international comparison serves as a good background when analysing the tasks of guidance assigned to administrative law.

3. New Emphasis

The multifaceted image that administrative research paints of the administration entails not only descriptive findings on the current state of comparative administrative law but also demands reflecting on this state and asking whether changes in scholarly access are indicated.

a) Preliminary Considerations

To this end, what follows will contrast the outmoded comparative perspective with its criticism in an *exemplary* (and slightly exaggerated) way, in order then to discuss some new emphases:[114]

- The administration is the central actor in the classic fields of comparative administrative law. The subjects of comparison are how *it* is governed by parliaments and other political committees, *its* competences and types of action, *its* standards and *its* review by the courts and other authorities. The clear perspective leads to clear comparative parameters and clearly defined assessments. This is primarily an advantage.

Yet there are also certain disadvantages that cannot be overlooked: The comparative framework seems static, and the administration's roleplay seems mechanistic. The underlying understanding of administration can be described, in Richard Stewart's much-cited term, as a 'transmission belt'.[115] Accordingly, administrative law appears as a self-contained world, expressed in its formal elements and concentrated on its instrumental function.

114 On the following the studies by Bignami (n. 71) and Napolitano (n. 3).

115 Richard Stewart, 'The Reformation of American Administrative Law', Harvard Law Review 88 (1975), 1667 (1671 ff.): 'The traditional model of administrative law thus conceives of the agency as a mere transmission belt for implementing legislative directives in particular cases.'.

It does not follow from this comparison of its positive and negative effects that the present concept of comparative administrative law would have to be dismissed or radically changed. The administration continues to be the central reference point for administrative law, just as administrative law is the central reference point for comparative administrative law. Thus, the matter justifies a certain measure of isolating, static examination. But if administrative action and administrative law are designed for efficacy, then the dynamics of actions and the changes of the framework in the comparative parameters must also find their place. New developments must be integrated. This can lead to a broadening of the research field and a shift in thematic emphases, which in turn changes the approach to comparative administrative law.

Three examples will serve to demonstrate this: the governance perspective (b), internationalization (c), and the role that information plays today in the administration's array of measures (d). But the examples also show that one must not be too quickly drawn in by the fascination of what is new and global and that one should not demand too much change. Changes of emphasis are at stake, not radical transformations.

b) Governance Perspective

Governance research, which is no longer a new focus in political science, makes it clear that the state cannot regulate important social sectors of the state alone (and that they were probably not regulated alone in the past either). Instead, regulation occurs in cooperation with commercial enterprises, associations, and other private actors. 'Regulatory structures' are at stake, requiring that the participants' different motives of action be coordinated and these results be maintained. New legal forms are advanced to this end: complex treaties to adopt specified provisions, mixed economic enterprises, working groups, and other hybrid forms of collaboration, which require developing a framework and rules of reliable, fair procedure.[116]

Governance structures do not supplant the administration. It manifests itself in these structures in various ways. But it must use other instruments

116 On this above under E. 2. as well as Gunnar Folke Schuppert (ed.), *Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien* (2005); Gunnar Folke Schuppert, *Governance als Prozess. Koordinationsformen im Wandel* (2009); Schuppert (n. 104), § 16, mn. 20 ff.; Martin Eifert, 'Regulierungsstrategien' in: *GVwR* (n. 13), § 19.

than those that correspond to the classic image of the executive power making unilateral sovereign decisions. Consequently, administrative law must think beyond its traditional scope. It must attend to the *interfaces*, where the participants' decisions converge within the regulatory structures. Therefore, it is not enough to compare the legal forms used. It is necessary to examine the participants' various motives as well, which determine the dynamics of the regulatory structures.[117] These ways in which administrative law *interlinks* with private law, and potentially also with criminal law, must be handled juridically.

This is also interesting for comparative administrative law: It is important to evaluate experiences with these issues of interlinkage in different legal systems and to develop models that can also be implemented transnationally. The breadth of the governance perspective proves to be especially advantageous for comparative work. It creates a broad frame in which to place states, without considering whether they have assigned a certain task or a certain political field more to administrative regulation or more to a private enforcement of the law. In the end, the governance perspective inevitably relegates comparative law to the path of *intradisciplinary* research. Topics include:

- Complex contractual arrangements to cover networks of private and administrative actors;
- Sanctions of a criminal, administrative, and contractual nature to enforce duties adopted self-regulatively;
- Forms of collective legal protection: group actions for ex. in environmental law or consumer protection law in areas that are subordinated, in the countries, variously to administrative supervision or private law enforcement;
- The role of soft law, 'agreements', and other forms of soft configuration of duties.

Yet in all this, it should not be overlooked that governance structures are dominant only in certain areas of administrative law. These areas concern market and economic regulation (in the broader sense), product safety, healthcare, and certain aspects of environmental protection. It is no coincidence that the American literature in comparative law emphasizes the governance perspective so strongly. For to a great extent, the USA's admin-

117 On this Bignami (n. 71), 872.

istrative law (or more precisely: what this term designates in the textbooks and leading journals) is concentrated on regulatory law.[118]

But administrative comparative law must not become entirely caught up in this. Not everything is governance. Rather, there are numerous other areas, such as police law, construction law, and tax law, which cannot be fully comprehended with conceptions of governance. In these fields, just as in the past, administrative law proves its value by structuring the legal relationships between the administration and the individual citizen, as the addressee of a burdensome order or as the petitioner for benefits to be awarded. These areas, too, with their small-scale case constellations that include the citizens directly, are worth being treated from the perspective of comparative law.

c) Internationalization of Administrative Law

Where the complex phenomenon of the internationalization of administrative law is concerned, two issues must be distinguished.[119] For one, the matter at hand is the increased importance of *international law*. International law is not yet *per se* a suitable subject of comparative administrative law. Yet the process of its creation often draws on models from national law, and in this respect, comparative administrative law can be seen as a practical prerequisite for international law, which should also be used for its interpretation. A topic that stems from comparative law is the impact of international law on national law. What are the techniques of reception? What isolation mechanisms are activated? How do legal systems even deal with the superimposed layer of international law? These are questions that can be evaluated comparatively.

Even more important is the second way in which the internationalization of administrative law manifests itself. This is the *internationalization of administrative relations*.[120] Of course, forms of cooperation beyond the state

118 Schmidt-Aßmann (n. 8), 10.

119 The following reflections are only sketched out. A systematic treatment of this topic would have to consider Europeanization as a supranationally heightened variant of the superimposition of legal systems and the development of internal administrative structures, one which confronts comparative administrative law with additional challenges.

120 On the following Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by*

have always existed between national administrations. But, as a glance at tax law, social law, or police law shows, such cooperation has increased significantly in recent times and has reached a new level of intensity. In addition to these *horizontal* relationships, *vertical* and *diagonal* relationships between national administrations and international organisations have emerged.[121] International law and administrative law, originally disparate subject matters, have moved closer together. The meaning of familiar legal forms has changed; new forms have been added. As a result, comparative administrative law has new key functions as well.

International mutual assistance is one example. It is a classic legal institution. In its practical implementation, it must rely on the participating administrations having a certain knowledge of the other administration's law or at least being able to attain it quickly. Otherwise they cannot assess what services they can expect from a foreign authority as administrative assistance and where its limits lie. In what legal framework and with what means the information has been collected may also determine the use of information obtained domestically. These are practical fields of application of comparative administrative law.

The topic '*global regulatory process*' has proven to be a field of research with its own profile.[122] Globally, the regulation of important social fields, above all of science, is seen as an important and necessary task. In very general terms, its fulfilment can be understood as a complex process that occurs in multiple phases and involves numerous institutions: legislative and law-enforcing authorities, agencies, courts, and private associations. In this respect, there are overlaps with the topic of 'governance'. For comparative law, the issue firstly is to gather the states' different regulatory techniques and to analyse the different mixing ratios of features derived from regulatory and private law: what regulatory tasks are in the hands of the state, and what is left to private initiative? Beyond this, comparative law can help to better understand the influences of international regulatory authorities on the national legal systems.[123] *Global regulation* thus becomes

International Institutions. Advancing International Institutional Law (2010); Sabino Cassese (ed.), *Research Handbook on Global Administrative Law* (2016).

121 Cf. Napolitano (n. 3), 1012.

122 Bignami and Zaring (n. 30); there on research design 8 ff.: rulemaking, oversight, enforcement, judicial review.

123 On this for ex. Gregory Shaffer, 'How the WTO Shapes the Regulatory State' in: Bignami and Zaring (n. 30), 447.

an area of reference for vertical and diagonal comparative law.[124] At the same time, it underscores the need for an interdisciplinary approach, which transcends the limits of the traditional disciplinary foundations of faculties of law.

d) 'Information-Based' Administrative Law

A third field where new developments prompt new emphases, in comparative administrative law as well, is administrative law concerning information. Typical administrative law conflicts today often arise not from the administration's decisions but from its treatment of information. The contradictory objectives of data protection and the publicity of information demarcate an area that revolves around 'information' as a medium of control and has proven to be conflictual.[125] One need only think of security agencies' secret data acquisition or of the administrative practice of publishing consumer information on the internet. The transnational traffic of information in the context of international administrative aid and of agency networks that exist worldwide show that administrative law concerning information has its own international and global perspective.

Comparative law in particular can make clear that one must consider other *cognitive interests* than the 'accountability paradigm', which is prioritized for the topics of 'governance' and 'global regulation'. Above all, the issue at hand is protecting and enforcing individual rights in situations that appear very confusing to the individual affected citizen. Information takes on ubiquitous and diffuse forms. Dealing with them is a real event, which lacks clear legal forms. Information is difficult to grasp, and so the administration's treatment of it is also difficult to contest. The value of information to which access is demanded often depends on a very specific point in time. This requires a quick decision. Conversely, once published, information can also hardly be eliminated again. Additional interests of legal protection come into play when information is gathered secretly.

On the whole, administrative law concerning information is a far-reaching legal area, for which the 'paradigm of individual legal protection' is at

124 Napolitano (n. 3), 1025 ff.; Bignami (n. 30), 34.

125 On the phenomenon of 'information-based conflicts' Eberhard Schmidt-Aßmann, *Kohärenz und Konsistenz des Verwaltungsrechtsschutzes* (2015), 157.

least as important as the 'paradigm of accountability'.[126] The comparative analysis of the relevant law must keep an eye on *both* orientations and monitor which of the two is emphasized in concrete situations. This stimulates reciprocal learning processes: Thus, a great deal speaks for the fact that legal systems which, like the German system, shifted only later from the principle of classifying documents to that of disclosing them, have not yet sufficiently grasped the profound change this involves for the entire administrative communication, for ex. in systematizing administrative reviews. Conversely, comparative law in administrative law concerning information can remind an administrative legal order, which, like the American one, is primarily focused on linking the administration to democratic government, how important citizens find the protection of their privacy. While the right to privacy was discussed in the USA earlier than in Europe, it was not developed as comprehensively as can now be said of European data protection law.[127] The scandals involving secret data acquisition by the National Security Agency (NSA) highlight the importance of an elementary, constitutionally recognized interest, which can demand an appropriate space in a free system of administrative law.[128]

G. General and Particular Objectives of Comparative Administrative Law

Comparative administrative law is first and foremost a scholarly project. In this, it is no different from comparative private, or criminal law (1).[129] But in its practical objectives, it has somewhat different focal points than

126 This does not preclude overlaps between the two paradigms: 'freedom of information' is simultaneously a means of strengthening 'accountability'; treated comparatively (USA, UK, Australia) in this respect in Cane (n. 19), ch. 11. Conversely, effective data protection can depend on arrangements that are not only shaped by individual rights but also rely on objective controls and structures of governance; cf. Friederike Voskamp, *Transnationaler Datenschutz. Globale Datenschutzstandards durch Selbstregulierung* (2015).

127 On this with further references Manuel Klar and Jürgen Kühling, 'Privatheit und Datenschutz in der EU und den USA – Kollision zweier Welten?', AöR 141 (2016), 166, esp. 177 ff.; Thomas Wischmeyer, *Überwachung ohne Grenzen. Zu den rechtlichen Grundlagen nachrichtendienstlicher Tätigkeiten in den USA* (2017).

128 Cf. on the public's privacy expectations vis-à-vis video surveillance of public spaces, which exceeds the level of protection guaranteed by US law, Klar and Kühling (n. 127), 205 with reference to empirical evaluations in the literature.

129 On comparative law generally Zweigert and Kötz (n. 11), § 2, I.; Siems (n. 23), 2 f.

comparative private law (2).[130] Both are interlinked in important ways and this is illustrated with the example of legal transplants (3).

I. Scholarly Project

The objective is to gain fundamental insights into the ordering and controlling aspects of law in society by means of comparative examination. What approaches and what forms of law (private law, criminal law, public law) are enlisted to pursue these effects and how the different approaches are connected to one another to form 'arrangements' are central questions of *interdisciplinary* research. Governance-oriented comparative administrative law is well-positioned to answer them.

Fundamental knowledge makes it possible to understand foreign legal systems. But it also fosters awareness of the particularities of one's own legal system. Therefore, the German Council of Science and Humanities, the *Wissenschaftsrat*, speaks succinctly of an 'analytical distance', which comparative law, like legal history, enables.[131] In the framework of *interdisciplinary* research, moreover, comparative law can contribute to better understanding the dynamics of social processes.[132]

The forms of scholarly comparative administrative law vary depending on the subjects of comparison and cognitive interests.[133] In addition to studies on individual legal institutions, there are explorations of complex reception processes. Generally speaking, in order to do justice to issues of administrative law, it is necessary to include framework conditions and the effects of enforcement. The connections to constitutional law and to administrative science practically inhere in the matter. This demands an ambitious development of theories, which does not happen abstractly in advance, though, but rather gradually while analysing the material. This

130 Schönberger (n 3), § 71 mn. 4 ff; See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.) ('Particularities of Comparative Administrative Law in Contrast to Traditional Comparative Civil Law'); von Busse (n. 61), 32 ff.

131 Wissenschaftsrat, *Perspektiven der Rechtswissenschaft in Deutschland* (2012), 31.

132 On this only Stefan Grundmann and Jan Thiessen (eds), *Recht und Sozialtheorie im Rechtsvergleich. Law in the Context of Disciplines* (2015).

133 Systematically on this Hirschl (n. 68), 193 f., who outlines a spectrum that reaches from detailed studies of individual systems to typologies and then to large-scale analyses of empirically obtained material, which are intended to clarify causal relations.

already shows how necessary it is to capture the legal systems included in the comparison in positive terms and to present them compactly, that is to say, how necessary it is to *work on the material*. Description alone is not comparative law, but it is an 'indispensable prerequisite' for it.[134]

2. Practical Objectives

The results of academic work do not remain in the ivory tower of academic self-assurance but instead spread to the practice of legislation and the application of the law. In this respect, too, one can in principle refer to the general comparative literature.[135] But the advance of international administrative actors (UN Security Council, World Bank, World Trade Organization [WTO]) and the increase in international and European administrative cooperation set slightly different priorities.[136]

(a) First and foremost, the task of scholarly work in comparative administrative law is to obtain general principles of law. National administrative law has developed in large part from legal principles and still continues to develop in them today, if one thinks of the transnational development of the principle of proportionality. But above all, European and international administrative law (including global administrative law) depend on the development of general principles. This becomes especially clear in cases where regulations of international law or of EU law refer to shared traditions or to principles of other legal systems, as demonstrated for ex. in art. 6 para. 3 Treaty on the European Union (TEU).[137] But the reach of general

134 Cf. only Max Rheinstein, *Einführung in die Rechtsvergleichung* (2nd edn, 1987), 22.

135 On this Kischel (n 21), § 2, mn. 81 ff. and 22 ff.; Thomas Pfeiffer, 'Rechtsvergleichung und Internationales Privatrecht in der Berliner Republik' in: Thomas Duve and Stefan Ruppert (eds), *Rechtswissenschaft in der Berliner Republik* (2018), 157 ff.

136 Cf. on the following Bernhardt (n. 37), 431 ff.; Karl-Peter Sommermann, 'Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa', DÖV 52 (1999), 1017 ff.; Karl-Peter Sommermann, 'Erkenntnisinteressen der Rechtsvergleichung im Verwaltungsrecht' in: Anna Gamper and Bea Verschraege (eds), *Rechtsvergleichung und juristische Auslegungsmethode* (2013), 195 ff.; Martin Bullinger, 'Zwecke und Methoden der Rechtsvergleichung im Zivilrecht und im Verwaltungsrecht' in: Ingeborg Schwenzer and Günter Hager (eds), *Festschrift für Peter Schlechtriem* (2003), 331 ff.; Möllers (n. 17), § 3 mn. 41 (practical relevance for the formation of internal administrative law and for cooperation structures in the EU).

137 Art. 38 para. 1 lit c of the Statute of the International Court of Justice ('the general principles of law recognized by civilized nations'), art. 6 para. 3 TEU ('the consti-

principles extends far beyond these particular cases. Comparative work in administrative law has its most important practical scope here.

(b) Secondly, their task is to serve as a *source of inspiration*, aiding with the preparation of major legislation projects, such as the codification of administrative procedural law. The development of the German Administrative Procedure Act of 1976 and the draft of an EU administrative procedural law constitute examples.[138] Comparative law is also a source of inspiration when preparing the legislation of secondary EU law. Finally, it is worth noting the large number of recommendations with which the Council of Europe seeks to ensure that the administrative legal orders of its Member States guarantee basic standards of administrative law.[139] They constitute an individual expression of the effort to harmonize the law, which is a classic objective of studies in comparative law.[140]

(c) The third practical goal of comparative law is to function as an *interpretive aid* for the interpretation of provisions, which in turn originated with the help of comparative law scholarship.[141] Here, comparative law is part of the genetic construction. To what extent insights from comparative law can also be consulted in other cases and perhaps even represent a 'fifth interpretive method' (Peter Häberle)[142] is contested and, for administrative law (unlike for constitutional law), may be considered for general teachings

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tutional traditions common to the Member States'), similarly art. 52 para. 4 EU CFR; art. 340 para. 2 TFEU ('non-contractual liability […] in accordance with the general principles common to the laws of the Member States'). Without textual reference, but also in this matter art. 41 EU CFR ('right to good administration'); on this Matthias Ruffert, in: Matthias Ruffert and Christian Calliess (eds), *TEU/TFEU Commentary* (4th edn, 2011), art. 41 CFR, mn 3 ('In this respect, Basic Law builds on international and European legal traditions as well as on the traditions of the Member States.'), in detail von Busse (n. 61), 217 ff.

138 On the Administrative Procedure Act: Carl Hermann Ule and Hans Becker, *Verwaltungsverfahren im Rechtsstaat* (1964); Carl Hermann Ule (ed.), *Verwaltungsverfahrensgesetze des Auslandes* (1967). On EU law: Jens-Peter Schneider, Herwig C. H. Hofmann and Jacques Ziller (eds), *Research Network on EU Administrative Law (ReNEUAL)-Model Rules on EU Administrative Procedure* (2014), there esp. introduction mn. 28 ff.

139 On this, the references in Ulrich Stelkens, in: Paul Stelkens, Hans Joachim Bonk and Michael Sachs (eds), *Verwaltungsverfahrensgesetz* (9th edn, 2018), EUR mn. 25 ff.

140 Cf. Zweigert and Kötz (n. 11), § 2, V.

141 In detail on the following von Busse (n. 61), 94 ff., 324 ff. and 392 ff.

142 Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (2nd edn, 1998), 312 ff.; Peter Häberle, 'The Rationale of Constitutions from a Cultural Science Viewpoint' (this vol.).

at most.[143] The German courts have an even more restrictive policy.[144] Other countries' courts are somewhat more open, even if the justification and the limits of such an approach are contested.[145] The member state courts act as 'functional Union courts' when applying EU law, which is thus a special case.[146]

(d) The great number of *conflict-of-law questions*, which require a comparative law approach in private law and have led to a firm connection between the two, do not exist in administrative law. But with the internationalization of administrative relations, above all in economic and regulatory law as well as in environmental, social, and tax law, forms of transnational administrative cooperation that demand knowledge of foreign law have increased.[147] An administration can only decide whether, for example, 'appropriate safeguards' and 'effective legal remedies' exist in a third state and whether it is therefore, pursuant to art. 46 EU General Data Protection Regulation (GDPR), authorized to transmit personal data to this state, if it familiarizes itself with the state's law or can otherwise access reliable knowledge. Dealing with foreign law assumes a minimum standard of comparative experience. In this case, the results are not a mere interpretive aid supplementing other interpretive aspects but a fundamental element of the application of law, as they provide information for the evaluations that

143 Cf. Kischel (n. 21), § 2, mn. 53 ff.; decidedly rejecting this for administrative law Möllers (n. 17), § 3 mn. 41.

144 On this Hannes Unberath and Astrid Stadler, 'Comparative Law in the German Courts' in: Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Laws* (2015), 581 ff. For different observations cf. Andreas Voßkuhle, 'Constitutional Comparison by Constitutional Courts – Observations from Twelves Years of Constitutional Practice' (this vol.).

145 Cf. only Thomas Kadner Graziano, 'Is It Legitimate and Beneficial for Judges to Compare?' in: Andenas and Fairgrieve (n. 144), 25 (40 ff.).

146 National courts may only abstain from a duty to refer pursuant to art. 267 TFEU if the interpretation of the relevant rule of EU law leaves 'no scope for any reasonable doubt'. Part of this obligation is also to make sure 'that the matter is equally obvious to the courts of the other member states' CJ judgment of 6.10.1982 (case 283/81) mn 16 – C.I.L.F.I.T.

147 Christian Tietje, *Internationalisiertes Verwaltungshandeln* (2001), 171 ff. and 288 ff. (selected areas); Christoph Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts* (2005); Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (2007); Markus A. Glaser, *Internationale Verwaltungsbeziehungen* (2010). Transnational police law is a separate issue; fundamentally on this Bettina Schöndorf-Haubold, *Europäisches Sicherheitsverwaltungsrecht* (2010).

inhere in the norm.[148] To date, comparative law lacked this relevance to practice, that is to say, the direct significance for authorities and courts, but now its importance is becoming more apparent.[149]

3. Special Case: Legal Transplants

Legal transplants constitute a subject area in which theoretical and practical work is interwoven in especially intimate ways. The transplant itself is primarily a political process, in which legislation or the judiciary are driving forces.

The question to what extent components of one legal system can truly be transplanted into another remains controversial.[150] In its own estimation, comparative administrative law can contribute arguments in favour of both sides of this dispute.[151] In administrative law in particular, the connection to institutions and a particular dependence on context raise doubts about the possibility of legal transplants. Yet, the development of administrative law has seen an entire series of successful transplants.[152]

Instead of questioning the possibility of legal transplants in general, it is advisable to look more closely at the conditions in which a transplant oc-

148 In terms of the conflict of laws, what is at stake is answering preliminary questions in the context of applying one's national law; cf. Ohler (n. 147), 49 f.

149 Similarly, Schönberger (n. 3), § 71 mn. 6; See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.).

150 References in Kischel (n. 21), mn. 38; Siems (n. 23), 196 f.; Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom', American Journal of Comparative Law 58 (2010), 583 (586-602); Margrit Seckelmann, 'Ist Rechtstransfer möglich? – Lernen vom fremden Beispiel', Rechtstheorie 43 (2012), 419 ff.; Günter Frankenberg, 'Legal Transfer' (this vol.).

151 On the following Schönberger (n 3), § 71 mn. 25 ff; see Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.).

152 Schönberger (n. 3), § 71 mn. 25; see Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.). Specifically on the influence of German administrative law, cf. Gonod (n. 15): on France; Irena Lipowicz, 'Einfluss des deutschen Verwaltungsrechts auf die Lehre des Verwaltungsrechts in Polen', Verwalt. 48 (2015), 365 ff.: on Poland; Francisco Velasco, 'Die Rezeption des deutschen Verwaltungsrechts in der spanischen Rechtsordnung', Verwalt. 48 (2015), 383 ff.: on Spain. An instructive presentation of numerous indirect processes in Javier Barnes (ed.), *Transforming Administrative Procedure* (2008).

curs or should occur as well as at the effects of reception.[153] Two examples may clarify that such an analysis demands a great degree of sensitivity in view of administrative law's special context dependence.

a) The Notice-and-Comment Procedure of the Administrative Procedure Act (APA)

Unlike most Continental laws on administrative procedure, the American Administrative Procedure Act of 1946 has a procedure for administrative rulemaking (§ 553 APA), which broadly comprises of three interrelated steps: (1) ex-ante public announcement of impending legislation or regulation (2) providing an opportunity for the public to comment (3) adopting regulation only after examination of the comments received and explanation provided.[154] The procedure is considered a crown jewel of American legal thinking and expression of a *pluralistic* understanding of the public good, which gives everyone the chance to participate in good legislation. It stands for transparency and deliberation. Its pleasantly open character suggests transplanting it also to administrative legal orders which have no or only rudimentary procedural requirements to date for the administration's rulemaking. Yet, the *initial situation of constitutional policy*, which prompted the creation of the notice-and-comment procedure in the USA, does not exist in Germany: in the USA, the 'independent agencies', which act largely autonomously, adopt the politically meaningful regulations. There is also no effective ban on delegation. The notice-and-comment procedure is supposed to compensate for the agencies' broad scope of action in this situation. In Germany, by contrast, it is the parliamentary responsible government, that has the jurisdiction to adopt regulations. Moreover, there are the restraints on delegation (art. 80 para. 1 cl. 2 Basic Law): 'content, purpose and scope' of the delegation have to be fixed by parliament itself. A compelling reason or even a constitutional obligation to 'readjust' delegated rulemaking procedurally thus does not exist.

On the other hand, the *German legal order* is not averse to taking over the APA model: While it is not customary for the public to participate in

153 On this Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in: Reimann and Zimmermann (n. 2), 441 ff.

154 Cf. only the portrayal in Susan Rose-Ackerman, in: Susan Rose-Ackerman, Stefanie Egidy and James Fowkes, *Due Process of Lawmaking* (2015), 77 ff. and 98 ff.; Peter Strauss, 'US Rulemaking' in: Barnes (n. 152), 229 ff.; Schmidt-Aßmann (n. 8), 170 ff.

the rulemaking of the executive power, this is already provided in some areas, such as spatial planning law. Thus, it is not a foreign concept. The Joint Rules of Procedure of the Federal Ministries moreover prescribe that drafts of regulations must be communicated to central organizations and expert groups, albeit leaving their selection to the discretion of the minister in question. Such a model is no longer suited to the equality of democratic opportunities of participation. The changed communicative situation speaks for a reconstruction: Instead of classifying documents, the standard today is that everyone has the right to access information freely. Adopting individual elements of the notice-and-comment procedure certainly seems attractive to a modern procedural law of administrative rulemaking.

By contrast, judicial reviews of procedure should not be expanded. The courts should also not be encouraged to intensify their already existing reviews of rulemaking procedure. The American experiences suggest that caution is in order here. At least for a time, the courts placed demands that were too high. As a result, necessary lawmaking acts have often been excessively delayed. Even if there is no empirical proof for the reproach that legislation is increasingly 'ossified',[155] one should avoid the procedure becoming unattractive and the agencies attempting strategies of evasion.

b) Independent Agencies

The independent agencies are a second institution illustrating the problem of legal transplants. The USA is considered the country of origin.[156] The classic example is the Interstate Commerce Commission, founded in 1887 to regulate train tariffs. The New Deal expanded this type of agency especially, which today includes for ex. the Federal Trade Commission (FTC), the Securities and Exchange Commission (SEC), the Federal Communication Commission (FCC), and the Consumer Product Safety Commission (CPSC). While it is broadly understood what an 'independent agency' means or what purpose it serves, there is no precisely delimited *legal form*. This is because independent agencies in the American system not only manifest themselves in diverse constellations, but also because their pos-

155 Cf. the references in Cane (n. 19), 301 (n. 17).

156 Briefly on the development there Peter Strauss, *Administrative Justice in the United States* (2nd edn, 2016), 178 ff.; in detail Marshall J. Breger and Gary J. Edles, *Independent Agencies in the United States* (2015).

ition is decisively determined by the American political system's premises of constitutional law and policy.[157]

In Europe, the idea has found a following above all in the regulation of network economies.[158] In part, it was adopted voluntarily; in part, the EU obligated the member states to do so in order to relieve the reduction of state monopolies from political pressure. In comparative law studies, the relevant experiences in the individual countries show how complex administrative organizational law in particular is and how difficult it is to predict the success of a legal transfer in this field:[159]Thus, despite the state's centralism, independent administrative agencies in France have for some time now belonged 'to the established and generally accepted structure of the regular administrative organisation.'[160] England, which one would expect to be especially close to American ideas of administrative organisation and regulation for various reasons, does indeed have a large number of independent agencies.[161] Yet these are tied to the ministries in various ways.[162]

157 Cf. the contributions in Susan Rose-Ackerman (ed.), *Economics of Administrative Law* (2007); comparing in precise terms Daniel Halberstam, 'The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies' in: Rose-Ackerman, Lindseth and Emerson (n. 18), 139 ff. (on the USA, Germany, and France); Martin Shapiro, 'A Comparison of US and European Independent Commissions' in: Rose-Ackerman, Lindseth and Emerson (n. 18), 234 ff.

158 On this Johannes Masing, 'Die US-amerikanische Tradition der Regulated Industries und die Herausbildung eines europäischen Regulierungsrechts', AöR 128 (2003), 558 (584 ff.); Matthias Ruffert, 'Verselbständigte Verwaltungseinheiten: Ein europäischer Megatrend im Vergleich' in: Hans-Heinrich Trute, Thomas Groß, Hans Christian Röhl and Christoph Möllers (eds.), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts* (2008), 431 ff. (comparing England, France, Germany, and EU).

159 Johannes Masing and Gérard Marcou (eds), *Unabhängige Verwaltungsbehörden* (2010); a summary in Gérard Marcou, 'Die Verwaltung und das demokratische Prinzip' in: *IPE* (n. 3), vol. 5, § 92, mn 38 ff.; Christoph Möllers, 'Verwaltungsrecht und Politik', there § 93 mn. 52 ff.

160 Thus Johannes Masing, 'Organisationsdifferenzierungen im Zentralstaat' in: Trute, Groß, Röhl and Möllers (n. 158), 428; similarly Eberhard Schmidt-Aßmann and Stéphanie Dagron, 'Deutsches und französisches Verwaltungsrecht im Vergleich ihrer Ordnungsideen', ZaöRV 67 (2007), 395 (443 ff.); ultimately also Ruffert (n. 158), 438 f.

161 On the Non-Departmental Public Bodies (NDPBs) Paul Craig, *Administrative Law* (7th edn, 2013), under 4-004; Ruffert (n. 18), 434 ff.

162 Cf. Craig (n. 161), under 4-011 and 4-017 ff.

In Germany, the problem of independent agencies is treated contingently to a great extent: The idea of an independent federal bank has positive connotations. The data protection officers' independence is recognized as well. But apart from that, agencies that work without instructions meet with considerable constitutional misgivings. Accordingly, the provisions of EU law establishing the independence of regulatory agencies for certain decisions have been adopted reluctantly.[163]

Apart from such external difficulties, of course one must ask whether independent agencies are really a ubiquitously applicable type of modern administrative law. Their history and their function are very closely connected to the US governmental system and its understanding of society. In the absence of a constellation that at least resembles the American field of tension between the parliament and the president, the concept remains vague. For it gains its force from a competitive situation, which effectively also guarantees a minimum of control. At any rate, the agencies in the EU administration can be compared with the US independent commissions only with difficulty.[164]

This does not mean that *decouplings* from the central authorities would not be appropriate for certain administrative tasks. Most administrative legal orders have these decouplings. One such area is expert risk assessments. But these organizational structures must be legitimated and structured independently. A general distrust of an outmoded agency system and the hope of being able to pursue more progressive politics with new organizational forms do not suffice.

H. Conclusion: Comparative Administrative Law – A Process of Shared Learning

The treatment of legal transplants once again clarifies the current tasks of comparative administrative law: It does not correspond to the self-understanding of developed administrative legal orders to take over legal institutions or regulatory systems *in toto* from another system. Ideologically charged eagerness to reform is entirely misplaced. In administrative law,

163 On this with further references Markus Ludwigs, 'Bundesnetzagentur auf dem Weg zur independent agency?', Verwalt. 44 (2011), 41 ff.

164 On this Shapiro (n. 157), esp. 245 f.; Miroslava Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies* (2014).

it already fails because the legal field as such is inherently grounded. Instead, the starting point of all practical comparative law must be 'the similarity of the issues to be solved'.[165] Such work requires food for thought and arguments for 'regulatory' or 'institutional choice'. The modern form of comparative administrative law is therefore '*shared learning*'.[166] This concept refers to communicative processes, which activate reflection in all participating legal systems. That applies also to Union administrative law, whose legislative preparation and judicial follow-up (art. 267 TFEU) can be understood as institutionalized forms of learning.

Comparative law makes arguments but does not force. It prompts a cautious review that weighs advantages and disadvantages and a transformation of outmoded *acquis* and dogmas. It is sobering to look at other legal systems. For it becomes apparent that there are regularly several ways to solve a problem. This realization prevents entrenched hubris just as much as continuing self-doubt. Many an instance of media frenzy would be calmed if one considered other, constitutionally similarly oriented legal systems. But above all, comparative law is a source that nourishes the adaptability of the *law* and the vibrancy of *legal scholarship*. The fundamental concern of both is learning.

165 Schönberger (n. 3), mn. 11; see Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.); also Bell (n. 2), 1257 (1266 f.).

166 On this Schmidt-Aßmann and Dagron (n. 160), 395 f.

Reflecting Various Practices

Legal Transfer

Günter Frankenberg[*]

Keywords: Legal transfer, legal transplant, bricolage, contextualization, cultural specificity, political deviance, modalities of transfer

A. Introduction

Laws[1] neither fall 'from heaven' as lawmakers' ingenious insights nor grow organically from the soil of local culture. While brilliant ideas and context are crucial for the construction of laws, they may be more adequately understood as products of the confluence of information – some local, some that has travelled from elsewhere. In the following, the focus will therefore be on how legal information travels – or as it is described here: how it is transferred. The concept of transfer is meant to make comparatists sensitive to the different ways legal items, such as rights and values, organizational provisions and doctrines, are converted into standardized information and over time become products or commodities on the global or regional markets where elites, politicians, social movements, and legal consultants shop for inspirational legal ideas, 'commanding' constitutional models, efficient bankruptcy regulations, progressive family laws, or mechanisms to cope with corruption already tested someplace else.

Legal transfer is understood here to operate as part of world-making. First, it will be shown how the information needed to design or revise laws is gleaned from foreign contexts, and how it arrives in a new setting not in its pristine form or design but *always already* processed intensely

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1 'Laws' is used here as a summary of the items amenable to transfer, like statutes, rules, doctrines, principles, arguments, cases, institutions, systematics, etc. I am indebted to Katrin Seidel, Felix-Anselm van Lier, and Marie-Claire Foblets for their thoughtful comments on a previous version.

on the way. Second, whether selected with care or haphazardly borrowed, imported in good faith or imposed with brute force, the translation and application of legal information to a new environment invariably presupposes intense modification and adaptation, which is here referred to as 'bricolage' in order to accentuate the aspect of ad hoc tinkering, in contrast to planned, systematic legal engineering.[2] Third, it will be shown below that transfer entails considerable hazards. Since the process of transfer is open-ended and unpredictable, the final result never simply brings forth the initial item but reproduces a fragment, cut-out, hybrid, modified copy, or 'pastiche' that imitates the norm, argument, or institution to be transferred. Transfer calls for an analysis that pays special attention to contexts and cultures, risks and side-effects. Fourth, while the process of decontextualization may be read as another globalization story, this narrative receives a critical twist if the focus is shifted to items that resist transfer and call for an answer to why and which kind of legal information remains context-bound.

B. From 'Transplant' to Transfer

The concept of 'legal transplant', introduced in 1974 by the legal historian Alan Watson from a basically functionalist perspective,[3] has been adopted without much theoretical ado, especially by comparatists with a historical or economic mindset.[4] Yet a return to *The Spirit of the Laws* might curb the career of this surgical term, which hardly complies with Montesquieu's (and other comparatists') observation that '[laws] should be so specific to

2 Claude Lévi-Strauss, *The Savage Mind* (University of Chicago Press 1966).

3 Ralf Michaels, 'The Functionalist Method of Comparative Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 339-382.

4 E.g. Morton Horwitz, 'Constitutional Transplants', Theoretical Inquiries in Law 10 (2009), 535-560; Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics', International Review of Law and Economics 14 (1994), 3-19; Jonathan M. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process', American Journal of Comparative Law 51 (2003), 839-885. For a differentiated view: Michele Graziadei, 'Comparative Law as the Study of Legal Transplants' in: Reimann and Zimmermann (n. 3), 441-475; Vivian Grosswald Curran, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law', American Journal of Comparative Law 46 (1998), 43-92; and Pier Giuseppe Monateri, 'Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition', Hastings Law Journal 51 (2000), 3-72.

the people for whom they are made, that it is a great coincidence if those of one nation can suit another',[5] or with any comparative style privileging the analysis of concrete cultural-social circumstances over abstract general concepts. Situating the 'transplant' in this field of diverse comparative approaches elucidates its functionalist pedigree and limits.

From a less traditional and more contextual perspective, '[t]he moving of a rule or a system of law from one country to another'[6] neither resembles an organ transplant nor captures with passable precision what happens when legal information travels. A transplanted kidney is removed from one body and relocated to another one, whereas a 'transplanted' civil code neither emigrates from one nor settles in a new 'body of norms'. It remains in its cultural setting and is only imitated, adapted, doubled, cloned elsewhere. Hence, 'transplant' is a limping metaphor which invites wonky associations and analogies. First, it obscures just *what* is transferred. Laws and systematics, doctrines and arguments, rights and values, institutions and programmes, degrees and curricula – virtually anything qualifies for travel. However, each item does not migrate *en bloc* qua organ but as text or knowledge, that is *information*. Second, 'transplant' conceals that legal information, when transcending borders between legal systems and interpretive communities, is not reduced to its basic structure (atom-like) but remains layered. It can be described as the layered interplay or narrative of propositions, structures, decisions, mentalities, experiences, case histories, and so forth,[7] a good deal of which gets lost in translation or gets transformed in 'translation chains'.[8] The fragmentary nature of 'transplants' and the very selectivity of the process are profoundly misrepresented by the organicist analogy. Third, the technical term 'transplant' is based on a doubly formalist reduction: law is reduced to rules and rules are brought down to their propositional content.[9] This way, law is transformed from

5 Charles-Louis de Secondat Montesquieu [1748]. *The Spirit of the Laws* (Garnier Frères, 1961), 295.

6 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974), 20.

7 Günter Frankenberg, 'Comparing Constitutions. Toward a Layered Narrative', International Journal of Constitutional Law 4 (2006), 439-459; Grosswald Curran (n. 4); Geoffrey Samuel, 'Taking Methods Seriously', Journal of Comparative Law 2 (2007), 94-119.

8 Richard Rottenburg, *Far-Fetched Facts: A Parable of Development Aid* (Cambridge University Press 2009).

9 Pierre Legrand, 'The Impossibility of "Legal Transplants"', Maastricht Journal of European and Comparative Law 4 (1997), 111-124; Pierre Legrand, 'What "Legal Trans-

a cultural artefact to an ensemble of words stripped of most of their contextual connotations. Fourth, in comparative practice, 'transplant' favours the presumption of similarity and projects of convergence. The concept is flanked by a unitary theory of law that guides comparatists to overestimate the (desired) harmonizing effect of 'transplants' and therefore to overlook how even unifying law ends up in new divergences.[10] Thus, the transplant thesis misses a great deal of law's peculiar properties, that it is produced 'somewhere in particular'[11] and offers instead a fairly uniform and deficient model of how and why laws travel – or why they do not.[12] In short: 'Translations are more delicate than heart transplants.'[13]

In contrast, 'legal transfer' alerts comparatists to a *problematic* phenomenon[14] that may be 'extremely common' but is anything but 'socially easy'.[15] Moreover, it supports a more contextual approach that focuses on comparison as practice and a theory of law constituting it as a cultural artefact.[16] By choosing this term, one dismisses the 'naturalism' of legal transplants as well as the solipsism of the notion of a 'nomadic character of rules'.[17] Directing the attention on what happens when transfer happens at least implicitly favours the analysis of differences[18] rather than the search for similarities,[19] and moves away from thinking in terms of congruence and convergence or looking for 'common cores' or 'universal' categories, theories, and histories of law.[20] Finally, transfer captures the *commodity*

plants"?' in: David Nelken and Johannes Feest (eds.), *Adapting Legal Cultures* (Hart Publishing 2001), 55-70.

10 Nursel Atar, 'The Impossibility of a Grand Transplant Theory', Ankara Law Review 4 (2007), 177-197.

11 Thomas Nagel, *The View from Nowhere* (Oxford University Press 1989).

12 For a critique of transplant thesis, see Legrand (n. 9). See also contributions to Günter Frankenberg, *Order from Transfer. Comparative Constitutional Design and Legal Culture* (Edward Elgar Publishing 2013); Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar Publishing 2016).

13 Raimundo Panikkar, 'Is the Notion of Human Rights a Western Concept?', Diogenes 30 (1982), 75.

14 Graziadei (n. 4).

15 Watson (n. 6), 7, 96.

16 Frankenberg (n. 12).

17 Legrand (n. 9).

18 Legrand (n. 9); Monateri (n. 4); Samuel (n. 7).

19 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998).

20 Even if 'legal transfer' may not put to rest the semantic variety or overcome the polarization of the discursive field. For a more explicit analysis and further references, see Frankenberg (n. 12); Günter Frankenberg, *Comparative Constitutional Studies.*

s*tructure* of the exported/imported legal information as a product that comes with standardization.

C. The Grammar of Legal Transfer (I): Concepts and Typologies

As regards laws' travels, a dazzling array of concepts[21] and a remarkable diversity of typologies[22] coincide with a salient scarcity of explanatory theories. This deficit testifies to (a) the narrow focus on specific events, such as the introduction of company law in Vietnam, the Argentine law on hazardous waste, or the legal protection of investment in Brazil;[23] (b) a generally descriptive orientation, such as tracing historical paths of influence[24] rather than venturesome explanatory ideas or the recognition of contingence; (c) reliance on what 'the author knows best', i.e. the 'settled knowledge'[25] covering the domestic terrain with all its 'dangerous incorrectness'[26] – knowledge shaped by experience, habit, familiarity, and lack of curiosity, which is not exposed to further critical and competent inquiry and therefore tilts towards ethnocentric depictions of the foreign as other;[27] (d) reliance on quantitative methods and a spatial lag model to analyse the diffusion and 'presence' of 108 constitutional rights after World War II;[28] (e) a combination of all or some of the features discussed above.

Between Magic and Deceit (Edward Elgar Publishing 2018), 111-191; see also Barry Friedman and Cheryl Saunders, 'Editors' introduction', International Journal of Constitutional Law 1 (2003), 177-403.

21 To name only the most commonly used terms: influence, inspiration, reception, diffusion, migration, borrowing, exportation/importation, adoption, adaption, proliferation, translation, transposition, imposition, octroy, transplant(ation), and transfer.

22 See Graziadei (n. 4); Miller (n. 4); Jean-Frédéric Morin and Edward Richard Gold, 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries', International Studies Quarterly 58 (2014), 781-792.

23 Miller (n. 4).

24 Watson (n. 6).

25 Karl Popper, *The Myth of the Framework* (Routledge 1994), 156.

26 Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective', Feminist Studies 14 (1988), 575-599.

27 Teemu Ruskola, *Legal Orientalism—China, the United States and Modern Law* (Harvard University Press 2013).

28 Benedikt Goderis and Mila Versteeg, 'The Diffusion of Constitutional Rights', International Review of Law and Economics 39 (2014), 1-19.

Typologies follow – albeit with variations and often implicitly – Max Weber's method of carving out ideal-types.[29] If one disregards the pitfalls of determining the motivations and intentions of recipients and donors, and suspends the vexing distinction between voluntary and non-voluntary transfers, the following ideal-types plausibly capture dominant patterns:

Imposition characterizes the coerced import of foreign laws in imperialist settings like military occupation or under colonial regimes.[30] Japan's MacArthur Constitution (1947) figures as the standard example for direct or imperialist imposition. The rather more common 'indirect imposition'[31] relies on negative political, economic, or other sanctions to ascertain 'voluntary' compliance.[32] In the context of asymmetric international relationships, this ideal-type can barely be distinguished from *contractualization*, when governments bargain with one another about the application of legal rules. 'One state will typically promote its own legal rules as constituting the common standard governing a particular issue-area … [and offer] compensation or side payments in another issue-area.'[33]

In contrast to externally dictated transfers, *imitation* or *emulation* appears to follow the logic of functionalism that still dominates comparative law.[34] When legal institutions are confronted with problems, they look for better solutions elsewhere, functionalists tend to argue. Whoever wants to encourage foreign investment might import well-reputed investment protection schemes (such as Vietnam in 1992 or South Africa in 2015).[35] A country coping with a congested criminal justice system might find the US practice of plea-bargaining worth adopting despite its evident flaws.

29 Miller (n. 4); Morin and Gold (n. 22).

30 Upendra Baxi, 'Postcolonial Legality' in: Henry Schwartz and Sangeeta Ray (eds), *A Companion to Postcolonial Studies* (Oxford University Press 2001), 540-555; Upendra Baxi, 'The Colonial Heritage' in: Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003), 46-75; Upendra Baxi, 'Colonial Nature of the Indian Legal System' in: Indra Deva (ed.), *Sociology of Law* (8th edn, Oxford University Press 2005), 41-83; Lauren Benton, *Law and Colonial Cultures. Legal Regimes in World History* (Cambridge University Press 2002).

31 Morin and Gold (n. 22), 782.

32 Graziadei (n. 4).

33 Morin and Gold (n. 22), 782.

34 Frankenberg (n. 12).

35 See Peter-Tobias Stoll, Till Patrik Holterhus and Henner Gött, *Investitionsschutz und Verfassung* (Mohr Siebeck 2017).

Drawing lessons from other countries' experience[36] may misfire, though, and does not always turn out to be cost-saving.[37] For instance, imported legal education projects in Brazil not only failed but actually consolidated the authoritarian regime because they lacked the corresponding liberal ideological frame and institutional basis.[38] The controversy over whether *prestige* motivates imitation,[39] at least in states undergoing political transformation,[40] or whether prestige is a largely empty category, need not be decided here. If not prestige, then certainly authority plays a significant role in legal transfer. The French *Code civil* or the German *Bürgerliches Gesetzbuch* were widely considered to be authoritative legal sources. Likewise, the nineteenth-century German professoriate and the elite law schools of the United States served as models for imitation.

Regulatory competition[41] is defined by the adoption of foreign rules and institutions, degrees and expertise in order to improve the position of one's country or oneself in a competitive world. Regulatory regimes or items (notably degrees and expertise) may enhance reputational or instrumental gains, depending on whether they are meant to generate legitimacy (decorating an authoritarian regime with rule of law, like Sadat's Egypt in 1971), procure economic rent (attracting investment, as in Vietnam, see above), or provide social capital and positions of influence, for instance for graduates of foreign masters programmes.[42]

D. The Grammar of Legal Transfer (II): Modalities and Pathways

In default of an established methodology, the export and import of legal information may be described in analogy to Edward Said's 'traveling theory'[43]

36 Richard Rose, 'What is Lesson-drawing?', Journal of Public Policy 11 (1991), 3-30.
37 Miller (n. 4).
38 David Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', Yale Law Journal 82 (1972), 47.
39 Graziadei (n. 4), 458; Rodolfo Sacco, *Introduzione al Diritto Comparato* (5th edn, UTET 1993), 148.
40 Miller (n. 4).
41 Morin and Gold (n. 22).
42 Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago University Press 2002).
43 Edward W. Said, *The World, the Text, and the Critic* (Vintage 1983).

or in terms of a commodity theory of law.[44] Said discerns four stages that, if translated into the legal domain according to the rules of the grammar of comparative practice, illustrate the pathways, risks, and side-effects of legal transfer. One can indeed analytically distinguish four moments of the transfer process:[45] a point of origin, the complex decontextualization of legal information, the inclusion in (or rejection from) the global reservoir or market, and finally the thorny recontextualization at the receiving end that involves bricolage and yields a variety of outcomes. The phases or moments of transfer outlined here are not to be taken as a strict sequence of discrete steps but as turns in the many possible pathways for the export and import of laws and constitutions.[46] As a matter of fact, if a set of initial circumstances cannot be pinned down – not even analytically – or calls for extensive (comparative) research or a critique of misleading originalist assumptions, the sequence moving from decontextualization via globalization to recontextualization may have to be reversed.

I. Initial Circumstances of Transfer

Originalist assumptions should be prudently weakened, though, as the starting point may only 'seem like one' – there is almost invariably a *before*. It is preferable to de-privilege origin and argue it down to a 'set of initial circumstances'[47] when and where legal transfer could plausibly have begun. The 1831 Belgian Constitution, though widely regarded as one of the leading and original constitutional documents of nineteenth-century Europe, supplies an ironic comment on originalism: the intensive transfer activity of its designers left only 5 per cent of the text that could be classified as 'original', i.e. not gleaned from other constitutions.[48] Similarly, the origins

44 Frankenberg (n. 12); Frankenberg 2016 (n 12); Ralf Michaels, '"One Size Can Fit All" – Some Heretical Thoughts on the Mass Production of Legal Transplants' in: Günter Frankenberg (ed.), *Order from Transfer. Comparative Constitutional Design and Legal Culture* (Edward Elgar Publishing 2013), 56-78.

45 Regardless of whether the material is taken from civil, criminal, or (as for instance in the following) constitutional law.

46 This also means that 'grammar' is not to be understood as a set of prescriptive, systematic rules.

47 Said (n. 43).

48 Frankenberg (n. 20), 173-176.

of the French *Déclaration* are shrouded by the plurality of genealogies;[49] incidentally, Korean constitutionalism also attests to the ambiguity of origin.[50]

2. Decontextualization

For the most part, comparatists agree that transfer presupposes that legal items have to be isolated from the formative conditions of their production and processed in order to transcend borders and contexts.[51] In the absence of transfer rules prescribed by an authoritative grammar, *decontextualization* can be circumscribed metaphorically: the items have to be stripped, shock-frozen, and packaged for the transgression of time, space, and culture – or 'skeletonized'.[52] In terms of a commodity theory,[53] which takes its cues – not its epistemology – from Marxism, decontextualization implies the standardization of legal information as marketable items, a process that presupposes three overlapping analytical operations:

Reification transforms 'live' and contested ideas into objects by divesting them of their historical background, sociocultural environment, and political-legal controversies. Cases travel without their 'case history', rules without their diverse interpretations, and institutions without the background story of their construction. Thus, the 'rights of Englishmen', once reified, migrated as traditional rights or rights reserved for nationals.[54] The German Federal Constitutional Court was reduced to its competencies and institutional structures and exported/imported as a model of judicial review.

49 Marcal Gauchet, *La révolution des droits de l'homme* (Gallimard 1989).

50 Chaihark Hahm, 'Conceptualizing Korean Constitutionalism: Foreign Transplants or Indigenous Tradition?', Journal of Korean Law 1 (2001), 151-196.

51 'The institutional structures and normative patterns generated in the formative experience of one nation become blueprints autonomous of the particular circumstances of their birth …' Saïd Amir Arjomand, 'Constitutions and the Struggle for Political Order', European Journal of Sociology 33 (1992), 39-82.

52 Clifford Geertz, *Local Knowledge. Further Essays in Interpretive Anthropology* (3rd edn, Basic Books 2000), 170-172.

53 For a different description of this process as 'vernacularization', see Sally Engle Merry, 'Legal Transplants and Cultural Translation: Making Human Rights in the Vernacular' in: Mark Goodale (ed.), *Human Rights: An Anthropological Reader* (Wiley-Blackwell 2009), 265-302.

54 E.g. the (Virginia) Act of May 1776, quoted by William F. Swindler, '"Rights of Englishmen" since 1776: Some Anglo-American Notes', University of Pennsylvania Law Review 124 (1976), 1091.

Formalization reduces norms to bare texts, which is to say to propositional statements bereft of the interpretive debates and epistemic conventions that bestow them with meaning. Likewise, institutions are scaled down to the statutory provisions supplying the propositional state of their organizational arrangement and functions. For example, the prohibition laid down in the 1947 Italian Constitution against 'reorganiz[ing] under any form whatsoever, the dissolved Fascist party' (Art. XII), once formalized, inspired bans on extremist organizations within aversive constitutional schemes elsewhere but did not suppress neofascist temptations in Italy.

Idealization transforms the appearance of legal information from *is* to *ought*. Norms and doctrines are presented as actually meaning what they *ought* to mean. Institutions are displayed as operating efficiently according to the official plan. In this way, the idealized object is enshrouded by normativist, ideological, or mythical narratives, such as 'the government of laws and not of men' (Art. XXX Constitution of Massachusetts 1780).

The long-distance travels of 'We the People' perfectly illustrate the three aspects of how legal information is standardized. Once disconnected from the imaginary United States-ean We, reduced to the propositional content, and severed from its background assumptions, the formula serves globally as a founding myth that elites from Afghanistan to Zaire almost invariably fall back on to enhance their legitimacy as *pouvoir constituant*. Likewise, decontextualization has initiated the transfer of a variety of very diverse items of legal information, such as the systematics of the *Codex Justinianus*, the principle of proportionality, rights catalogues, the concept of 'good faith', curricula and degrees of legal education, courtroom etiquette, and the notion of 'cruel and unusual punishment'.

3. Transfer as Globalization

Having been extracted from a specific (local) context, legal information may be transferred to the global space, where lawmakers select from a variety of maxims of design, concepts and arguments, institutional patterns, catalogues of rights, cluster of values, and more. In contrast to narratives of global law and normative visions of a law of humanity,[55] the global is con-

55 Philip Allott, 'The Emerging Universal Legal System' in: Janne E. Nijman and André Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007), 63; David Held, *The Global Covenant*

ceptualized here as a space, turning the focus on the archival aspect (storage centre, arsenal, or showroom),[56] where decontextualized and marketable legal items are registered, stored, and displayed. In contrast, the concept of a global network[57] accentuates the exchange of ideas and services. As a global arsenal (or consciousness), 'legal IKEA' contains the results of myriads of transfers while remaining silent over items not included or rejected. Inclusion and exclusion depend on a threshold test. Once legal information has passed through the three-pronged process of decontextualization and turned into a standardized commodity, it attains the appearance of universal, global, or at least regional applicability ('appearance' meaning that a new coating provided by political technology and the ideology of expertise is grafted onto legal information), and receives from the community of drafters, advisers, engineers, and scholars the seal of quality reserved for the modern idiom and its shiny parts.

While commodified items may look harmless, they are anything but innocent. They may transport colonial baggage, political projects, hegemonic intentions, ethnocentric perspectives, economic imperatives, human tragedies, hopes, and disappointed expectations. A perfect exemplification of IKEA-style globalization is the ambitious Comparative Constitutions Project[58] established in collaboration with Google Ideas. It contains an enormous dataset ready to be downloaded anywhere and anytime. One might call it global bookkeeping of constitutional provisions, digitalized and decontextualized, but it is nevertheless very useful as a tool for further research and interpretation.

Merchants of transfer – political elites, legal consultants, non-governmental organizations (NGOs), scholars, the media, etc. – visit the global showroom (internet) and shop for a complete legal regime or code, or for smaller items, like a rationale for an insolvency law, a balancing test, or rules of plea bargaining. Standardization does not preclude the avail-

(Cambridge University Press 2004). For global narratives, see Bruce Ackerman, 'The Rise of World Constitutionalism', Virginia Law Review 83 (1997), 771-797; Anne Peters, 'The Globalization of State Constitutions' in: Nijman and Nollkaemper (n. 55), 251-308.

56 Depending on the theoretical perspective, it may also be referred to as a global reservoir, showroom, supermarket, or consciousness. See Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited', International Journal of Constitutional Law 8 (2010), 563-579.

57 Michaels (n. 44).

58 See https://www.constituteproject.org/content/about?lang=en/, accessed 25 October 2023.

ability of a plurality of models. To deal with race-based discrimination, Bangladesh, India, Sri Lanka, Canada, and other countries have picked different samples on display in the global showroom: they range from equality doctrines to affirmative action to criminal sanctions for discrimination.

In one of the darker corners, autocrats can find varieties of authoritarian constitutions and emergency regimes.[59] Unless suffering imposition, customers have the choice between finished products *prêt à porter* and disassembled parts to be reconnected later, or very abstract, inspiring ideas that require a high degree of constructive elaboration.

Once deposited on the shelves of the market, globalized legal items generally refer neither to their (original) production site nor to the production process. Decontextualized and globalized legal information hardly ever comes with sufficient, in-depth background information about the local prerequisites, socioeconomic forces, conflicts, etc. that infiltrate the application of laws and affect the operation of institutions. Globalized items usually do not mention that expertise and experts are needed to set institutions 'in motion' and to guide the application of norms. Unlike medication, they remain silent over risks and side-effects. Where contextual information is or could be available, it is rarely heeded, because legal consultants and reformers operate within fairly rigid time-limits and political constraints, not to mention the constraints set by cultural-legal ignorance and lack of institutional imagination. Customers come to the showroom with an engineer's mindset rather than the disposition of an anthropologist or culture-conscious legal critic.

4. Recontextualization: Risks and Side-effects

Finally, at the end of the 'translation chain',[60] globalized items have to be *recontextualized*, i.e. *adapted* to a new (host) environment; one could also say turned into the native or ordinary language, i.e. 'vernacularized'[61] in their new life-world. There, whatever is being transferred meets with 'conditions

59 Helena Alviar García and Günter Frankenberg (eds), *Authoritarian Constitutionalism* (Edward Elgar Publishing 2019); Günter Frankenberg, *Authoritarianism. Constitutional Perspective* (Edward Elgar Publishing 2020); Victor V. Ramraj and Arun K. Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press 2009).

60 Rottenburg (n. 8).

61 Merry (n. 53).

of acceptance or, as an inevitable part of acceptance, resistance'.[62] These conditions determine the 'grand hazard'[63] of any legal transfer: rejection or recontextualization within the new legal-cultural setting.

Recontextualization presupposes the unfreezing and unpacking of the received items. Thereafter, any imported information is subject to reinterpretation, redesign, and bricolage.[64] The simple reassembling of the imported parts/information usually does not provide the desired results. A great deal of improvising and experimenting is required when the now fully (or partly) accommodated (or incorporated) idea has to be inserted in the new legal framework and then put to use under the new circumstances by the new epistemic community – courts, governmental agencies, legal scholars, social movements, legal consultants, and more. Thereby, any imported item undergoes a process of transformation 'by its new uses, its new position in a new time and place',[65] especially because it does not come with a master plan for the efficient functioning of an institution or the smooth interpretation and application of norms and doctrines. Legal transfer is 'a craft of place', performed by craftspeople who reassemble the decontextualized information.[66]

The deficit of contextual information accounts for the considerable risks and side-effects. *Immunoreactions* that block the transfer and recontextualization completely are rare but not unheard of. They occur especially under three circumstances: First, the commodified item simply does not make sense in the new setting, because there is no method or expertise in place to decode its message for proper readjustment. Second, the transferred item meets with unrelenting political opposition. This happened, for instance, in 1920 to the plans to transfer the Swiss federal system to (former) Czechoslovakia, and to the export of the US model of legal education mentioned above. Third, immunoreactions are also likely to occur when the operative logic of the transferred items remains obscure or misunderstood and institutions do not even remotely work as expected. Thus, the imported abstract judicial review of laws did not work in postsocialist Russia.

62 Said (n. 43), 227.
63 Montesquieu (n. 5).
64 Comprising a series of introductory, adaptive, modifying, improvisational moves that may be translated as 'tinkering' to convey its makeshift, do-it-yourself character. For a theoretically elaborated concept of bricolage as a method of 'wild thinking', see Lévi-Strauss (n. 2), 16-32.
65 Said (n. 43), 227.
66 Geertz (n. 52), 167.

Bad fit is a more common transfer result if the package contains information that cannot be adequately decoded or adapted. Similarly, transfer may qualify as a *missing link* problem if important information for putting a transferred item into practice is not available. Unlike immunoreactions, bad fits and missing links do not create unsurmountable problems but send the bricoleurs either back to the drawing board for institutional redesigning or normative tinkering, or else to the global showroom to shop for additional or different information to accommodate certain existing power constellations or cultural dispositions.

5. Recontextualization: Results

The open-ended process of de- and recontextualization[67] is likely to produce – not a genuine copy of the 'original' item but – a diversity of results, as is illustrated by the mutations of the 'We the People' formula or the variations of law-rule. At best, the end-product turns out to be a modified replica, a respectful or ironic imitation or pastiche of different styles or models.

It is characteristic of a *modified replica* that one of its elements is changed (or dropped altogether) or another one added while preserving the general sense and logic of the item, like 'We the representatives of the people of the Argentine nation'. The formula turns into a *hybrid* if the imagination of a democratic polity and the invocation of a collective (We) – both yet to be established – are blended with a concept from a different political tradition or context to form a novel type or inspire a new imagination. The post-Taliban Constitution (2004) – 'In the name of Allah … We the people of Afghanistan' – places the imaginary democratic We into an ethnically fragmented setting and combines it with a unifying religious conception. If not for the religious connotation, the notion of an Afghan people would not resonate on the ground.

In the framework of a constitutional monarchy (Cambodian Constitution 1993), assuming good faith on the part of the designers, We the People qualifies as a *naïve novelty* grafting the popular We-rule onto the monarchic I-rule, thus trying to tap the magic of democratic constitutionalism while preserving traditional monarchy. The bad faith interpretation would treat

67 Open-endedness and bricolage are hugely simplified by the transplant metaphor.

the Cambodian formula either as an ironic imitation or as a respectful pastiche, depending on the framers' mindset and motives.

E. Defying Transfer, Resisting Globalization

Any theory trying to explain how legal information is turned into a market product and transferred needs to be corrected as far as it suggests that globalization invariably streamlines any legal idea and practice. Comparative studies bring to the fore that not all legal information travels.[68] From a distance, these items appear odd[69] or strange; up close, they remain unfamiliar. At any rate, they defy standardization. Identifying and understanding them calls for a complex hermeneutic that avoids the pitfalls of ethnocentrism and Western hegemony.[70] In comparative practice, odd items have to be brought very close and kept very far away.[71] Their strangeness has to be deciphered – not domesticated. Unless treated as legal information that is inferior to the kind one is familiar with, i.e. othered,[72] these strange items, if submitted to scrutiny, betray the influence of local traditions and experiences and reflect social struggles, political anxieties, and visions.

1. Identifying 'odd details'

Items resisting commodification – odd details – pose riddles. By the same token, it is perilous to identify and analyse them. Not always rough, unpolished, and strange, but peculiar and withdrawn, they flunk the threshold test to globalization, as it were, because they deviate from global standards and run against what mainstream scholars regard as the orthodoxy and

68 Frankenberg (n. 20), 136-151.

69 I refer to them as 'odd details' not to suggest any derogatory connotation, but to stress the fact that they disrupt the global narrative and are in that sense *quite different*.

70 Frankenberg (n. 12), 77-112.

71 Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973), 3-70.

72 Othering is defined here as a comparative practice in which, through discursive routines of theory and method, foreign laws are perceived and interpreted as inferior to hegemonic (Western) legal regimes. See Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in: Carry Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press 1988), 271-313; Robert J. C. Young, *White Mythologies: Writing History and the West* (Routledge 1990).

critics as the ideology of 'Western law'.[73] Three categories can be distinguished, albeit tentatively.

a) Historical Idiosyncrasy

History may be an obstacle to marketability if legal information is perceived as being inextricable from the historical situation of its creation. In terms of history, oddity is basically synonymous with obsolete, passé, no longer useful. Its meaning or logic can only be decoded and fully understood within the historical context. For instance, during the revolutionary epoch, constitutional elites put a cap on rulers' stipends to curb *ancien régime*-style luxury and executive greed.[74] Meanwhile, the practice of monetary compensation of officeholders is regulated more discretely by statutory law.

Not only constitutions but also criminal codes and civil codes testify to quite different regulations that are today considered obsolete due to the passage of time. For example, that husbands were entitled to determine their wives' breastfeeding period (Prussian General Civil Code 1794) was very much indebted to the era of patriarchal prerogatives one would now consider out-of-date. Likewise, the differentiated ordinances regulating in great detail the periods and garments of mourning bear witness to a premodern regime of disciplinary mechanisms. 'Quite different' and 'obsolete' may mean, though, that certain practices are abolished, as for instance hideous forms of criminal punishment,[75] only to be replaced by sanctions that appear less drastic and cruel but still cause damage beyond compare, notably sensory deprivation and other practices of 'modern' torture.

73 Regarding the ideology or 'white mythology' of Western law, see Renj David, 'On the Concept of Western Law', Cincinnati Law Review 52 (1983), 126. 'As Westerners, we have an ideal: a society is ruled, so far as is possible, solely by law. In French, we write the word "law" with a capital letter .... Our ideal is to have the law reign'.

74 French Constitution of the Consulate (1799), Title IV, nos. 39 and 43; Constitution of Haiti (1805) Art. 1 (20).

75 E.g. Ancient Rome: being sewn into a sack with animals and thrown off a cliff; China: death by 1,000 cuts (Ling Chi), banned in 1905; England: drawing and quartering, from 1352 on a statutory penalty for men accused of high treason, abolished in 1867. For more examples see Michel Foucault, *Discipline and Punish. The Birth of the Prison* (2nd edn, Vintage Books 1995); Edward Peters, *Torture* (University of Pennsylvania Press 1996); Jeremy Waldron and Colin Dayan, *The Story of Cruel and Unusual* (MIT Press 2007).

b) Cultural Specificity

Legal information is not likely to pass the threshold test for inclusion in the global reservoir if it is (or appears to be) too context-specific, i.e. so intensely bound to its cultural-epistemic environment that it would simply not make sense elsewhere. Disregarding the notorious 'crazy laws' of the states of the US,[76] such items are conspicuously overdetermined by the practices, mores, and idiosyncrasies of the community at the local production site. They encapsulate local knowledge,[77] for instance as vernacular entitlements or prohibitions. If practised over time and considered 'law' by the community or relevant local actors, these norms may constitute customary law.[78]

Cultural specificity seems to be a necessary condition of constitutional preambles as well as of criminal codes to the extent that they are meant to protect the collective identity. Rwanda's commemoration of the genocide is elevated from the standard accounts, similar to the Iraqi Constitution, which grafts a biblical story onto the commodified 'We the People': 'We are the people of the land between two rivers, the homeland of the apostles and prophets [,] … pioneers of civilization.… Upon our land the first law made by man was passed' (Preamble of the Constitution of Iraq 2005). The cultural context is encoded in normative aspirations, notably those of constitutions and criminal law,[79] such as the principles of a 'harmonious society' (Arts. 8 and 9 Constitution of Bolivia), the concept of Gross National Happiness (GNH) (Art. 9 (2) Constitution of Bhutan), the obligation of government authorities in the Netherlands to promote saving and 'keep the country habitable' (Art. 21 Constitution of the Netherlands), or legal rules of ethical conduct, like the prohibition on slaughtering cows and calves in India.

Cultural specificity is a particularly treacherous label. Other than the fact that an item has *not yet* been exported or imitated elsewhere after bricolage,

76 It is illegal in Alabama to drive blindfolded, in Colorado to keep a couch on the porch, in Delaware to sell dog or cat hair, in Kentucky (for women) to marry more than three times, in Oregon to go hunting in a cemetery, in South Dakota to sleep in a cheese factory, and in Oklahoma to wrestle a bear, to take just a few examples.

77 Greetz (n. 52).

78 John Comaroff and Simon Roberts, *Rules and Processes. The Cultural Logic of Dispute in an African Context* (Chicago University Press 1981).

79 Today's Constitution of Thailand mandates that the 'standard of morality for persons holding political positions, government officials and State officials at all levels shall be in conformity with the established code of morality' (Art. 270).

there are no reliable criteria to distinguish global(ized) items from legal information that resists the pull of global constitutionalism or globalization in general. The resistant items might travel in a specific region. Especially with regard to cultural strangeness, one is left with the *appearance* of deepened context-dependence, as regards India's epic constitution spanning almost 500 pages, by far surpassing even its lengthiest counterparts (in Myanmar, Brazil, and Papua New Guinea); or the sixty-year gestation period of the 1992 Saudi Basic Law, which directs attention to a specific local, political-religious constellation that is not likely to be reproduced elsewhere. At the intersection of history, politics, and culture, one could locate Haiti's paradoxical provision that 'All men are born, live and die there free and French' (Art. 3 Constitution of 1801).

c) Political Deviance

Unlike historical obsolescence and cultural idiosyncrasies, *rejection* from the global constitution follows a political logic. The showroom remains closed for items that defy, provoke, or subvert the dominant ideology and practice of law-rule and thus the hegemony of the liberal paradigm. Political deviance resists the dynamic of globalist colonization. The revolutionary 1805 Constitution of Haiti challenged the liberal notion of 'colour-blindness' and turned against colonial racism: regardless of their skin colour, all 'Haytians shall hence forward be known only by the generic appellation of Blacks' (No. 14). Conversely, the Jim Crow laws carried forward the institution of slavery by requiring racial segregation in the southern states of the United States until 1965. The infamous 'separate but equal' doctrine justifying this practice[80] was shared by the apartheid regime of South Africa, but would be excluded from transfer today as a political (and historical) oddity. Rather forcefully, Bolivia asserted a 'deviant' political project: 'We have left the … neo-liberal State in the past. We take on the historic challenge of collectively constructing a Unified Social State of Pluri-National Communitarian Law' (Preamble, Constitution 2009). Few other countries, if any, would dare confront the hegemons with such audacity.

80 *Plessy v. Ferguson* 163 U.S. 537 (1896).

Political deviance/resistance has many faces. Apart from institutional designs, like Nigeria's 'peculiar', 'bizarre', or 'irregular' federal system,[81] it shows particularly in attacks on the columns of Western constitutionalism: secularity, neutrality, formal equality, and private property. To begin with *secularity*: unless they feature concepts of the divine state or a state religion or church, modern constitutions stay away from the transcendent.[82] After revolutionary moments or in times of transition, political elites take recourse to prefabricated religious materials, however, to buffer and sanctify their mandate as *pouvoir constituent*. They invoke the presence of the Most Holy Trinity (Ireland 1937/2015) or Supreme Being (Haiti 1805), or better yet: the protection of Divine Providence (US Declaration of Independence 1776) or hope for 'the guiding hand of God' (Constitution of Papua New Guinea 1975). On a lighter note, the breeze of transcendence refreshes the traveller in Tonga: 'Since it appears to be the will of God that man should be free as He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in this Kingdom be free forever' (No. 1 Constitution of the Kingdom of Tonga 1875).

As long as law, law-rule, and constitutionalism are standardized within the liberal paradigm, socialist legality qualifies as a prototypical political deviant. Socialist institutions, doctrines and ideas as well as social rights are shelved, if at all, in a corner for commodities with production damages. Legal IKEA would hardly display the provision '[that] work is remunerated to its quality and quantity … [and that] the social economic system … has thus eliminated unemployment and the "dead season"' (Art. 45 Cuban Constitution 1976). Likewise, the limitation of daily work hours, a thirteenth salary, and the rules that wages have to be paid weekly and that workers should be granted rest (preferably on Sundays), as laid down in Brazil's 1988 social-democratic Constitution (Art. 7, sec. XV), run against the standard of reality-blindness set by liberal constitutionalism.

81 Rotimi T. Suberu and Larry Diamond, 'Institutional Design, Ethnic Conflict Management, and Democracy in Nigeria' in: Andrew Reynolds (ed.), *The Architecture of Democracy* (Oxford University Press 2009), 400-446.

82 An interesting mélange is provided by the Constitution of the People's Republic of Bangladesh (1972), which proclaims the 'high ideal of secularism' (Preamble and Arts. 8 (2) and 12) and professes to eliminate 'communalism' and 'abuse of religion' to privilege the (secular) state, while declaring Islam as state religion (Art. 2A).

2. The Oddity of a Right to Bear Arms

Identifying odd details meets with the charge that, once again, it is the Global South that produces bizarre laws and needs to be civilized. An analysis of the Second Amendment of the US Constitution might clarify that oddity is also a Northern phenomenon. It is here where history, culture, and politics intersect: 'A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.' After allocating competences and installing checks and balances, the US Constitution, or rather the Federalists, tried to placate the distrust that may befall people in a federal system with the Second Amendment. Who exactly the bearer of these rights should be, and what purpose the arms-bearing was and is meant to serve, has been contested ever since. A grammatical reading privileges the institution of a well-regulated (i.e. trained and disciplined) militia as the point of reference. Bearing arms has distinctly military connotations. Historically, the Second Amendment appears to draw from at least two very different traditions. The institutional guarantee of a militia and the accessory rights of militiamen can be traced back to the Assize of Arms of King Henry II (1181), ordering freemen to provide for arms and military gear. In the practice of the early settlers and the colonial charters, these rights mutated into a duty that all 'able-bodied men' owed to their community.[83] History also offers a reading of the Second Amendment as granting individual rights: the common law right to self-defence, dating back to the 1689 Bill of Rights. Hence, the 1776 Constitution of Pennsylvania looked in both directions and referred the right to bear arms to 'the defence of themselves and the state' (Art. XIII). The US Supreme Court first privileged the institutional reading in several rulings; only recently, with a slim majority in *District of Columbia v. Heller* (2008), has the individual right come to triumph.[84] The very peculiar American way of balancing the military and political power of the people, states, and the nation qualifies as a unique specimen – an odd detail – by virtue of its history and structure, its controversial interpretation, and mainly the myth of the US as a gunfighter nation.

83 See the 1780 Constitution of Massachusetts: 'The people have a right to keep and to bear arms for the common defence' (Art. XVII).

84 *District of Columbia v. Heller* 554 U.S. 570 (2008). Despite J. Stevens's rather well-founded dissent, this reasoning was later pursued undauntedly in *McDonald v. Chicago* 561 U.S. 742 (2010) and *Caetano v. Massachusetts* 577 U.S. 14-10078 (2016).

This historical, cultural, and political oddity is not derogated by half a dozen other provisions that carry forward a basically nineteenth-century project: Liberia's Constitution of 1847 follows the communitarian line and defines collective defence as the subject of protection and purpose. In 1853, the right reappeared in the Argentine Constitution as the obligation 'to bear arms in defense of the fatherland and of this Constitution' (Part I, sec. 21). Statutory rules in Switzerland and Nicaragua correspond to this purpose. Article 10 Constitution of Mexico (1917) entitles citizens 'to have arms of any kind in their possession for their protection and legitimate defense, except such as are expressly forbidden by law, or which the nation may reserve for the exclusive use of the army, navy, or national guard', and specifies that 'they may not carry arms within inhabited places without complying with police regulations'. The 1976 Cuban Constitution guarantees the 'right to struggle through all means including armed struggle' (Art. 3(2)), but qualifies it as a right to resistance 'against anyone who tries to overthrow the political, social and economic order'. Article 38 of Guatemala's Constitution (1985) comes close to the individualist reading of the Second Amendment: 'The right to own weapons for personal use, not forbidden by law, in the person's home, is recognized.... The right to bear arms, regulated by the law, is recognized.' Today's Constitution of Haiti (1987) is instructive insofar as it grants every citizen 'the right to armed self-defense, within the bounds of [his] domicile, but has no right to bear arms without express well-founded authorization from the Chief of Police' (Art. 268-1). These provisions send forth several messages: first, in most cases the right to keep and *bear* arms (or the corresponding duty) serves a public purpose; second, as a means of self-defence it is limited to the home; third, the personal use of firearms is generally subject to legal regulation. No other constitution sports the right to bear arms *in public* as an individual fundamental right, thus the comparative view confirms the oddity of the Second Amendment.

3. Local, Regional, Global Items of Law

The analysis of legal transfer and of items resisting transfer is burdened with the difficulty of differentiating, with sufficient certainty, between marketable and non-marketable items, between hybrids complementing and modifying the modern idiom and information deviating from its standard

varieties. Instead of overrating categories, the analysis of oddity may turn out to be the domain for clarifying the 'foreign' and how it is related to the own/familiar.[85] Searching for odd details may liberate comparative studies from the straightjacket of unitary thinking, challenge the narrative of globalization, and instigate the 'insurrection of subjugated knowledges',[86] that is, of an autonomous kind of juridical knowledge production whose validity does not depend on the approval of the established regimes of thought.

F. Merchants of Transfer

Legal transfer does not 'just happen'; it is promoted by agents and agencies, institutions and organisations. It is difficult both to specify what they do and to determine who or which they are. The merchants of transfer are recruited from the 'small worlds' of elites, advisors, committees and commissions, social movements, and NGOs with a legal agenda. They populate the expertise networks within and without academia, parliaments, courts, corporations, and the media in a world of struggle.[87] Their influence should not be overrated, because quite often they see their proposals rejected or revised as they go through recontextualization and bricolage – and because they sometimes get entangled in 'palace wars'.[88] Despite the process of commodification, an expert's advice, a 'checklist' or model provided by a consultant, or a draft law or constitution may bend the course of the legal reform, codification, or constitutional debate in a country and manipulate it for the benefit of a hegemon.[89]

85 Judith Resnik, 'Constructing the "Foreign" – American Law's Relationship to Non-Domestic Sources' in: Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015), 437-471.

86 Michel Foucault, *Power/Knowledge* (Pantheon Books 1980), 78-108.

87 David Kennedy, *A World of Struggle. How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

88 Dezalay and Garth (n. 42); Tom Ginsburg, 'Constitutional Advice and Transnational Legal Order', Journal of International, Transnational, and Comparative Law 2 (2017), 5-32.

89 See the analysis of a paradigmatic adviser by Harshan Kumarasingham, 'A Transnational Actor on a Dramatic Stage – Sir Ivor Jennings and the Manipulation of Westminster Style Democracy: The Case of Pakistan', Journal of International, Transnational and Comparative Law 2 (2017), 55-84.

The merchants of transfer who populate the transnational networks, tapping the global reservoir as well as contributing to its contents, may simultaneously profess to be 'originalists' and claim to disregard foreign laws and doctrines in their judicial practice. They are people who pursue projects alongside their work of making decisions, securing investment, mobilizing protest, or strategizing foreign policies. Whether operating top-down, bottom-up, or sideways, their legal ideas and arguments usually come as collateral moves, unless of course they are involved in an official capacity in deciding cases, controversies, or lawmaking disputes. Merchants of transfer are likely to regard themselves as experts, yet they are always bricoleurs, too. They may travel as frequent flyers and reside in palaces of global expertise, but in the end they have to 'work by the light of local knowledge'.[90]

90 Geertz (n. 52), 167.

The Constitutional Traditions Common to the Member States: Identification and Concretisation

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Keywords: common constitutional traditions, human dignity, German Basic Law, European Convention on Human Rights, Charter of Fundamental Rights of the European Union, constitutional identity, national reservations, identification

A. The Common Constitutional Traditions in the Case-Law of the Court of Justice

I. Historical Foundations

The constitutional traditions and/or legal principles common to the Member States have played a central role in the case-law of the Court of Justice from the very beginning, and quickly became central jurisprudential tenets of the EU legal order a decisive part of the legal order in all Member States.

From the very beginning, the Court of Justice has derived general legal principles from the administrative law systems of the Member States, in order to be able, for example, to identify the legal requirements of an annulment of administrative decisions by institutions and other bodies of the European Union in accordance with the rule of law. Although EU law does not contain any general rules on the annulment of administrative decisions (revocation, withdrawal), it has drawn the regulatory regime applicable to them from the administrative law of the Member States. To take just one example, the decision in *Algera* of 12 July 1957 states:

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> 'The possibility of withdrawing such measures is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries.'[1]

A high point in this respect is the fundamental rights case-law of the Court of Justice in the 1970s and 1980s, which was encouraged in particular by the decisions of the *Corte Costituzionale* (Italy) in the *Frontini* case[2] and the *Bundesverfassungsgericht* (Federal Constitutional Court, Germany) in its *Solange I* decision,[3] and examples of which include the decisions in the *Nold* and *Hauer* cases. However, as early as 1970, in its decision in *Internationale Handelsgesellschaft*, the Court of Justice had already emphasised the constitutional traditions common to the Member States as the basis of European protection of fundamental rights, provided that they were ensured within the framework of the structure and objectives of the European Economic Community.[4]

The first detailed statements on the free choice and pursuit of employment and the guarantee of property ownership could then be found in the judgment *Nold*. The Commission had authorised Ruhr-Kohle AG to amend its trading rules, which established the conditions for admitting coal wholesalers to the right of direct supply. On that basis, Nold, a coal and constructions materials trader based in Darmstadt, lost its status as a direct purchaser, which it had held for years. In his action for annulment brought against the authorisation, he argued that his right of ownership and his free choice and pursuit of employment had been violated. The Court answered as follows:

> '(14) If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must

1 Judgment of 12 July 1957, *Algera and Others* v. *Common Assembly*, 7/56 and 3/57 to 7/57, EU:C:1957:7, 79 ff.
2 *Corte Costituzionale*, Decision No 183/1973 – *Frontini*, EuR 1974, 255.
3 BVerfGE 37, 271 ff.– *Solange I*.
4 Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, 1,125 ff.

be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched. As regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.
(15) The disadvantages claimed by the applicant are in fact the result of economic change and not of the contested Decision. It was for the applicant, confronted by the economic changes brought about by the recession in coal production, to acknowledge the situation and itself carry out the necessary adaptations.'[5]

This was further elaborated in the judgment *Hauer*, which remains (for the time being) the apex of the jurisprudential development of the EU's freedom of property rights and the freedom of trade or profession. Even though it was ultimately found that there was no violation of the fundamental rights in question, the decision is characterised by an extraordinary amount of effort in terms of argumentation and dogmatic reflection. In this case, the winegrower Liselotte Hauer applied for authorisation to plant vines on her property in Bad Dürkheim (Germany). Authorisation was refused on the ground, inter alia, that Regulation No 1162/76 on measures designed to adjust wine-growing potential to market requirements prohibited all new planting of vines for a longer period. The Court of Justice, which had been seised by way of a request for a preliminary ruling, stated:

'(17) The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights. …
(19) Having declared that persons are entitled to the peaceful enjoyment of their property, that provision [Article 1 to the first Protocol to the ECHR] envisages two ways in which the rights of a property owner may be impaired, according as the impairment is intended to deprive the owner of his right or to restrict the exercise thereof. In this case it is

5 Judgment of 14 May 1974, *Nold v. Commission*, 4/73, EU:C:1974:51, 491.

incontestable that the prohibition on new planting cannot be considered to be an act depriving the owner of his property, since he remains free to dispose of it or to put it to other uses which are not prohibited. On the other hand, there is no doubt that that prohibition restricts the use of the property. In this regard, the second paragraph of Article 1 of the Protocol provides an important indication in so far as it recognizes the right of a State "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest". Thus the Protocol accepts in principle the legality of restrictions upon the use of property, whilst at the same time limiting those restrictions to the extent to which they are deemed "necessary" by a State for the protection of the "general interest". …

(20) Therefore, in order to be able to answer that question [concerning whether the contested regulation was contrary to fundamental rights], it is necessary to consider also the indications provided by the constitutional rules and practices of the … Member States. One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, Article 14(2), first sentence), to its social function (Italian constitution, Article 42(2)), to the subordination of its use to the requirements of the common good (German Grundgesetz, Article 14(2). second sentence, and the Irish constitution, Article 43.2.2°), or of social justice (Irish constitution, Article 43.2.1°). In all the Member States, numerous legislative measures have given concrete expression to that social function of the right to property. …

(21) More particularly, all the wine-producing countries of the Community have restrictive legislation, albeit of differing severity, concerning the planting of vines, the selection of varieties and the methods of cultivation. In none of the countries concerned are those provisions considered to be incompatible in principle with the regard due to the right to property.

…

(23) However, that finding does not deal completely with the problem raised by the Verwaltungsgericht. Even if it is not possible to dispute in principle the Community's ability to restrict the exercise of the right to property in the context of a common organization of the market and for the purposes of a structural policy, it is still necessary to examine

whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property.'
It was likewise ultimately found that there was no such interference, or, moreover, a violation of the freedom of occupation.[6]

2. Dwindling Importance in the Case-Law of the Court of Justice

With the increasing number of Member States and the establishment of the European Union's fundamental rights standards in the form of the European Convention on Human Rights and Fundamental Freedoms ('the ECHR'), but above all with the integration of the Charter of Fundamental Rights of the European Union ('the Charter') into primary law, reliance on the constitutional traditions common to the Member States has been receding into the background in the case-law of the Court of Justice. This is understandable and is to a certain extent also in line with the Court of Justice's understanding of the autonomy of EU law. However, it does not sufficiently take into account the needs of the legal order and the constitutional structure of the European Union as a compound of its Member States.

B. The Common Constitutional Traditions as the Basis of the European Legal Order

1. Origins in the Treaties

According to Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are general principles of EU law. Furthermore, Article 52(4) of the Charter provides that fundamental rights under the Charter, in so far as they result from the constitutional traditions common to the Member States, are to be interpreted in harmony with those traditions. Other provisions of primary law also refer, at least in essence, to the constitutional

6 Judgment of 13 December 1979, *Hauer*, 44/79, EU:C:1979:290, 3727 ff.

traditions common to the Member States. This applies, for example, to the statement in Article 2 TEU, according to which respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, are common to all Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail, or to the second and third paragraphs of Article 340 TFEU, according to which the European Union and the European Central Bank (ECB), respectively, must, in accordance with the general principles common to the laws of the Member States, compensate any damage caused by their institutions or by their servants in the performance of their duties.

2. Common Constitutional Traditions in the Area of Fundamental Rights

The older case-law of the Court of Justice impressively developed the principle that the constitutional traditions common to the Member States are of central importance, above all to the understanding of fundamental rights. This has not changed significantly with the Charter coming into force, as can be seen by taking a closer look at the function and structure of the fundamental rights guarantees in their various forms.

In its *Ökotox* decision of 27 April 2021, the Second Senate of the Federal Constitutional Court held that the fundamental rights of the *Grundgesetz* (German Basic Law), the guarantees of the ECHR and the fundamental rights of the Charter are predominantly rooted in common constitutional traditions and are thus expressions of universal and common European values, with the consequence that the ECHR and the constitutional traditions common to the Member States as well as the concrete expression given to them by constitutional and apex courts are not only to be taken into account as a basis for the interpretation and application of the fundamental rights of the Basic Law, but are equally important for the interpretation and application the fundamental rights of the ECHR and the Charter.

The fundamental rights guarantees laid down in the German Basic Law (*Grundgesetz* – GG), the ECHR and the Charter are all based on the protection of human dignity, provide guarantees of protection which, in essence, are functionally comparable in terms of those entitled and obliged, in structure, and therefore largely constitute congruent guarantees.

a) Human Dignity as the Archimedean Point of All Three Catalogues

With Article 1(1) GG and the precedence of the fundamental rights section over the provisions concerning the law governing State organisation, the *Grundgesetz*, for example, places emphasis on the primacy of the individual and his or her dignity over the power of the State and the enforcement of its interests.[7] Accordingly, all public authorities are obliged to respect and protect human dignity, and this includes, in particular, the safeguarding of personal individuality, identity and integrity as well as fundamental equality before the law.[8]

However, Article 1(2) GG also places the fundamental rights of the Basic Law in the universal tradition of human rights[9] and in the development of the international protection of human rights, attaching particular importance to the European tradition and development of fundamental rights.[10] The principles underlying the openness of the *Grundgesetz* to international and European law (preamble and Article 1(2), Article 23(1), Articles 24, 25, 26 and Article 59(2) GG) ensure that this also applies to the further development of both the universal and the European protection of fundamental rights.

Since 1950, the national requirements regarding fundamental rights have been safeguarded and supplemented by the ECHR, with which the Contracting States took, according to the preamble, 'the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights of 10 December 1948]', and they have since further refined them through 16 protocols. Even though human dignity is not expressly guaranteed within that framework, particular importance is attached to it in the ECHR. This is made clear in the prohibition of torture in Article 3 ECHR and the prohibition of slavery and forced labour in Article 4 ECHR, as well as in the preamble, which expressly refers to the Universal Declaration of Human Rights of 1948.[11]

7 See BVerfGE 7, 198 (204 ff.) – *Lüth*.
8 See BVerfGE 5, 85 (204); 12, 45 (53); 27, 1 (6); 35, 202 (225); 45, 187 (227); 96, 375 (399); 144, 20 (206 ff. para. 538 ff.).
9 See BVerfGE 152, 216 (240 para. 59) – *Recht auf Vergessen II*.
10 See BVerfGE 111, 307 (317 ff.); 112, 1 (26); 128, 326 (366 ff.); 148, 296 (350 ff. para. 126 ff.); 152, 152 (177 para. 61) – *Recht auf Vergessen I*.
11 See also ECtHR, *Pretty v. United Kingdom*, judgment of 29 April 2002, nr. 2346/02, § 65.

The Charter also places the focus on the individual, as evidenced by its preamble. Article 1 of the Charter recognises human dignity not only as a fundamental right in itself, but – according to the explanation to that article[12] – as 'the real basis of fundamental rights'. Moreover, the fundamental rights laid down in the Charter are tied in with both the constitutional traditions common to the Member States and the ECHR, in accordance with Article 52 et seq. of the Charter, and – in so far as they apply to German State authority – have in principle the same function as the fundamental rights laid down in the German constitution and the ECHR.[13]

Thus, the common point of reference for all three catalogues is the Universal Declaration of Human Rights of 10 December 1948, which emphasises, in its preamble, the central importance of human dignity.[14] Accordingly, all three catalogues of fundamental rights are ultimately concerned with the protection of the individual and his or her dignity. This is given concrete expression in the individual fundamental rights in an area-specific manner and fundamentally confers on the persons entitled to the rights concerned a right of self-determination in the respective areas of life, free from paternalism by public authority or social forces and structures.

b) Comparable Structure and Function of Fundamental Rights

Historically, jurisprudentially and functionally, the fundamental rights of the *Grundgesetz* primarily guarantee the individual's rights in order to enable him the defence of his self-determination against the State and other public authorities.[15] They protect the freedom and equality of citizens from unlawful interference by public authorities. Such interference must be proportionate and must not affect the essence of the fundamental rights (Article 19(2) GG). Those are also constitutional decisions in an objective

12 OJ 2007 C 303, 1, at 17.

13 See BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, inter alia – para. 37 – *Rumänien II*.

14 UN A/RES/217 A (III); see also Eckard Klein, 'Die Grundrechtsgesamtlage' in: Michael Sachs and Helmut Siekmann, *Der grundrechtsgeprägte Verfassungsstaat – Festschrift für Klaus Stern* (2012), 389 (390 ff.); Catherine-Amélie Chassin, 'La notion de dignité de la personne humaine dans la jurisprudence de la Cour de justice' in: Abdelwahab Biad and Valérie Parisot, *La Charte des droits fondamentaux de l'Union européenne* (2018), 138 ff.

15 See BVerfGE 7, 198 (204 ff.) – *Lüth*.

sense, establishing values and principles which – irrespective of any individual concern – oblige public authorities to ensure that these rights do not become devoid of purpose in the reality of economic and social life. Fundamental rights thus form the dogmatic or constructive basis of participation and benefit rights as well as the State's duties to protect (*Schutzpflicht*). This does not call their primary orientation into question, but serves to reinforce their validity in everyday life.[16]

In terms of substance, and as interpreted by the European Court of Human Rights, the ECHR also contains guarantees of individual freedom and equality and safeguards them against State intervention where it is not in accordance with law or not necessary in a democratic society (see, for example, Article 8(2) ECHR). These guarantees are open to further development[17] and have become increasingly convergent with national constitutions. The protection of fundamental rights under the ECHR is not limited to protection against interference by the State on the individual's sphere of freedom, but also comprises – similar to the *Grundgesetz* – obligations to guarantee and protect rights.[18]

This also applies to the fundamental rights of the Charter, which protect the freedom and equality of EU citizens not only against interference by institutions, bodies, offices and agencies of the European Union, but also against interference by Member State authorities when they are implementing EU law (Article 51(1) of the Charter). The addressees of the Charter – like those of the Basic Law and the ECHR – are bound by the principle of proportionality and must not affect the essence of fundamental rights (Article 52(1) of the Charter). In addition, principles are derived from the fundamental rights of the Charter – in so far as they are not horizontally

16 See BVerfGE 50, 290 (337) – *Mitbestimmung*.

17 See, in relation to the ECHR as a 'living instrument', ECtHR, *Tyrer v. United Kingdom*, judgment of 25 April 1978, nr. 5856/72, § 31; *Marckx v. Belgium*, judgment of 13 June 1979, nr. 6833/74, § 41; *Airey v. Ireland*, judgment of 9 October 1979, nr. 6289/73, § 26; *Rees v. United Kingdom*, judgment of 17 October 1986, nr. 9532/81, § 47; *Cossey v. United Kingdom*, judgment of 27 September 1990, nr. 10843/84, § 35; *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, nr. 15318/89, § 71.

18 See Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (7th edn, 2021), § 19; Jens Meyer-Ladewig and Martin Nettesheim, in: Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *EMRK* (4th edn, 2017), Art. 1, para. 8; Hans-Joachim Cremer, in: Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG* (2nd edn, 2013), Chapter 4, para. 63 ff.

applicable[19] – and those principles may give rise to further (derivative) entitlements.[20] Against that background, the fundamental rights of the Charter constitute a fundamentally functional equivalent to the guarantees of the *Grundgesetz*.[21]

c) Largely Congruent Content

The three catalogues of fundamental rights are also largely congruent in terms of content. This already results in part from the 'most favourable provision' principle of Article 53 ECHR, in accordance with which the ECHR may not be construed as limiting or derogating from human rights and fundamental freedoms laid down in the law of the Contracting States. The provision therefore makes clear that the ECHR in any event constitutes a minimum standard common to the Contracting States, beyond which, however, they may go.[22] Therefore, in determining the content of guarantees, the European Court of Human Rights repeatedly refers to both national and EU fundamental rights.[23]

Similar considerations apply to the Charter. Already in its preamble, it refers to the constitutional traditions common to the Member States as well as the inviolable and inalienable human rights protected in international conventions and in the ECHR, thereby making clear that it serves to give (further) concrete expression to universal and European legal principles.

19 Regarding Article 21 of the Charter, see CJEU, judgment of 22 November 2005, *Mangold*, C-144/04, 2005 [ECR], I-10013 (10040 ff., para. 77); judgment of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, paras 22, 51; critical in that regard: Højesteret (Denmark), judgment of 6 December 2016 – 15/2014.

20 See Eckhard Pache, in: Matthias Pechstein, Carsten Nowak and Ulrich Häde (eds), *Frankfurter Kommentar EUV/GRC/AEUV* (2017), *Art. 51 GRC*, para. 38; Armin Hatje, in: Ulrich Becker, Armin Hatje, Johann Schoo and Jürgen Schwarze (eds), *EU-Kommentar* (4th edn, 2019), *Art. 51 GRC*, para. 22.

21 See BVerfGE 152, 216 (239 ff., para. 59); BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, inter alia – para. 37.

22 See Grabenwarter and Pabel (n. 18), § 2, para. 14.

23 See ECtHR (Grand Chamber), *Bosphorus Airways v. Ireland*, judgment of 30 June 2005, nr. 45036/98, § 148; *Zolothukin v. Russia*, judgment of 10 February 2009, nr. 14939/03, § 79; *Scoppola v. Italy*, judgment of 17 September 2009, nr. 10249/03, § 105; *Bayatyan v. Armenia*, judgment of 7 July 2011, nr. 23459/03, § 103 ff.; ECtHR, *TV Vest As & Rogaland Pensjonistparti v. Norway,* judgment of 11 December 2008, nr. 21132/05, §§ 24, 67; see also Dieter Kraus, in: Dörr, Grote and Marauhn (n. 18), Chapter 3, para. 24; Dagmar Richter, in: Dörr, Grote and Marauhn (n. 18), Chapter 9, paras 3, 74; Meyer-Ladewig, Nettesheim and von Raumer (n. 18), Introduction, para. 22.

In 2009, the Treaty on European Union expressly elevated that concrete expression to the rank of primary law (Article 6(1) TEU), but at the same time also stipulated that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general (legal) principles of EU law (Article 6(3) TEU). This is expressly clarified again in Article 52(3) and (4) of the Charter.

3. Mutual Influence of the Fundamental Right Guarantees

Against that background, it is not only the interpretation of the fundamental rights guaranteed in the German constitution that is determined by the ECHR, the Charter and the constitutional traditions common to the Member States as well as the concrete expression given to them by the constitutional and supreme courts. The interpretation of the Charter must be guided by the ECHR and the constitutional traditions common to the Member States as given concrete expression by the aforementioned courts too.[24] The same applies to the ECHR.

This remains true notwithstanding the fact that the ECHR (only) has the status of a Federal law in the German legal system (Article 59(2) GG), accordingly is subordinate to the *Grundgesetz* and does therefore not, in principle, belong to the standard of review of the Federal Constitutional Court. However, in accordance with its settled case-law, the guarantees of the ECHR guide the interpretation of the fundamental rights and the rule-of-law principles of the German Basic Law in accordance with Article 1(2) GG[25] and thus have gained an indirect constitutional dimension. This also applies to the Charter[26] as well as the constitutional traditions common to other democratic constitutional States in the European legal space[27] and the concrete expression given to them by apex courts.[28] The fact that the abovementioned sources are also taken into account in the interpretation of the fundamental rights of the Grudges is not merely an expression of

24 See BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, inter alia – para. 37 – *Rumänien II*.

25 See BVerfGE 74, 358 (370); 111, 307 (316 ff.); 120, 180 (200 ff.); 128, 326 (367 ff.); 138, 296 (355 ff., para. 149); 152, 152 (176, para. 58) – *Recht auf Vergessen I*.

26 See BVerfGE 152, 152 (177 ff., para. 60) – *Recht auf Vergessen I*.

27 See Stefan Storr, Sebastian Unger and Ferdinand Wollenschläger (eds), *Der Europäische Rechtsraum* (2021).

28 See BVerfGE 32, 54 (70); 128, 226 (253, 267); 154, 17 (100, para. 125).

the German Basic Law's openness towards European law and the Federal Constitutional Court's responsibility for integration. Rather, it takes into account Germany's integration into the European legal space and its development, promotes the strengthening of common European fundamental rights standards and prevents friction and inconsistencies in guaranteeing fundamental rights protection in the interest of its effectiveness and legal certainty.

In view of the express provisions in the Treaties, the common roots, not least in human dignity, and the largely congruent content of the guarantees, the ECHR and the constitutional traditions common to the Member States as well as the concrete expression given to them by the constitutional and apex courts are also to be taken as the basis for the interpretation and application of the Charter – taking into account inter alia also the fundamental rights of the *Grundgesetz* and the case-law of the Federal Constitutional Court. This was expressed by the Second Senate already before, i.e. in its decision of 1 December 2020.[29]

These findings are not questioned by the fact that the fundamental rights guarantees of the Charter, the ECHR, the *Grundgesetz* and other national constiutions are not completely congruent, as a large proportion of the (minor) divergences is based less on conceptual differences in the specific guarantees than on the different ways in which they have been interpreted by the competent courts. However, the interpretation of the Charter must not be based on particular understandings that are evident only in the legal practice of some Member States. Where substantive divergences exist, it is up to the Court of Justice to clarify them within the framework of a preliminary ruling procedure pursuant to Article 267(3) TFEU in order to preserve unity and coherence of EU law.[30]

4. Constitutional Identity and National Reservations of Review

It is also inherent to the constitutional traditions common to the Member States that the Member States participate in European integration only on the basis of their respective national constitutions and that, therefore, a certain degree of constitutional identity or sovereignty is inviolable, the

29 See BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, inter alia – para. 37 – *Rumänien II*.

30 See BVerfGE 152, 216 (244 ff., para. 71) – *Recht auf Vergessen II*; BVerfG, decision of 27 April 2021 – 2 BvR 206/14 – para. 73 – *Ökotox*.

preservation of which the national constitutional and apex courts must ensure.

a) Constitutional Limits on Open Statehood and Constitutional Identity

The vast majority of national constitutions contain explicit or implicit provisions – developed by case-law and jurisprudence – on the limits to open statehood of the respective Member State even if the concrete boundaries of those limits have not yet been sufficiently clarified in every Member State.

With respect to Germany, for instance, the Federal Constitutional Court has repeatedly emphasised in a long line of case-law[31] that the conferral of power to the European Union does not entail the power 'to abandon, through the conferral of sovereign rights on intergovernmental institutions, the identity of the constitution by affecting its basic structure. i. e. the substructures that constitute it'.[32] The constitution amending legislator has codified that case-law in the third sentence of Article 23(1) GG and settled that Article 79(2) and (3) also applies to '… the establishment of the European Union and to the amendment of its legal bases in the Treaties by which … [the] content of the *Grundgesetz* is amended or supplemented or such amendments or supplements are enabled …'.[33] Similar provisions can be found in almost all other Member States:[34] In Denmark the constitution entails as unalienable the requirement of sovereign statehood,[35] in France and Italy the republican form of government,[36] and in Austria the 'establishing provisions of the Federal Constitution' (*Baugesetze der Bundesverfassung*), in the form they were given by the Treaty of Accession of Austria of 1994.[37] In Greece, human rights and the foundations of the

31 BVerfGE 37, 271 ff. – *Solange I*; 73, 339 ff. – *Solange II*; 75, 223 ff. – *Kloppenburg*.

32 BVerfGE 73, 339, 375 ff.– *Solange II*.

33 For a somewhat less serious approach to those limits, see Jürgen Schwarze, 'Ist das Grundgesetz ein Hindernis auf dem Weg nach Europa?', JuristenZeitung (1999), 637, 640.

34 Belgian Consitutional Court, Decision No. 62/2016 of 28 April 2016.

35 Højesteret (Supreme Court), judgment of 6 April 1998, I 361/1997, EuGRZ (1999), 49, 52, para. 9.8.

36 Article 89 of the French Constitution; CC Décision n° 2017-749 DC du 31 juillet 2017 - CETA.

37 Christoph Grabenwarter, 'Offene Staatlichkeit: Österreich' in: Armin von Bogdandy, Pedro Cruz Villalon and Peter Huber (eds), *Handbuch Ius Publicum Europaeum, Band II, Offene Staatlichkeit - Wissenschaft vom Verfassungsrecht* (2008), § 20, paras 34, 55; Theo Öhlinger, *Verfassungsrechtliche Aspekte des Vertrages von Amsterdam in*

democratic order of the State are conceived as not to be affected by European integration (Article 28(2) and (3) of the Greek Constitution), as are the 'presidential' parliamentary democracy that is set out in Article 110(1) of the Greek Constitution, human dignity, equal access to public office, freedom of personal development, liberty of the person, or the separation of powers enshrined in Article 26 of the Greek Constitution.[38] The Swedish Instrument of Government refers to 'the principles by which the State is governed' as a limit to integration (Chapter 10, § 5), to which the legal literature attributes, above all, the Freedom of Press Act, transparency and access to documents.[39] In Spain, too, the Tribunal Constitucional has recognised a 'core' of 'values and principles' in the Spanish constitution that cannot be affected by integration, but has left open the question of their precise delimitation so far.[40] The only exception to this is the Netherlands, which, with regard to the transfer of sovereign rights, provides only for a procedural hurdle for the transfer of sovereign rights (Article 91(3) of the *Grondwet* (Constitution of the Kingdom of the Netherlands)).[41]

b) National Reservations of Review

It is self-evident that such constitutional limits to integration can be monitored and enforced only by the courts, which are responsible for the integrity of the national constitution.

In accordance with settled case-law of the Federal Constitutional Court, Article 23(1) Sentence 1 GG contains a promise of effectiveness and implementation with regard to EU law,[42] which also includes the endowing of EU law with precedence of application over national law in the statue of ratification in accordance with the second sentence of Article 23(1)

Österreich in: Waldemar Hummer (ed.), *Die Europäische Union nach dem Vertrag von Amsterdam* (1998), 297, 300 ff.

38 Regarding the problems of interpretation, see Julia Iliopoulos-Strangas, 'Offene Staatlichkeit: Griechenland' in: von Bogdandy, Cruz Villalon and Huber (n. 38), § 16, para. 41 ff.

39 Joakim Nergelius, 'Offene Staatlichkeit: Schweden' in: von Bogdandy, Cruz Villalon and Huber (n. 38), § 22, paras 19, 34.

40 STC 64/1991; DTC 1/2004; Antonio López Castillo, 'Offene Staatlichkeit: Spanien' in: von Bogdandy, Cruz Villalon and Huber (n. 38), § 24, paras 21, 63 ff.

41 For greater detail, see the summary in Peter M. Huber, 'Offene Staatlichkeit: Vergleich' in: von Bogdandy, Cruz Villalon and Huber (n. 38), § 26, para. 85 ff.

42 See BVerfGE 126, 286 (302); 140, 317 (335, para. 37) – *Identitätskontrolle I*; 142, 123 (186 ff., para. 117) – *OMT*.

GG.[43] This, in principle, also applies with regard to conflicting national constitutional law and, in the event of a conflict, generally leads to the inapplicability of that law in the specific case.[44] However, the precedence of application of EU law exists only by virtue of and within the framework of the constitutional conferral of power.[45] Therefore, the limits to the opening of the German legal order to EU law, which is foreseen in the *Grundgesetz* and is implemented by the integration legislature, reside not only in the integration programme laid down in the Treaties, but also in the identity of the constitution. This cannot, except by revolution, neither be changed, nor be affected by integration (third sentence of Article 23(1) in conjunction with Article 79(3) GG). The precedence of application exists only to the extent that the Basic Law and the statute of ratification permit or provide for the transfer of sovereign rights.[46] Only to that extent is the application of EU law in Germany democratically legitimised.[47] The Federal Constitutional Court guarantees those limits through, in particular, judicial review of matters pertaining to identity and matters potentially involving *ultra vires* acts. Similar constitutional reservations do exist for the constitutional or apex courts of other Member States.[48]

43 See BVerfGE 73, 339 (375); 123, 267 (354); 129, 78 (100); 134, 366 (383, para. 24) – *OMT-Vorlage*; BVerfG, decision of 23 June 2021 – 2 BvR 2216/20 – para. 73 ff. – *e.A. EPGÜ II*.

44 See BVerfGE 126, 286 (301) – *Honeywell*; 129, 78 (100); 140, 317 (335, para. 38 ff.) – *Identitätskontrolle I*; 142, 123 (187, para. 118) – *OMT*.

45 See BVerfGE 73, 339 (375) – *Solange II*; 75, 223 (242) – *Kloppenburg*; 123, 267 (354) – *Lissabon*; 134, 366 (381 ff., para. 20 ff.) – *OMT-Vorlage*.

46 See BVerfGE 37, 271 (279 ff.); 58, 1 (30 ff.); 73, 339 (375 ff.); 75, 223 (242); 89, 155 (190); 123, 267 (348 ff., 402); 126, 286 (302); 129, 78 (99); 134, 366 (384, para. 26); 140, 317 (336, para. 40); 142, 123 (187 ff., para. 120); 154, 17 (89 ff., para. 109); BVerfG, decision of 23 June 2021 – 2 BvR 2216/20 – para. 74 – *e.A. EPGÜ II*.

47 See BVerfGE 142, 123 (187 ff., para. 120); BVerfG, decision of 23 June 2021 – 2 BvR 2216/20 – para. 74 – *e.A. EPGÜ II*.

48 In that regard, see, for the Kingdom of Belgium: Constitutional Court, decision No 62/2016 of 28 April 2016, para. B.8.7.; for the Kingdom of Denmark: Højesteret, judgment of 6 April 1998 – I 361/1997, Section 9.8.; judgment of 6 December 2016, I 15/2014; for the Republic of Estonia: Riigikohus, judgment of 12 July 2012, 3-4-1-6-12, para. 128, 223; for the French Republic: Conseil Constitutionnel, decision No 2006-540 DC of 27 July 2006, para. 19; decision No 2011-631 DC of 9 June 2011, para. 45; decision No 2017-749 DC of 31 July 2017, para. 9 ff.; Conseil d'État, decision No 393099 of 21 April 2021, para. 5; for Ireland: Supreme Court of Ireland, *Crotty* v. *An Taoiseach* (1987), I.R. 713 (783); *S.P.U.C. (Ireland) Ltd. v. Grogan* (1989), I.R. 753 (765); for the Italian Republic: Corte Costituzionale, decision No 183/1973, para. 3 ff.; decision No 168/1991, para. 4; decision No 24/2017, para. 2; for Latvia: Satversmes

C. Identification of a Common Constitutional Tradition

In its case-law on fundamental rights and on principles of general administrative law, the Court of Justice has established the method that the identification of general legal principles, in general, and constitutional traditions common to the Member States, in particular, must be carried out by an evaluative legal comparison. A common constitutional tradition does not require all Member States to share it, but it must exist in the majority of Member States, at least from a functional point of view. In view of the degree to which the spheres of Roman law and Germanic law have shaped EU law as a whole, a common constitutional tradition or a general legal principle can be assumed only if it demonstrably exists in both spheres of legal tradition and in a substantial number of Member States. The number of European Union citizens who are already subject to such a principle may also play a role in that respect. In accordance with the persuasive case-law of the Court of Justice, the same applies to international treaties of the Member States, in particular with regard to the protection of human rights.

A common constitutional tradition or a general principle of law, on the other hand, cannot be decreed in a decisionistic manner. Rather, new constitutional traditions or legal principles must grow bottom up. Institutions, bodies, offices and agencies of the European Union that disregard that requirement act *ultra vires*; national courts that do so act unlawfully as well and, potentially – for example in cases where they assume an *acte clair* within the meaning of Article 267 TFEU – arbitrarily.

The question was addressed by the Federal Constitutional Court in its decision in *Honeywell* of 6 July 2010, which concerned whether a general principle of prohibition of discrimination on grounds of age could be derived from the common constitutional traditions and the international treaties of the Member States, even though, at the time of the decision in *Mangold* [49] – which formed part of the subject matter of the proceedings in *Honeywell* – only 2 of the 15 constitutions of the Member States contained

tiesa, judgment of 7 April 2009, 2008-35-01, para. 17; for the Republic of Poland: Trybunał Konstytucyjny, judgments of 11 May 2005, K 18/04, paras 4.1., 10.2.; of 24 November 2010, K 32/09, para. 2.1. ff.; of 16 November 2011, SK 45/09, paras 2.4., 2.5.; for the Kingdom of Spain: Tribunal Constitucional, declaration of 13 December 2004, DTC 1/2004; for the Czech Republic: Ústavní Soud, judgment of 31 January 2012, 2012/01/31 – Pl. ÚS 5/12, Section VII; for Croatia: Ustavni Sud, decision of 21 April 2015, U-VIIR-1158/2015, para. 60.

49 Judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709.

a specific prohibition of discrimination based on age.[50] The Second Senate ultimately did not rule on the merits, because the general principle of the prohibition of discrimination on grounds of age, which was challenged with regard to its derivation from the constitutional traditions common to the Member States, neither established a new area of competence for the European Union at the expense of the Member States nor did it extend an existing competence, so that the criterion of structural significance required for *ultra vires* review was not met. Nevertheless, it can be surmised that the derivation of that principle from the common constitutional traditions of the Member states might not have been entirely convincing.[51]

D. Consequences

The constitutional traditions common to the Member States have enduring relevance not only for the area of fundamental rights, and the importance of that relevance has not yet been fully grasped. They force all participants in the European network of courts (*Rechtsprechungsverbund*), but above all the European Court of Human Rights, the Court of Justice and also the national constitutional and apex courts, to make greater efforts with regard to constitutional comparison and to the development of robust methods for their identification and concretisation.

This requires – above all for the Court of Justice, which is charged with the task of practically implementing the unity in diversity prescribed by the Treaties – an institutionalised dialogue with the constitutional and apex courts of the Member States when it comes to identifying common constitutional traditions or touching the respective constitutional identities. In such cases, the Court of Justice should not take the decision without a robust safeguard – unlike what happened in the *Egenberger* case.[52] The second paragraph of Article 24 of the Statute of the Court of Justice already allows – one might also argue obliges – it *de lege lata* to clarify this question *lege artis*. Ideally, this would take place by means of a request addressed to the court seised to interpret the constitution in a binding manner. *De lege*

50 Opinion of Advocate General Mazák in Palacios de la Villa, C-411/05, EU:C:2007:106], I-8531, point 88; Sven Hölscheidt, in: Jürgen Meyer, *Kommentar zur Charta der Grundrechte der EU* (2nd edn, 2006), Art. 21, para. 15.

51 BVerfGE 126, 296 (…) – *Honeywell*.

52 Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257.

ferenda, however, the Treaty legislature should insert an Article 267a TFEU, which provides for such a reverse preliminary ruling procedure in detail and entitles and – in the areas listed in Article 4(2) TEU – obliges the Court of Justice to obtain a preliminary ruling from the respective constitutional or supreme courts of the Member States. This would be the keystone in the vault of the network of constitutional courts.[53]

53 See Christoph Grabenwarter, Peter M. Huber, Rajko Knez and Ineta Ziemele, 'The role of the constitutional courts in the European judicial network', European Public Law 27 (2021), 43 (58 ff.).

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

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Keywords: non-binding, Federal Constitutional Court, comparative constitutional law scholarship, legitimacy, jurisdictional limits, motives, methods, judicial dialogue, judicial self-reflection

A. Introduction

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

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

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

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

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

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

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

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

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

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

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

B. Comparative Constitutional Law and the Court

I. The Scope of Comparative Constitutional Law

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

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

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

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

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

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

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

2. The Use of Comparative Law in the Court

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

11 Martini (n. 8), 360.
12 Cf. Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat', JuristenZeitung 44 (1989), 913, 916; Peter Häberle, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (Duncker & Humblot 1992); Peter Häberle and Markus Kotzur, *Europäische Verfassungslehre* (8th edn, Nomos 2016), paras 699 ff.
13 Likewise, Baer (n. 8), 391-392, 397. For further comparison Classen (n. 5), para. 51.
14 Peter Häberle, 'Das deutsche BVerfG, eine "Nachlese" zu 60 Jahren seiner Tätigkeit' in: Peter Häberle (ed.), *Verfassungsgerichtsbarkeit – Verfassungsprozessrecht* (Duncker & Humblot 2014), 251, 256-257.
15 Cf. for example Sommermann (n. 1), para. 86; Angelika Nußberger, 'Wer zitiert wen?', JuristenZeitung 61 (2006), 763, 770; Cheryl Saunders, 'Judicial Engagement with Comparative Law' in: Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011), 571, 574; Bobek (n. 10), 150.
16 Martini (n. 8), 72 ff.

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

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

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

19 BVerfGE 7, 198 (208) – Lüth.

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

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

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

23 BVerfGE 32, 54 (70) – Betriebsbetretungsrecht.

24 BVerfGE 36, 146 (165) – Eheverbot.

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

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

C. Relationship Between the Court and Comparative Law Scholarship

I. The Increase in Comparative Constitutional Law Scholarship

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

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

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

27 BVerfGE 128, 226 (253) – Fraport.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

43 Paulsen (n. 26).

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

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

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

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

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

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

49 Martini (n. 8).

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

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

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

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

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

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

53 Voßkuhle (n. 38), 491-492.

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

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

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

2. Constitutional Comparison and Academic Support

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

57 Bryde (n. 2), 298.
58 Accessible under http://oxcon.ouplaw.com/home/MPECCOL.
59 Cf. the references in n. 51.
60 András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017).

D. The Legitimacy and Limits of Judicial Constitutional Comparison

I. Legitimacy

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

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

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

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

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

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

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

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

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

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

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

2. Jurisdictional Limits

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

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

3. Motives

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Methods of Constitutional Comparison

I. No Methodologically Sound Concept

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

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

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

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

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

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

81 Zweigert and Kötz (n. 34), 42-43.

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

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

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

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

2. Constitutional Comparison as Part of a Permanent Judicial Dialogue

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Conclusion: Constitutional Comparison and Judicial Self-Reflection

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

93 Baer (n. 8), 398.

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

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.

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).

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).

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).

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.

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).

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

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.

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.

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.

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.

I. 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.

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,

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/.

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.

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.

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).

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).

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.

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.

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).

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.

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).

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).

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.

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).

Transformative Constitutionalism: Not Only in the Global South

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Keywords: transformative constitutionalism, liberal constitutionalism, US constitutionalism, South Africa, India, public interest litigation, German Basic Law, proportionality, social transformation, Judicial legitimacy, practice-oriented scholarship

A. Introduction

Transformative constitutionalism has emerged as a new concept in comparative law.[1] The term is associated with the rise of activist tribunals in a number of Global South jurisdictions and many of those who invoke transformative constitutionalism understand it as a counter-model to the North.[2] With an optimistic belief in the power of courts to bring about change, it

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1 Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013). See also the use of that term in numerous country chapters in Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South: the Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013). As I explain below, the concept was first used in relation to South African constitutionalism in Karl E. Klare, 'Legal Culture and Transformative Constitutionalism', South African Journal of Human Rights 14 (1998), 146. See also recently Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan and Ximena Soley (eds), *Transformative Constitutionalism in Latin America: the Emergence of a New Ius Commune* (Oxford University Press 2017).

2 For representative examples among many, see, e.g., Upendra Baxi, 'Preliminary Notes on Transformative Constitutionalism' in: Oscar Vilhena, Upendra Baxi and Frans

appears to many Southern scholars as a fresh approach, unburdened by the skepticism toward judicial intervention present in the United States and other Northern jurisdictions. Yet, while South–South comparisons are key to better grappling with the challenges faced by lawyers in Southern societies, the existing literature is too quick to dismiss Northern examples as irrelevant to their endeavor to make transformative constitutionalism work. Some Northern countries, such as Germany, have adopted important features of a transformative understanding of law, and their experiences provide useful, currently often ignored, resources for Southern scholars to draw upon.

To begin with, transformative constitutionalism is not a project geared only, or even mainly, to combating poverty, even though this is a prevalent theme in many Southern jurisdictions.[3] Transformative constitutions cherish a broader emancipatory project, which attributes a key role to the state in pursuing change. As a result, transformative constitutionalism as a legal concept is not a distinctive feature of Southern societies, but part of a broader global trend toward more expansive constitutions which encompass positive and socioeconomic rights and which no longer view private relationships as outside constitutional bounds. As such it strongly resembles what I have previously described as 'activist constitutional'[4] as well as Alexander Somek's concept of 'Constitutionalism 2.0.'[5] This is not to say that the *political* projects underlying transformative constitutionalism are not different around the world. Especially in many Southern countries, those underlying political projects are distinctively politically left, something that is less true in Northern jurisdictions like Germany. Yet, as a *legal* concept, transformative constitutionalism is not necessarily tied to one particular political agenda apart from a broader emancipatory commitment to use law to steer state action and drive social change toward a more just

Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013), 19; David Bilchitz, 'Constitutions and Distributive Justice: Complementary or Contradictory?' in: Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South: the Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013), 41 judicial process.

3 For more on the role of poverty, see *infra* Part B.

4 Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press 2015), Ch. 1.

5 Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014), Ch. 2.

and equal society. Why countries adopt a transformative understanding of law may vary: in some states, successful revolutionaries will be seeking to entrench their vision for change in a constitution to be enforced by courts; elsewhere, political elites may be attempting to change national fortunes for the better with less public attention and support.[6] But whatever the reason for adopting transformative constitutionalism, transformative regimes are here to stay, and courts and scholars in the North and the South will have to grapple with the implications of that project.

How best to realize an aspirational constitution is a contested question, fraught with many challenges to the traditional understandings of law and of the judicial role. The multitude of different approaches to transformative constitutionalism reflects this fact. If we want to understand and tackle these challenges, we need to broaden our comparative horizons. Doing new things can get courts into trouble, and transformative constitutionalism brings many new and multifaceted questions of redistribution and positive rights into the domain of law. Whenever courts deviate from the standard forms of judicial process and legal reasoning—because they let a new group of people speak, because they develop new rights or prescribe new remedies—their burden of justification increases.[7] This is true across most legal systems: where law is a long-established social practice, as is the case in the common law world, it is tied to tradition and the established social mores.[8] Where it is seen as a science, as is the case in the European continental tradition, it entails the promise of internal consistency and determinacy. In either case, courts can have a hard time fitting a host of new questions into established legal doctrines and dealing with them in recognizably legal ways. This not only poses risks to legal certainty and systemic fairness, but also presents a challenge to judicial legitimacy.

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6 See Bruce Ackerman, 'Three Paths to Constitutionalism—And the Crisis of the European Union', British Journal of Political Science 45 (2015), 1. In contrast, Ackerman's third category of constitutional legitimacy, the insider model, makes a more unlikely context for transformative constitutionalism.

7 On 'newness' and its meaning for judicial adjudication, see James Fowkes, Socio-Economic Rights and the Newness Hypothesis, Max Planck Lecture (Jan. 29, 2014); James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in South Africa* (Cambridge University Press 2016), Ch. 6.

8 For a comparative analysis of hierarchical (continental law) and coordinate (common law) legal cultures, see, e.g., Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to Legal Process* (rev. ed. 1991).

The existing Global South literature has so far only scratched the surface of this problem. Writers often focus on showing the expansive things courts can do (which they often associate with the promise, and sometimes with the emerging practice, of Southern approaches) and on rebutting those who are suspicious of such expansions of the judicial role (sometimes associated with Northern, in particular U.S., approaches).[9] However, the most important question is often not whether courts could potentially do more ambitious things on a case-by-case basis, but *how* they can *best* do so. If this is the line of enquiry, the practice of older, more settled legal systems is deeply relevant, whether of those in the North, as in Germany, or in the South, as in India or Colombia, and each equally deserve our attention.

What is interesting about the German case in particular is that German lawyers have approached the challenges of transformative law in a very different, much more traditionally *legal* way than a number of their Southern counterparts, particularly in India, have done. In spite of its comprehensive commitment to an activist state, German constitutionalism is tied to a rather traditional understanding of law as a science and a distinct discipline of its own.[10] This contrasts most starkly perhaps with the Indian practice, which stands out for its collaborative, outcome-oriented and more 'political' approach even among Southern countries.

This Article sets out to examine these two approaches to transformative constitutionalism, the German and the Indian, more closely, so that we may better understand the different ways in which *courts* in different systems deal with their often quite similar legal tasks—a comparison that is ignored if the debate about transformative law is framed in ideological North–South categories. Germany and India are selected here, because they stand for two very different approaches, and their example can therefore shed light on

9 Defenders of judicial activism are more prevalent in the literature. See P.N. Bhagwati and C.J. Dias, 'The Judiciary in India: A Hunger and Thirst for Justice', National University Juridical Studies Law Review 5 (2012), 171; Satyaranjan Purushottam Sathe, *Judicial Activism in India* (2002). For a more nuanced and more critical account, but still framing the debate in terms of 'activism,' see Madhav Khosla, 'Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate', Hastings International and Comparative Law Review 32 (2009), 55. The South African debate has moved beyond 'activism,' but here, too, court enthusiasts dominate, and judicial restraint is often understood purely in strategic terms, as a means of ensuring continued political support by the African National Congress (ANC) for the South African Constitutional Court. See, e.g., Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013).

10 *See infra* Part C.I for further discussion. For details, see Hailbronner (n. 4), Ch. 3.

the broader debates. First, however, we need to get a better sense of what transformative constitutionalism entails as a concept of comparative law. To that end, this Article considers the emerging Global South literature on transformative constitutionalism and examines briefly what is usually set up as the counter-model, U.S. constitutionalism. With Global South scholars, it argues that there is indeed something distinctive about transformative constitutionalism that goes beyond the traditional paradigm of U.S. constitutionalism, notwithstanding the fundamental vagueness of that concept. In contrast to the existing literature, it argues that the legal core of that concept is nevertheless not distinctively Southern, resting ultimately on the constitutional entrenchment of a vision of fundamental social change and an active role of the state in pursuing it.

The second Part then turns to consider Germany as a case of transformative constitutionalism, so defined, sketching out its approach to transformative law as compared to the Indian model. Third, the Article examines the promises and problems of the two different paradigms. I argue, in particular, that the Indian model, which focuses on just outcomes over procedure and form carries significant risks for courts in the long run. In contrast, the German approach tends to emphasize professional expertise, thus avoiding many of these risks, but leading ultimately to the exclusion of nonexperts from the process of constitutional interpretation. Lastly, I sketch some suggestions as to how we might go about reconciling both worlds: preserving independent legitimation of courts and law, as achieved by the German model, while adopting a more flexible and pragmatic approach to addressing the recurring problems of institutional failure and poverty in many Southern jurisdictions. To be sure, a lot more work remains to be done—and much suggests that it is time for the North to learn from the South at least as much as the other way around.[11]

B. Transformative Constitutionalism

As previously mentioned, it is important to acknowledge there is no single comprehensive comparative theory or concept of transformative constitu-

11 For a first exploration of the issues where Europeans might learn from the South, see Michaela Hailbronner, 'A View from Western Europe' in: Conrado Hubner-Mendes, Roberto Gargarella and Sebastián Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022).

tionalism. Although Global South comparisons are a burgeoning field at the moment, the volumes dealing with it so far mainly present individual country reports on what are thought to be some common elements of Global South constitutionalism.[12] Most scholarship that engages explicitly with transformation constitutionalism is currently South African.[13] A scholar from the United States, Karl Klare, initially introduced the idea of transformative constitutionalism in a 1998 article in the *South African Journal of Human Rights*, where he addressed the relationship between constitutional content and legal methodology in the context of South African constitutionalism.[14] Klare describes transformative constitutionalism as 'an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.'[15] On its 'best reading,' the South African Constitution was 'social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural and self-conscious about its historical setting and transformative role and mission.'[16] Its transformative character, so Klare famously argued, required a new transformative methodology.

12 See, e.g., Vilhena, Baxi and Viljoen (eds) (n. 1); Bonilla Maldonado (ed) (n. 1); Varun Gauri and Daniel Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2009).

13 See, e.g., Pius Langa, 'Transformative Constitutionalism', Stellenbosch Law Review 17 (2006), 351; Theunis Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?', Stellenbosch Law Review 20 (2009), 258; Andre J. Van Der Walt, 'Transformative Constitutionalism and the Development of South African Property Law (Part 1)', Tydskrif Vir Die Suid-Afrikaanse Reg/Journal of South African Law (2005), 655; Andre J. Van Der Walt, 'Transformative Constitutionalism and the Development of South African Property Law (Part 2)', Tydskrif Vir Die Suid-Afrikaanse Reg/Journal of South African Law (2006), 1; Marius Pieterse, 'What Do We Mean When We Talk About Transformative Constitutionalism?', South Africa Public Law Journal 20 (2005), 155; Elsa Van Huyssteen, 'The Constitutional Court and the Redistribution of Power in South Africa: Towards Transformative Constitutionalism', African Studies 59 (2000), 245; Henk Botha et al. (eds), *Rights and Democracy in a Transformative Constitution* (Sun Press 2003); Dikgang Moseneke, 'Transformative Constitutionalism: Its Implications for the Law of Contract', Stellenbosch Law Review 20 (2009), 3; Dennis M. Davis and Karl Klare, 'Transformative Constitutionalism and the Common and Customary Law', South African Journal on Human Rights 26 (2010), 403; Eric C. Christiansen, 'Conceptualizing Substantive Justice Conference Article: Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice', Journal of Gender, Race and Justice 13 (2010), 575.

14 Klare (n. 1).

15 Id. at 150.

16 Id. at 153.

The old formalist style of legal reasoning under apartheid, he argued, was simply not suited to realize the aspirations of the new constitution and would be unable to achieve the goals of the new South Africa[17]—advocating in turn an American critical legal studies-inspired and more candid style of argumentation.

Klare's paper paved the way for much of later academic writing, although his particular, critical-legal-studies-inspired approach to adjudication and scholarship has been only moderately successful, and often gave way to other theoretical approaches.[18] Today, 'transformative constitutionalism' is nevertheless the most widely used label for South African constitutionalism. But like any popular concept, it has taken on many different meanings over time, some more cautious than others. The basic core of the idea of transformative constitutionalism is that it entails a commitment to *social and political change*, and not just change at the margins, but of a more fundamental sort. Yet, this doesn't tell us very much. Change is important to transitional constitutionalism[19] too, so how is transformative constitutionalism different? The former Chief Justice of the South African Constitutional Court, Pius Langa, has argued that a transformative constitution envisages *permanent* change because it entails a 'way of looking at the world that creates a space in which dialogue and contestation are truly possible.'[20]

The famous South African constitutional bridge joins no shores; rather, what matters is the very activity of 'bridge-*building*.'[21] Unlike transitional constitutional regimes, which typically aim for a particular state of society, which, once achieved, does not require further change, transformative constitutions require a *constant* effort of self-improvement.

But what kind of change do transformative constitutional systems pursue? This is not an easy question. Some scholars argue that a transformative constitution must have justiciable socioeconomic rights, 'fair access to vital

17 Id. at 170.

18 In particular, the work of Dworkin has influenced the South African debate. See, e.g., Drucilla Cornell and Nick Friedman, 'The Significance of Dworkin's Non-Positivist Jurisprudence for Law in the Post-Colony', Malawi Law Journal 4 (2010), 1. For a Habermasian take on transformative constitutionalism, see Dennis Davis, *Democracy and Deliberation: Transformation and the South African Legal Order* (Juta & Company Ltd 1999).

19 Ruti G. Teitel, *Transitional Justice* (Oxford University Press 2000).

20 Langa (n. 13), 354.

21 Fowkes, Building the Constitution (n. 7), ch. 4.

socio-economic goods and services, to fairness in the workplace.'[22] Many emphasize that constitutional rights must affect relationships between private parties since a transformative constitution cannot accept that private life takes place in a realm of its own where the old hierarchies and inequalities persist.[23] Transformative constitutionalism is hence embedded in a leftist, progressive political agenda for a more just and equal society. This is a start, but many questions remain open.

Unsurprisingly, things get messier still once we move beyond the South African debate to the broader Global South one. Different countries look very different once we map them onto Klare's definition of transformative constitutionalism. Compare, for example, the South African emphasis on participatory governance at the federal level in decisions such as *Doctors for Life*,[24] which has become a pervasive concern in South African jurisprudence, with the Indian case, where participatory governance exists generally only at the level of individual states, such as Kerala[25] or West Bengal,[26] and does not reflect general constitutional commitment. Indian 'multiculturalism' similarly looks different from South African. Going beyond the current South African Constitution, the Indian Constitution not only sets out specific provisions to improve the lives of members of the lower castes and specific minorities in its schedules, but constitutional amendments have also introduced quotas for women and other disadvantaged groups sitting on local councils.[27] However, when it comes to the protection of other minorities, such as homosexuals, the Indian case looks much weaker than the South African, as the recent *Naz* decision upholding the criminal-

22 Moseneke (n. 13), 12.

23 Van Der Walt, 'Transformative Constitutionalism (Part 2)' (n. 13). Similarly, see Davis and Klare (n. 13).

24 *Doctors for Life Int'l v. Speaker of the National Assembly and Others* (2006) (6) SA 416 (CC).

25 Frank Fischer, 'Participatory Governance as Deliberative Empowerment: The Cultural Politics of Discursive Space', American Review of Public Administration 36 (2006), 19, 26 ff.

26 Archon Fung and Erik O. Wright, 'Thinking About Empowered Participatory Governance' in: Archon Fung and Erik O. Wright (eds), *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (Verso 2003), 4, 12 ff.

27 See State-Wise List of Scheduled Castes Updated up to 30-06-2016, Indian Ministry of Social Justice and Empowerment, http://socialjustice.nic.in/UserView/index?mid=76750 (last visited August 7, 2017); see also India Constitution, Articles 330, 332, 334, 343D, 343T for seat reservations for members of scheduled castes.

ization of homosexuality[28] demonstrates, contrasting with the much more liberal South African jurisprudence.[29]

In light of such complexities, the recent volume on transformative constitutionalism in the Global South by Oscar Vilhena and coauthors is understandably modest when it comes to proposing a comparative concept of transformative constitutionalism. The editors stress that transformative constitutionalism must entail both ideas of material redistribution and symbolic recognition (without treating these as sharply distinct concerns), but they ultimately conclude that '[i]n summary, the contributions in this book challenge (but do not necessarily prevent) attempts to confine transformative constitutionalism to a particular comprehensive doctrine.'[30] Given the difficulties in providing a clear definition of transformative constitutionalism and the discrepancies between Southern states, the a priori exclusion of Northern examples from the debate appears particularly arbitrary. Nevertheless, its Southernness has become integral to transformative constitutionalism as a concept of comparative law, and two points should be made about this. First, the emergence of South–South comparisons as a serious field of comparative law has of course been long overdue.[31] Any observer confronted with, for example, African constitutional scholarship will be struck by the constant references to Northern systems, compared to the near complete silence when it comes to references to other African or Southern jurisdictions.[32] This is both surprising and problematic, given the number of Southern countries find themselves struggling with similar

28 *Koushal & Another v. NAZ Foundation & Others* (2014) 1 SCC 1.

29 On gay marriage, see, e.g., *Minister of Home Affairs & Another v. Fourie & Another (*2006) (1) SA 524 (CC). The South African Constitution also explicitly recognizes sexual orientation as a prohibited ground of discrimination in Section 9. South Africa's Constitution, 1996 § 9.

30 Oscar Vilhena et al., 'Some Concluding Thoughts on an Ideal, Machinery and Method' in: Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013), 617, 620.

31 See especially Daniel B. Maldonado, 'Introduction' in: Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: the Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013), 1.

32 See, e.g., the first volume in a new series on African constitutionalism and the individual country chapters which hardly refer even to each other in the context of a workshop on comparative African constitutional law, Stellenbosch Handbooks in African Constitutional Law: Charles M. Fombad (ed), *The Separation of Powers in African Constitutionalism* (Oxford University Press 2016). The main exception to this pattern seems to be an emerging trend to quote South African decisions.

problems. Underlying some of the Global South literature is therefore the concern that Southern societies are confronting much greater degrees of poverty and state failure than do Northern societies, and that this matters to our understanding of law. Yet, in framing the concept of transformative constitutionalism, these concerns have played only a subsidiary role.[33] Transformative constitutionalism does *not* understand itself primarily as a legal paradigm devoted to combatting the specific ills of developing states, or more specifically poverty,[34] and the diverse legal practices and developments in Southern societies reflect that fact.[35] This is not to say that it might not be useful to think about whether those problems might require particular constitutional answers, but transformative constitutionalism as it is described in the current literature is simply a lot more than.

Second, it may be, these points notwithstanding, that some wish to confine transformative constitutionalism to a Southern context for reasons including the desire to advance the Global South as a category in comparative law. For those taking this position, I am less interested in this Article in a terminological contest than in the substantive point. This Article argues that the project of transformative constitutionalism, functionally or substantively speaking, bears important resemblance to legal developments in some Northern jurisdictions, such as Germany. Many of the problems Southern societies are facing are not unfamiliar to Northern countries and are here as they are combated by means of law, and in particular constitutional law. Northern societies such as Germany may have today very different levels of poverty and enjoy long-established, largely well-

33 See Sanele Sibanda, 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty', Stellenbosch Law Review 22 (2011), 482, 482 (criticizing this fact).

34 See Vilhena, Baxi and Viljoen (n. 1); Maldonado (n. 1).

35 In India and Colombia, middle-class interests have in particular in recent decades increasingly come to dominate in courts as opposed to those of the poor: see, e.g., Varun Gauri, 'Fundamental Rights and Public Interest Litigation in India: Overreaching or Underachieving?', Indian Journal of Law and Economics 1 (2011), 71; David Landau, 'The Reality of Social Rights Enforcement', Harvard International Law Journal 53 (2012), 189. South African practice is similarly concerned with much more than the eradication of poverty and critics often claim that transformative constitutionalism in its current form is not suited to do as much for the eradication of poverty as it should: see Sibanda (n. 33). And the Colombian Court's rise has arguably more to do with its role in helping to overcome the decade-long internal struggles and civil war. See, e.g., Manuel J. Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court', Washington University Global Studies Law Review 3 (2004), 529.

functioning welfare systems, but this has not always been the case, and that often matters for the way constitutionalism is understood in these societies. Moreover, state-building and social change are concerns for many societies involved in constitution-drafting; and those concerns, once entrenched in a legal system, often shape its law even when the initial transition has been completed. Race, class, and gender shape the mechanisms of political exclusion and social marginalization everywhere and lawyers in many societies attempt to combat these problems with legal tools. If these attempts are not just isolated endeavors by a few progressive lawyers, but represent instead a broader social and political consensus, then constitutional law in these societies often becomes a tool for greater social change. It would therefore be a sound comparative practice for those engaged in the project of transformation in the South to consider Northern examples and vice versa, rather than rule out certain examples for purely geographical or terminological reasons. I believe it is better to acknowledge the similarities in our concepts and thus to use transformative constitutionalism wherever we find aspirational constitutional projects of state-driven change. But even if one disagrees about this, what matters ultimately is not a question of terminology, but whether there are sufficient similarities between Northern countries and the developments emerging in the Global South to make North–South comparisons worthwhile for both sides.

Consequently, from a Southern perspective, the most important task is to decide *which* Northern countries may be relevant to the enterprise of better understanding the challenges to law and judicial legitimacy which transformative constitutionalism entails. Given the problems associated with defining transformative constitutionalism, a good way of approaching that task is by asking what transformative constitutionalism is *not*. To that question Global South scholars have given a reasonably clear answer, namely transformative constitutionalism is *not* U.S. constitutionalism. Karl Klare described South African constitutionalism as 'an unmistakable departure from liberalism (as contemplated in classic documents such as the U.S. Constitution).'[36] Upendra Baxi[37] and David Bilchitz[38] both address the issue of Global South constitutionalism in terms of economic injustice and inequality as a major point of contrast with the U.S. model, and transformative constitutionalism's transcendence of that model as a genuinely new

36 Klare (n. 1), 152.
37 Baxi (n. 1), 22–23 (if I understand him correctly).
38 Bilchitz (n. 2), 50.

thing. Indeed, it is the overarching dominance of U.S. constitutionalism in comparative scholarship, which provides another reason for these scholars to insist on Southern distinctiveness.

What then makes U.S. constitutionalism the counter-paradigm to the trend we see emerging in the Global South? U.S. citizens have, of course, lived under very different constitutional regimes since the country was founded, as scholars such as Bruce Ackerman and Mark Tushnet have pointed out.[39] This means that it is hard to pin U.S. constitutionalism down to one particular model. To what degree and in what respect the Southern opposition to the United States makes sense as a counter-paradigm, is therefore not a question that can be comprehensively answered here. If Southern scholars nevertheless consider the United States as a model for what Southern jurisdictions are transcending, this has much to do with the fact that, broadly speaking, U.S. constitutionalism does not entrust the federal state with the task of bringing about a more just and equal society. Its conception of law is 'reactive,' to borrow from Mirjan Damaska,[40] and its constitutionalism represents, in Somek's useful terms, 'Constitutionalism 1.0' with its emphasis on liberty.[41]

The lack of a 'positive' or activist role for the state in U.S. constitutionalism is evident not just in the absence of explicit textual provisions calling for state action—as is common in many other constitutions—but more importantly in its constitutional practice and theory. The U.S. Constitution is understood as an instrument for bringing about a more just society insofar as it provides a framework within which individuals can exercise their liberty, both for the public and private good. U.S. constitutionalism, at least as it currently stands, does not entail a 'serious constitutional theory giving priority to what in the Catholic tradition was called 'the common good.'[42] True, ever since the famous 'switch in time' at the Supreme Court in the wake of the New Deal, the constraining power of the U.S. Constitution on positive state regulation has been starkly reduced and the U.S. administrative state has grown (with some backlash under the Reagan and subsequent administrations). However, even this landmark change has, overall, not

39 Bruce A. Ackerman, 'Holmes Lectures: The Living Constitution', Harvard Law Review 120 (2007), 1737; Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Bloomsbury 2009).
40 Damaška (n. 8), 73 ff.
41 Somek (n. 5), ch. 1.
42 Tushnet (n. 39), 234.

implied a shift toward viewing the Constitution as an instrument to compel positive state action, but only did away with constitutional barriers to such action should it arise. In other words, U.S. citizens and their elected representatives may decide to pursue a progressive political agenda at the federal level, and the Supreme Court's jurisprudence ensures that constitutional obstacles are often low if they do,[43] but the U.S. Constitution does not oblige them to do so. This is illustrated among other things by the reluctance to develop constitutional state duties and corresponding positive rights for citizens and by the limited application of rights in relationships between private people.[44]

There are exceptions, of course: some scholars have recently started to question the characterization of U.S. constitutionalism in 'negative' terms, as a framework for restraining state action. In a thoughtful and nuanced article, Stephen Gardbaum has argued that many of those features commonly considered exceptional in the United States and related to a negative conception of U.S. rights actually resemble much of what is going on elsewhere.[45] He and Jeff King[46] have also pointed to important cases of successful socioeconomic rights litigation at the level of individual states such as over the right to education in New York,[47] while Mila Versteeg and Emily Zackin have made a broader argument against U.S. exceptionalism based

43 Whether the U.S. Supreme Court will stick to its New Deal precedents and exercise restraint in ruling on U.S. federal policy initiatives under the Commerce Clause has become more questionable in decisions such as *United States v. Alfonso D. Lopez Jr.*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), but the recent decisions on the Affordable Care Act, e.g., *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) and *King v. Burwell*, 576 U.S. (2015), suggest that at least for some time deference may still prevail.

44 For the negative conception of rights in the United States, see, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir.), cert. denied, 465 U.S. 1049 (1983); Tushnet (n. 39), at 233 ff.; Helen Hershkoff, 'Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings' in: Varun Gauri and Daniel Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2009), 268.

45 Stephen Gardbaum, 'The Myth and the Reality of American Constitutional Exceptionalism', Michigan Law Review 107 (2008), 391.

46 Jeff King, 'Two Ironies About American Exceptionalism over Social Rights', International Journal of Constitutional Law 12 (2014), 572.

47 See *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 316, 317 (Ct. App. 1995); *Campaign for Fiscal Equity v. State of New York*, 719 N.Y.S.2d 475 (Sup. Ct. 2001) (I am referred to these cases by Jeff King).

on state constitutions.[48] While these critiques are important in shedding light on some typically neglected aspects of U.S. constitutionalism, they ultimately cannot do away with the above characterization of U.S. constitutionalism. This is partly because the developments described are situated at the level of states rather than the federation. Insofar as the critique refers more broadly to U.S. constitutionalism on the federal level, it represents more of a marginal correction rather than a full-blown rejection of that picture. While Stephen Gardbaum rightly points out that rights in most countries apply only indirectly to disputes between private persons, and that in the United States, too, there are instances where ordinary private law is interpreted in light of constitutional values,[49] he cannot dispel the impression that this happens ultimately much less often in the United States than elsewhere. In contrast to a country like Germany, there are no doctrines under which constitutional rights are understood as 'objective law' radiating through the entire legal order; instead, canons of constitutional avoidance and the state action doctrine generally shield private relationships from constitutional law in the United States, with a few exceptions. Similarly, as Gardbaum himself admits, there are strong judicial precedents in the United States negating the existence of protective state duties (and therefore positive rights),[50] even if this prevailing understanding may not be necessitated by the constitutional text or the intentions of the drafters.

In individual cases, U.S. constitutional history may nevertheless provide some inspiration and important lessons to Southern scholars, and this is particularly true of the developments during the Warren era in the field of racial justice in the spheres of housing, employment, and education.[51]

48 Mila Versteeg and Emily Zackin, 'American Constitutional Exceptionalism Revisited', University of Chicago Law Review 81 (2014) 1641.

49 Stephen Gardbaum argues that the presence or absence of constitutional arguments in private law disputes is primarily a matter of how far the substantive constitutional rights stretch in any given case (Gardbaum (n. 45), 431 ff.). I cannot engage with his arguments here comprehensively, but if the substantive reach of constitutional rights is at fault, then it is nevertheless striking that, apparently, the substantive reach often ends when private relationships are concerned. Given this and the abovementioned existence of a canon of constitutional avoidance and lack of any explicit doctrine of horizontal effect, I am not convinced that the United States is really quite as similar in this respect to Germany as Gardbaum claims.

50 See especially *Jackson v. City of Joliet*, 465 U.S. 1049 (1984); *Deshaney v. Winnebago City Department of Social Servs.*, 489 U.S. 189 (1989).

51 Bruce Ackerman, *We the People: The Civil Rights Revolution* (Harvard University Press 2014). This is not to say that courts were entirely successful in their attempt at

During that time, the U.S. Supreme Court, together with other actors, repeatedly forced federal and state governments as a matter of constitutional commitment to take racial equality more seriously. It developed aggressive remedies such as busing that obliged the state to change segregation in U.S. schools in the interest of pursuing real equality.[52] Whether we judge these measures in retrospect to have been successful or not, cases such as these provide useful sources of information about expansive judicial action and its risks. This is important, especially for Southern jurisdictions with significant racial inequality, such as South Africa or Brazil; and civil rights jurisprudence in the United States provides important lessons for countries seeking to transform their societies today, as many Southern scholars are aware. Indeed, there are considerable similarities between U.S. developments during the Warren era and Latin American approaches, for example when it comes to dealing with systemic problems and developing innovative judicial remedies,[53] an area where U.S. courts have long been more creative than Northern European ones.[54]

Yet the Supreme Court's transformative line of decision making remains *limited to certain spheres*[55] and to a *certain time* in U.S. history.[56] The idea that the U.S. Constitution must primarily safeguard individual freedom (understood in a negative, formal way), and guard against concentrations of state power that might endanger such freedom, still prevails today. It is visible in U.S. constitutional, as well as political, discourse, from the contemporary debates about the Affordable Care Act to attitudes to social security. A recent book describes the American social insurance model as deeply conservative and work-oriented, with entitlements following not from belonging to a community, but being based on previous earnings and

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transformation. See especially Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford University Press 2006); Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd ed., University of Chicago Press 2008).

52 See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

53 Southern scholars are well aware of this: see, e.g., Cesar Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America', Texas Law Review 89 (2010), 1669, 1671 (n. 16).

54 On Germany and France, see Hailbronner (n. 11).

55 Ackerman (n. 51).

56 See, e.g., the recent rollback of federal supervision of voting rights regulations in the Southern states in *Shelby County v. Holder*, 570 U.S. 2 (2013) and earlier of federal competence under the Commerce Clause in *United States v. Alfonso Lopez Jr.*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).

contributions.[57] This is sharply distinct not just from the kind of politics we observe today in the Global South but also in many European countries, and U.S. constitutionalism exercises no pressure to change this.

As a result, it seems fair to say that transformative constitutionalism makes sense as a concept insofar as it seeks to overcome the U.S.—especially pre-New Deal—paradigm, according to which constitutions must primarily constrain state power and safeguard individual freedom (understood in formal, negative terms). Transformative constitutionalism not only requires a constitutional commitment to broad-scale social transformation, aspiring ultimately to a better and more equal society. Transformative constitutions also envisage a *state* that actively pursues that change. Transformative constitutionalism is therefore possible only in those societies that demand—unlike the United States—an active role for the state as a catalyst of fundamental social change and that use their constitutions as a tool to enforce this activist idea of statehood.

As a consequence of their commitment to fundamental state-driven change, transformative constitutional regimes typically include at least three further features.[58] The first is a stipulation of justiciable state duties and/or positive rights that direct state action to realize the constitutional idea. Second, constitutional rights must matter in private disputes: if we cherish a comprehensive idea of social change and real equality, then obstacles in the private sphere must be abolished. It is a common place, but it is nevertheless true that private actors in fact hold significant power that shapes the lives of all of us. In order to make use of our constitutional freedoms, it will therefore be necessary to hold private parties in some way, whether directly or indirectly, to account with respect to our constitutional rights. Because realizing constitutional goals and values is in the public, and not just the private, interest (even when individual rights are involved), transformative constitutions also typically allow for broad access to court(s), by broadly construing individual standing, allowing for public interest litigation, or by conceding other state institutions the right to bring cases to high courts (abstract review).[59]

57 Theodore R. Marmor et al., *Social Insurance: America's Neglected Heritage and Contested Future* (Sage Publications 2013), 241.

58 See also Hailbronner (n. 4), Ch. 1.

59 The U.S. model may as such seem less clearly opposed to broad access to courts, but the changing jurisprudence on standing in U.S. courts (a broad understanding during the 1950s: see, e.g., *Calvert Cliffs Coordinating Comm'n v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), and a narrower understanding in the 1980s and later: see,

Beyond this core conception, however, I see little grounding for a thicker, more clearly Southern concept in the existing literature. Perhaps the version of transformative constitutionalism I offer here represents a 'transformative constitutionalism light.' But as previously mentioned, Southern societies are, unsurprisingly, and in spite of certain commonalities, very different, and these differences have influenced their constitutional texts and practice. Certainly, Southern constitutional regimes confront institutional failure and poverty more often than Northern regimes and this shapes their constitutional practice. Yet, at least if we take the existing literature seriously, this is not all transformative constitutionalism is about. Even in the 'light' sense in which I use the term here, it still represents a distinctive new model of constitutionalism as compared to the model in place elsewhere such as the United States. Whatever exact understanding of transformative constitutionalism we therefore adopt, legal comparison with similar Northern systems promises to yield important insights.

C. Transformative Constitutionalism In Practice

1. Beyond the United States: The German Case

If U.S. constitutionalism represents in important ways the model Southern jurisdictions aim to transcend, other Northern countries are much closer to the Southern paradigm. One Northern country that is particularly interesting to the contemporary Global South debate is Germany.[60] Like South Africa after apartheid, Germany emerged after the Second World War a broken and morally discredited country with a strong imperative of political and social change. The German Basic Law reflected this commitment, but it did so only in a cautious and conservative way: it looked

e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)) demonstrate how access is linked to our broader understanding of the constitution and its function in society. For more on this, see also Antonin Scalia, 'The Doctrine of Standing as an Essential Element of the Separation of Powers', Suffolk University Law Review 17 (1983) 881; for more critical accounts, see Cass R. Sunstein, 'What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III', Michigan Law Review 91 (1992) 163, 183–84.

60 This is not to say that only a comparison with other countries in the strict sense of the word makes sense. Another interesting jurisdiction for fruitful North–South comparisons might well be the European Union, given, in particular, the Court of Justice of the European Union's key role as a 'motor of integration' and thereby a driver of social change.

primarily backwards to those traditions that seemed untainted, the German nineteenth-century concept of the rule of law (the *Rechtsstaat*) with its accompanying negative rights.[61] That German framers could, unlike most Southern societies, look backwards, had much to do with what they thought needed fixing. After a period of only twelve years of National Socialism, and with its victims murdered or outside the country, turning to the past to find inspiration for the future seemed a more feasible option to postwar Germany than in contemporary Southern societies with their long history of colonialism and racial injustice. In spite of the conservative orientation of German constitutional framers, however, German constitutionalism became, over time, transformative in important respects.[62] That it did is due primarily to the Justices at the German Constitutional Court and German legal scholars.

The early Justices of the German Constitutional Court were, like most new German elites, aware that they were confronted with the major task of changing Germany from a totalitarian dictatorship into a Western democratic state, respectful of individuals and their rights.[63] Bringing about such fundamental change was not just a difficult task; it was a task that required more than traditional liberal constitutionalism, as it had previously been understood in Germany. Postwar county courts were staffed with up to eighty to ninety percent former members of the Nazi party, while many civil servants in the lower ranks of the bureaucracy were similarly former Nazi members.[64] Established legal doctrines were in many ways not adequate to change the German society and the state, as they did not touch on private disputes or regulate important administrative matters that had long been considered executive prerogatives and nonjusticiable. Though not always entirely conscious of what they were doing,[65] the Justices created new tools

61 Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland: Vierter Band 1945–1990* (C.H. Beck 2012), 214 ; see also Hailbronner (n. 4), Ch. 2.

62 For this and the following argument in detail, see Hailbronner (n. 4).

63 See, e.g., Martin Drath, 'Die Grenzen der Verfassungsgerichtsbarkeit', Vereinigung der deutschen Staatsrechtslehrer 9 (1950), 17 (first presented at the Annual Public Law Professors Conference (Staatsrechtslehrertagung)). Shortly thereafter, Drath became one of the first Justices of the new German Federal Constitutional Court.

64 Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany* (Thomas Dunlap trans., University of Chicago Press 1998), 176.

65 For example, in the *Lüth* case (Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, (1958), 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198), where the Court developed the indirect effect of constitutional norms, see Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses: der*

allowing them to take on their challenging task, transforming the Basic Law from a charter of individual rights and organizational provisions into something much bigger: an 'objective order of values.'[66] As values, constitutional norms had a radiating effect on the whole legal order, informing the application of legal rules in all fields of law, including private law. This move would enable the subsequent Constitutional Court Justices to drive change not just at this historical moment, but in the future—confirming a shared understanding that the potential for future change had to be preserved. In one of their most famous, albeit contested, early decisions, the German Justices wrote that the 'free democratic order of the Basic Law assumes that the [existing state and social conditions] can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects.'[67]

As a result, German constitutionalism today displays many core elements of transformative constitutionalism. To begin with, the Basic Law (GG) sets out a number of affirmative state duties in its directive principles—among which the social state principle (*Sozialstaatsprinzip*) is the most important—and goes back to the original text of the Basic Law of 1949.[68] Other principles, such as the protection of the environment and of animals (Article 20a GG), were added later. The Basic Law also explicitly mandates the state to protect human dignity and mothers (Articles 1 and 6 GG). More important than these explicit textual anchors for positive rights is, however, the fact that, according to established precedent and doctrine, most fundamental rights entail a protective dimension that creates de facto state duties of care (see discussion below for more detail).[69] German constitutional rights are also assumed to have a strong horizontal dimension, albeit only

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Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts (Springer 2010), 345. For a broader discussion of that concept in the historical context in the German literature, see also Thilo Rensmann, *Wertordnung und Verfassung: das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung* (Mohr Siebeck 2007).

66 7 BVerfGE 198.

67 BVerfG Aug. 17, (1956) 5 BVerfGE 85, 516 (prohibiting the Kommunistische Partei Deutschlands (KPD), the Communist Party of Germany) (translated by author).

68 For a more detailed account of the shifting meaning of the social state principle, see John Philipp Thurn, *Welcher Sozialstaat? Ideologie und Wissenschaftsverständnis in den Debatten der bundesdeutschen Staatsrechtslehre 1949–1990* (Mohr Siebeck 2013).

69 One of the internationally most famous judgments of the German Constitutional Court is its first decision on abortion in which the Court demanded that the unborn life be protected by means of criminal sanctions, BVerfG Feb. 25, (1975) 39 BVerfGE 1.

indirectly. Based on this indirect horizontal effect, the German Constitutional Court interprets broad provisions and general clauses in private law in light of the constitution.[70] And while German constitutional law does not provide for the kind of public interest standing we see in many Southern jurisdictions, the Court's broad reading of the scope of constitutional rights as well as provisions for abstract review (Article 93 I Nr. 2 GG) ensure that constitutional challenges are easy to bring—confronting the Court with a caseload of about 6,000 new cases each year.[71]

All this comes with a reasonably strong substantive conception of equality in German constitutionalism. Not only does the Basic Law entail the above mentioned social state principle, it also cherishes a progressive understanding of the right to property whose use is explicitly bound by Article 14(2) to serve the common good.[72] The German Constitutional Court has engaged in a broad reading of what qualifies as property which includes, among other things, a tenant's contractual rights against his landlords—leading to a very tenant-friendly housing law in Germany.[73] The Basic Law also allows, in Article 15, for the nationalization of important means of production,[74] even though this provision has, in practice, been largely irrelevant. Based on the Court's early reading of the Basic Law as 'an objective order of values' and in continuation with older German traditions of paternalist statehood, the Court generally views the state not merely as a potential restraint on individual freedom, but as a provider of the conditions necessary for individuals to enjoy their constitutional rights. Doctrine reflects this in the so-called protective function of German fun-

The Court modified this stance in a later decision, however. See BVerfG May 28, 1993, 88 BVerfGE 203.

70 For an introduction to that concept, see Bodo Pieroth et al., *Grundrechte. Staatsrecht II* (30th edn, C.F. Müller 2014), 189 ff.

71 For the official judicial statistics, see Bundesverfassungsgericht, Verfahrenseingänge pro Jahr und Senat (Mar. 2, 2016), http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2015/gb2015/A-I-2.pdf. On access in the German system, see *infra* Part D.1.

72 Grundgesetz [GG] [Basic law] Article 14(2), translation at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html. Article 14(2) of the GG reads: 'Property entails obligations. Its use shall also serve the public good.'

73 See BVerfG May 26, (1993) 89 BVerfGE 1.

74 GG Art. 15 ('Land, natural resources and means of production may for the purpose of socialisation be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation').

damental rights (*Schutzpflichtenfunktion*).[75] This protective function has given rise to a number of both procedural and substantive positive rights, sometimes with a strong socio-economic dimension.[76] Examples include the right to welfare, which is drawn from human dignity and the social state principle,[77] and the right to a specific process of university admission, which guarantees that existing academic capacities are used up to their fullest extent.[78] All this is, much like in the current South African case, bound into an understanding that individual freedom and common welfare are not opposites, but rather conditional upon each other: 'Its [the Basic Law's] idea of man is not one of the autocratic individual, but of a person standing in the community and being obliged to it in multiple ways.'[79] In the 1950s and 1960s, the Court's jurisprudential innovations were part of a broader political and cultural movement for change under the new Basic Law. *Verfassung and Verfassungswirklichkeit*—constitution(al ideal) and constitutional reality—featured as the title of numerous speeches, essays, and academic publications that emphasized how the social and political realities in West Germany still differed from the constitutional ideal.[80] As everyone agreed that Nazi scholarship had not taken the normative dimension of law seriously enough in its efforts to adapt legal concepts to the political ideology of Nazism, this was now supposed to change and the Basic Law was to become the binding blueprint for a new German society. It was now understood that constitutional values would not merely reflect prevalent social opinions but rather shape them. Some even argued that the Court needed to educate the population about the meaning of rights and democracy.[81]

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75 See, e.g., Eckart Klein, 'Grundrechtliche Schutzpflicht des Staates', Neue Juristische Wochenschrift [NJW] (1989), 1633. See also Wolfram Cremer, *Freiheitsgrundrechte: Funktionen und Strukturen* (Mohr Siebeck 2003).

76 For an overview, see Pieroth et al. (n. 70), 99 ff.

77 See recently BVerfG Feb. 9, (2010) 125 BVerfGE 175, 133.

78 BVerfG July 18, (1972) 33 BVerfGE 303.

79 BVerfG Dec. 20, (1960), 12 BVerfGE 45, para 19.

80 See Wilhelm Hennis, 'Verfassung und Verfassungswirklichkeit—ein deutsches Problem' in: Wilhelm Hennis, *Regieren im modernen Staat: Politikwissenschaftliche Abhandlungen I* (Mohr Siebeck 1999), 183 (with further references).

81 Drath (n. 63). Later scholars have similarly stressed the Court's educatory function: see Jutta Limbach, 'Die Integrationskraft des Bundesverfassungsgerichts' in: Hans Vorländer (ed), *Integration durch Verfassung* (Westdeutscher Verlag 2002), 315, 315–16; Brun-Otto Bryde, 'Integration durch Verfassungsgerichtsbarkeit und ihre Gren-

But while the German Constitutional Court kept building on its transformative landmark decisions to develop the jurisprudential categories of a transformative understanding of German constitutionalism, its institutional and political role changed over time. In the 1970s, the newly elected Social Democrat Chancellor Willy Brandt used the phrase 'dare more democracy' (*mehr Demokratie wagen*) as his campaign slogan, and called for a new beginning and political reforms centering on democratization. This displaced the Court and the Basic Law as focal points of national transformation.[82] The Court, a progressive institution in the 1950s and 1960s under Adenauer's patriarchal regime, now became the conservative branch. From the 1970s onwards, German elites no longer generally agreed on the need for political and social change independently of their political convictions as they had in the immediate postwar years.[83] Since West Germany had finally become a stable democracy by the 1980s, change seemed—at least to some—no longer necessary. Political conservatives sought to celebrate this (past) achievement first and foremost,[84] and calling for change became once again a feature of political progressivism—rather than reflecting commitment shared by both conservatives and Social Democrats. Political debates shaped legal debates, and, on the right, conservative scholars increasingly started to question the new transformative doctrines, which had formerly represented mainstream thinking.[85] After the Court went through a period of conservative activism in the 1970s,[86] even progressives became more critical of the Court's expansive legal doctrines.[87] But, by then, it was too

zen' in: Hans Vorländer (ed), *Integration durch Verfassung* (Westdeutscher Verlag 2002), 329, 331–32.

82 For this and the following, Hailbronner (n. 4), Ch. 2.

83 For a recent account of this familiar history, see Ulrich Herbert, *Geschichte Deutschlands im 20. Jahrhundert* (C.H. Beck 2014).

84 See, e.g., Dolf Sternberger, 'Rede zur Hundertjahrfeier der Sozialdemokratischen Partei Deutschlands' in: Dolf Sternberger, *Staatsfreundschaft* (Insel Verlag 1990), 17 ff.

85 Stolleis (n. 61), 475–76.

86 Richard Häussler, *Der Konflikt zwischen Bundesverfassungsgericht und politischer Führung* (Duncker & Humblot 1994), 52 ff.; Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court 1951–2001* (Oxford University Press 2015), ch. 2.

87 See, e.g., Ingeborg Maus, 'Liberties and Popular Sovereignty: On Jürgen Habermas' Reconstruction of the System of Rights', Cardozo Law Review 17 (1995), 825; Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1998), 309 ff. For a broader overview (and refutation) of the criticism from the left, see Dieter Grimm, 'Reformalisierung des Rechtsstaats als Demokratiepostulat?', Juristische Schulung 20 (1980) 704.

late: the Court's early landmark decisions and its transformative doctrines had already become firmly entrenched. Today, they form the basis of many of its most expansive judgments, even though the Basic Law is no longer commonly understood as an instrument for social change.[88]

2. The Indian Case

To say that India has embraced a form of transformative constitutionalism is not controversial. For the purposes of comparison, it is nevertheless useful to briefly recall some of the basic features of the Indian brand of transformative constitutionalism.

Like its German counterpart, the text of the Indian Constitution reflects the commitment to social justice, obliging the state to make sure that 'the ownership and control of the material resources of the community are so distributed as best to subserve the common good.'[89] At the same time, Indian constitutional drafters, just like the drafters of the German Basic Law, sought to avoid charging the judiciary with the monitoring of these obligations. In line both with the country's British heritage and with communist models of governance, it was initially neither expected nor indeed considered desirable that the Indian Supreme Court play a significant role in the social and economic transformation of Indian society. Even the introduction of judicial review was contested among the framers of the Indian Constitution,[90] and when they decided for the inclusion of a justiciable bill of rights, they took care to frame its provisions narrowly in order to avoid excessive judicial scrutiny. Refusing to insert a 'due process' clause into their Constitution, the Indian framers wanted to depart from the American example of what was conceived by many as improper judicial activism.[91]

88 Of course, the change they bring about is not always progressive in political terms. In its 1974 decision on abortion for example (BVerfG Dec. 25, 1975, 39 BVerfGE 1), the German Constitutional Court famously built on the protective aspect of the right to life to demand the criminalization of abortion. This is not surprising. Sufficiently abstract doctrines and methodological tools can serve very different political ends, and this is true for transformative constitutional doctrines as well.

89 Indian Constitution, Part IV, Article 39(b).

90 Sathe (n. 9), 34–35.

91 Apparently, U.S. Supreme Court Justice F. Frankfurter had recommended this to the Indian framers. See id. at 37.

When it first emerged, the Indian Supreme Court's activism was not directed toward social justice, but toward the protection of traditional liberal rights, in particular property.[92] This brought the Court into a series of famous conflicts with the government, leading ultimately to the Court's weakening under the emergency regime of Indira Gandhi. Only in the aftermath did the Indian Supreme Court start to engage in what has sometimes been described as a 'populist quest for legitimation,'[93] based primarily on the development of public interest litigation (PIL). Now the Court started increasingly to conceptualize law as a tool to transform Indian society and increase social justice. It is this attempt, and the Court's emphasis on being able to offer justice to all Indians,[94] together with the resulting focus on equality, that marks the later period of Indian constitutionalism as transformative. Much like in Germany, the transformative character of Indian constitutionalism is therefore built principally on the Supreme Court's jurisprudence and constitutional politics, rather than on the text of the Indian Constitution.[95]

With its directive principles, the Indian Constitution, like the German Basic Law, incorporated explicit affirmative state duties. Even though these duties were not initially thought justiciable, this changed when the Court started to read fundamental rights in the light of the Constitution's nonjusticiable directive principles. It thus created a new kind of social rights, hitherto foreign to the Indian Constitution, that were based on a widespread understanding that many of the Constitution's civil-political rights would become meaningless if they weren't backed up by certain economic and social measures ensuring the effective enjoyment of these rights.[96] Some of the best-known examples involve the constitutional right to life, which

92 Id. at 46 ff.

93 Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980) 121. For a more recent account of the Indian Supreme Court in terms of judicial populism, see Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-emergency India* (Cambridge University Press 2017).

94 Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India', Third World Legal Studies 4 (1985), 107.

95 The Indian developments were remarkably judge-led. See Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (The University of Chicago Press 1998), Ch. 5, 6.

96 Madhav Khosla, *The Indian Constitution: Oxford India Short Introductions* (2012) 134–35. For details, see also Madhav Khosla, 'Making Social Rights Conditional: Lessons from India', International Journal of Constitutional Law 8 (2010), 739.

the Court understood to imply a right to livelihood.[97] Perhaps most importantly, the development of PIL from the late 1970s onwards helped create the procedural conditions that would allow the Indian Supreme Court to hear cases of particularly disadvantaged groups if they were brought by a public-spirited citizen or organization. This is especially true for the first phase of PIL in the 1970s and 1980s. The Indian approach to horizontality appears to be somewhat more ambivalent. While some rights are explicitly applied only to the state or authorities under the control of the Indian government (Article 12), others apply horizontally or—at least—create state duties to protect individuals against other private parties. Overall, however, the Indian case for horizontality looks a lot weaker than the South African and perhaps even than the German.[98] Yet, with its many legal innovations pushing for change in the Indian state and society, Indian courts count indisputably and rightly as a haven of transformative law.

D. Different Approaches to Transformative Constitutionalism

The most striking difference between Germany and India lies in their different approaches to what are at least in some respects similar challenges of transformative constitutionalism. Charging courts with the task of realizing a transformative constitution expands the realm of what were previously thought to be legal questions. Established legal traditions often provide no or little guidance on how to address many new issues.[99] Whereas doctrine and precedents on habeas corpus or property rights go back centuries, there is little in the existing doctrine that can tell us about the appropriate allocation of water or about how to calculate the amount of welfare a poor person should receive to be able to lead a dignified life. Dealing with such non-traditionally legal questions is therefore difficult for courts, which permanently risk overreaching into the domain of politics or being seen to do so, making their public authority particularly vulnerable to criticism.

97 *Tellis & Others v. Bombay Mun. Corp.* (1985) 3 SCC 545, AIR 1986 SC 180.

98 Khosla (n. 96), 90 ff. For a more detailed analysis, see Stephen Gardbaum, 'The Indian Constitution and Horizontal Effect', in: Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016), 600.

99 Fowkes, Socio-Economic Rights (n. 7).

Germans and Indians have dealt with this particular legal challenge very differently. Germans have largely done so in a way that preserves traditional attributes of continental legal culture and the idea of legal autonomy. In contrast, Indians have adopted a more collaborative approach that emphasizes legal flexibility and makes the Supreme Court's contribution to social improvement key to its public legitimacy. These different understandings of judicial legitimacy and differing degrees of trust in legal autonomy have prompted different approaches to (1.) the structuring of the judicial process, (2.) legal language, and (3.) standards of reasoning. Only the first of these features, the different structuring of the judicial process, is in the strict sense related to the development of PIL by the Indian Supreme Court, whereas this is not strictly true of language or judicial reasoning. Yet, even though the percentage of PIL cases in the Supreme Court amounts only to about one percent of the Court's docket,[100] PIL and its focus on social justice are central to the legitimacy of the Indian Supreme Court after Indira Gandhi's emergency regime in the late 1970s.[101] As such, it not only features heavily in the scholarly literature, but has also transformed the way we look at the Indian Supreme Court more broadly. Together, the different approaches in these three key fields have led to the development of very different ideas of judicial legitimacy and law in the two systems.

1. Judicial Processes

The German Constitutional Court has largely preserved the traditional structure of the judicial process: a plaintiff may raise a complaint if she can plausibly argue that her rights have been violated. The Court will then hear both sides, as well as experts and *amici*, and finally submit a verdict that ends the case. This differs considerably from Indian PIL, which has (1) broadened access to courts, mainly through extensions of standing; (2) structured the judicial process with the aim of encouraging cooperation and consensus; and (3) at the remedial stage, provided at least sometimes

100 Gauri (n. 35).

101 Anuj Bhuwania, 'Courting the People: The Rise of Public Interest Litigation in Post-Emergency India', Comparative Studies of South Asia, Africa and Middle East 34 (2014), 314.

for a consensual solution of the problem, potentially involving the court in a continuous dialogue with the parties over a longer time period.[102]

If law is to be a tool of social transformation, it makes sense to encourage plaintiffs to file cases. One effective way of doing that is by expanding standing. The Indian Supreme Court merely requires now that the plaintiff has sufficient interest to start a lawsuit and not be a 'mere busybody.' Under this framework, nongovernmental organizations (NGOs) and publicly spirited individual citizens can raise almost any issue that constitutes some breach of legal rules or constitutional principles, and the court then has to decide if it wants to address it.[103] Indian PIL has also transformed the nature of the trial from an adversarial contest conducted within strict procedural rules to what courts have called a 'cooperative or collaborative effort on the part of the petitioner, the State or public authority and the Court to secure observance of the constitutional or legal rights, benefits and privileges.'[104] Within this collaborative paradigm, the court is supposed to function as an ombudsman receiving complaints from the citizens and drawing the state's attention to them, providing a forum to discuss the problem and seek a common solution, and acting as a mediator suggesting possible solutions.[105] Indian remedies similarly have changed their nature from judicial decrees to structures for collaborative problem solving and monitoring. Structural remedies may provide courts with a middle ground between expansive judicial interference and abandonment of their constitutional responsibilities, and may furnish the necessary expertise to assess complicated questions of fact as well as ensure compliance. For example, in a case involving the use of bonded labor in construction projects for the Asian games in New Delhi, the Indian Supreme Court ordered three different state institutions to hold weekly investigations and file their reports with

102 See, e.g., Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?', American Journal of Comparative Law 37 (1989), 495, 498 ff. On the ideas in this section, see also James Fowkes, 'Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge', Cambridge Journal for International & Comparative Law 1 (2012), 235.

103 Susan D. Susman, 'Distant Voices in the Courts of India—Transformation of Standing in Public Interest Litigation Transformation of Standing in Public Interest Litigation', Wisconsin International Law Journal 13 (1994), 57.

104 *People's Union for Democratic Rights (PUDR) v. Union of India* (1983) 1 SCR 456, 458.

105 See, e.g., Clark D. Cunningham, 'Public Interest Litigation in the Indian Supreme Court: A Study in the Light of American Experiences', Journal of Indian Law Institute 29 (1987), 494. See also, more recently, Bhagwati and Dias (n. 9).

the Court, and mandated two independent institutions to interview the workers, observe construction sites, and again to file weekly reports both with the Court and the state.[106]

The German Court has taken a different approach to these matters. Although it adheres to a traditional conception of standing—requiring a plausible violation in one's own constitutional rights (following section 90(1) *Bundesverfassungsgerichtsgesetz*)—rather than allowing for publicly interested citizens to bring cases, the Court has interpreted a number of constitutional rights so broadly that it has de facto expanded standing enormously. In particular, by reading Article 2 of the Basic Law, the right to liberty, as a residual right to do, or not do, whatever one pleases, the Court has made potential rights violations easy to establish and thereby facilitated access to the Constitutional Court.[107] Plaintiffs are also free to decide whether to hire a lawyer to bring a case in the first place and may apply to the Court for legal aid to hire one, depending on their financial means and chances of success.[108] The German model in this regard thus involves substantive legal innovations paired with (established) institutional support in a way that ultimately lowers the barrier to bringing cases, much like the Indian procedural approach does. Nevertheless, the different pathway structures the German judicial process ab initio differently from the Indian. In the German case, the violation of individual rights remains key and is the only issue the Court must address; the idea of having the parties and potentially other stakeholders negotiate a common solution, which the Court might then adopt, would appear utterly foreign to a German lawyer, even if the German Constitutional Court, too, may decide to hear experts and consider amicus briefs. With regard to remedies, the German Constitutional Court has sometimes given the legislature a deadline to fix an otherwise unconstitutional statute or even ordered preliminary

106 Modhurima Dasgupta, 'Public Interest Litigation for Labour: How the Indian Supreme Court Protects the Rights of India's Most Disadvantaged Workers', Contemporary South Asia 16 (2008), 159.

107 Bundesgerichtshof [BVerfG] [Federal Constitutional Court] Jan. 16, (1975), 6 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 32—the *Elfes* case.

108 Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen* (9th edn, C.H. Beck 2012), 59. See also, BVerfG Jan. 31, (1952) 1 BVerfGE 109.

measures until the legislature gets to grips with an issue.[109] However, unless the Court provides for automatic invalidity of a statute after the deadline for the legislators to fix it has passed, plaintiffs must start a new case to sanction legislative inaction if the legislature has not acted. Unlike in India, therefore, the German Court does not stay involved in the matter over a longer period of time, even if certain policy issues will recur on its docket, such as in the issue of party finance.[110] A German trial therefore ends with a verdict, whereas in India the process of addressing a common problem may take years, with the Indian Supreme Court remaining involved in overseeing governmental programs, often with the help of civil society organizations charged with monitoring progress.

2. Language

The judicial language in the two systems is different, too. A comparatively deductive style and dry and sometimes technical tone characterize German constitutional jurisprudence, varying little between a case involving the human dignity of immigrants and one raising intricate questions of tax law. Hardly ever will the German Court use rhetorical flourish or pathos, or appeal to the emotions of its audience.[111] The Court speaks primarily to the expert community of other lawyers, making its judgments hard to access for laypersons. This is different in many common law countries where the individual personality of a judge traditionally matters more than in the Weberian judicial bureaucracy of Germany where the Court typically speaks with one voice and in the name of the institution independent of its particular members. Even though dissenting opinions have been allowed in the German Constitutional Court since 1971, they remain rare in practice.[112] In India, by contrast, judgments are much more emotive, rhetorical,

109 Malte Graßhof, '§ 78' in: Dieter C. Umbach et al. (eds), *Bundesverfassungsgerichtsgesetz: Mitarbeiterkommentar und Handbuch* (2d edn, C.F. Müller 2005), 955; Schlaich and Korioth (n. 108), 417 ff.

110 For an overview, see Sebastian Lovens, 'Stationen der Parteienfinanzierung im Spiegel der Rechtsprechung des Bundesverfassungsgerichts', Zeitschrift für Parlamentsfragen (2000), 285.

111 Hailbronner (n. 4), 111–12.

112 Only in 8% of all decisions between 1971 and 2013 did German Constitutional Court Justices write separate opinions. See Statistics Dissenting and Concurring Opinions 1971–2016, Bundesverfassungsgericht, http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2016/gb2016/A-I-7.pdf (last visited 25 October 2023).

personalized, and long, and judges sometimes even cite poetry in their opinions.[113] More broadly, as Ramnath has pointed out, the multi-layered quality of Indian Supreme Court judgments allows the Court to address the social context of a particular case, which may often be irrelevant to the legal argument as such.[114] Here, judges may reply, and sometimes give indirect advice, to policy makers and other members of the Indian society who are not necessarily part of the legal community. In this way, justice is 'de-professionalized,' providing a basis for the public credibility of the Indian Supreme Court.

3. Standards of Reasoning

Indian and German judges have also adopted different standards of legal reasoning. In short, Germans have mastered the challenge of transformative constitutionalism by building new legal doctrines, whereas Indians have opened up the judicial process and emphasized flexibility.

An enormous mass of practice-oriented legal scholarship has enabled the German Constitutional Court to develop a reasonably systematic approach to constitutional adjudication. Unlike in India, where little effort has been made to develop a more doctrinally coherent legal approach to the new understanding of Indian constitutionalism emerging in the 1970s, German scholars and judges worked to build the Court's early transformative tools into a broader body of constitutional doctrine.[115] As a result, judges could justifiably claim that their new approaches were part of a coherent system of professional knowledge and therefore legal. But the new doctrines not only had to be sufficiently legal-looking to qualify as justifiable exercises of judicial power but also sufficiently flexible to address a whole range of new legal questions. These demands were met on the level of both constitutional methodology and the more concrete doctrine on specific constitutional rights. As a matter of methodology, German constitutional jurisprudence is only rarely literal in a narrow sense—the meaning of a particular word

113 Rakesh Bhatnagar, *Some 'Poetic Justice' Literally*, DNA India (May 16, 2011), http://www.dnaindia.com/india/column-some-poetic-justice-literally-1543681.

114 Kalyani Ramnath, 'The Runaway Judgment: Law as Literature, Courtcraft and Constitutional Visions', Journal of Indian Law and Society 3 (2012) 1.

115 Hailbronner (n. 4), Ch. 3.

is typically only the starting point for the legal analysis but not usually its endpoint.[116]

While the German Court will typically draw on all traditional methods of legal interpretation (grammatical, systematic/structural, historical (subjective), purposive/teleological), it emphasizes particularly the teleological approach.[117] The freedom to draw on all these methods, and the breadth of the teleological approach in particular, afford the Court the necessary flexibility to develop credible legal answers to new questions in spite of vague constitutional language. On the level of individual doctrines, German proportionality analysis is a case in point. As a mechanism for assessing any violation of constitutional rights, its scope is considerable. At the same time, its four-pronged framework[118] provides a coherent structure that does not vary from case to case and thus gives the impression of stability and consistency.[119] Proportionality also leaves room to plug right-specific doctrine into its framework, for example by fleshing out the considerations the Court must take into account when balancing the good to be achieved against the right at stake.[120]

German scholars have played a major role in this success story. The importance of legal scholarship for judicial practice is of course a traditional feature of continental legal versus common law cultures and hardly comes as a surprise. Yet, under a transformative constitution, the German emphasis on practice-oriented scholarship assumes a more important role than it would under a traditional narrower constitution. This is because the expansion of law in transformative systems propels so many new questions

116 Michaela Hailbronner and Stefan Martini, 'The German Federal Constitutional Court' in: Andras Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2016), 356.

117 Id.

118 The first question in proportionality analysis is whether the aim pursued in order to limit a right is itself in accordance with constitutional law. Then, the limitation of the right in question must be (1) suitable to achieve the aim pursued; (2) the least restrictive means to do so; and (3) overall proportional to the good that is to be achieved by the limitation. For an English introduction to German proportionality (as compared to the Canadian model), see Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence', University of Toronto Law Journal 57 (2007), 383.

119 Alec Stone-Sweet, 'All Things in Proportion? American Rights Doctrine and the Problem of Balancing', Emory Law Journal 60 (2011), 797, 807.

120 For a detailed analysis of German balancing, see also Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press 2013).

onto the judicial agenda, that it is hard for courts—especially in systems of centralized rather than diffuse constitutional review—to grapple with all of them in a sufficiently well thought out and reasonably consistent manner. Judges, especially when they have dockets as large as the German Constitutional Court or (worse still) the Indian Supreme Court, often do not have the time to engage more deeply with the impact of their decisions on the established doctrine and the legal system as a whole. Scholars do. And judges are likely to listen, in particular when scholarly work is not presented in thick monographs that emphasize a theoretical approach, but instead in short articles in law journals and—ideally—compiled in commentaries. The latter form of legal writing is particularly important for legal practice because commentary writers sift through the existing literature on a given question of interpretation and set out the so-called *herrschende Meinung* (literally, 'the governing opinion,' but better translated as 'the prevalent opinion') and summarize what the dissenters are saying (*andere Ansicht* or *Mindermeinung*).[121] As the German legal academy is large and new books and articles constantly appear, commentaries are highly efficient in processing the available information on any given topic in the condensed form that is useful for legal practitioners.

The Indian approach has been altogether different. To begin with, the collaborative structure of PIL trials encourages negotiation and common problem solving, which rarely follows established doctrinal lines but requires a more flexible approach. In this context, Article 142 of the Indian Constitution has been important. That article enables the Indian Supreme Court to do 'complete justice' in deciding its cases. It has taken on an increasingly important function in the Court's jurisprudence: from a means of ironing out 'minor procedural irregularities and hyper-technicalities,' it has over time become a 'residuary power, supplementary and complementary to the powers specifically conferred on this Court by statutes' and occasionally 'a means to ignore express statutory provisions to the contrary in the interest of doing full justice.'[122] In this latter function, Article 142 has

121 The 'herrschende Meinung' consists in the decisions of higher courts and the scholarly writings in the most important commentaries, handbooks, and law journals. See Ingwer Ebsen, *Das Bundesverfassungsgericht als Element gesellschaftlicher Selbstregulierung* (Duncker & Humblot 1985), 22ff.; Thomas Drosdeck, *Die herrschende Meinung—Autorität als Rechtsquelle* (Duncker & Humblot 1989).

122 See Aparna Chandra, Under the Banyan Tree: Article 142, Constitution of India and the Contours of 'Complete Justice' (paper presented at Yale Law School Doctoral Scholarship Conference, Dec. 1–2, 2012) (on file with author).

particularly helped the Indian Supreme Court push for accommodations between parties that largely ignore their existing legal rights and which may or may not accord with their wishes.[123]

Even beyond the use of Article 142, however, Indian constitutional jurisprudence is frequently criticized for its 'lack of 'precedent-consciousness," 'poor craftsmanship,' and the 'highly variable quality of legal norms made or enunciated by the Court.'[124] This legal flexibility can be partly explained with respect to the fact that implementation of judgments in India may be less secure and that pragmatism is important to finding solutions that are likely to work in practice. Yet this explanation does not always hold. The *Naz* judgment of the Indian Supreme Court illustrates this, having been widely and accurately criticized for its dismal judicial reasoning, even though it faced none of the above problems (a judgment to the contrary might, of course, have run into questions of implementation).[125] More often, the reason for the problematic quality of Indian Supreme Court judgments may lie in the Indian Supreme Court's practice of having two-judge benches decide most cases, which is no doubt in part a reaction to the Court's enormous caseload. For even though substantial questions of law are meant to be decided by a five-judge bench, only very few decisions are taken there.[126] Overall, there is also far less practice-oriented legal scholarship in India on which courts might be able to draw. At the same time, this practice, along with the problematic quality of many Indian Supreme Court decisions, is also more easily justifiable in a system where legitimacy is not conceived in terms of scientific expertise but instead in terms of good outcomes.

4. Conclusion

To sum up, Germans have grappled with transformative constitutionalism by systematizing it into an existing body of doctrine (*Dogmatik*) with the help of legal scholars—preserving not only the structure of traditional

123 Id.

124 Baxi (n. 93), 16.

125 See, e.g., Rehan Abeyratne and Nilesh Sinha, 'Insular and Inconsistent: India's NAZ Foundation Judgment in Comparative Perspective', Yale Journal of International Law Law 39 (2014), 74.

126 Nick Robinson et al., 'Interpreting the Constitution: Supreme Court Constitution Benches Since Independence', Economic and Political Weekly 46 (2011), 27.

judicial processes, but also the idea of law as an autonomous field separate from politics and a science to be dealt with by professionals. Indians have taken a different path, and in doing so, they have, to a significant degree, blurred the traditional boundaries between law and politics. Whereas in the political domain, decisions are—at least in the prevalent republican tradition—supposed to (1) serve the common good rather than individual interests, and (2) be based on collective choices and mechanisms of decision-making, in the legal domain things were traditionally reversed: the legal system served primarily to protect individual rights understood as spheres of individual freedom, and in doing so, routinely employed highly individualized judicial procedures that required a concrete case or controversy and an individual right at stake.[127] This traditional model has of course already been transformed by the turn to transformative constitutionalism with its conception of law as a tool for a broader conception of social justice rather than merely a set of individual rights and constraints on state power. What is remarkable about Indian PIL, however, is that it also significantly alters the second variable of this traditional model, namely the individualized nature of judicial processes—and does so in a different and far more fundamental way than the German system. German abstract review breaks with an absolutist notion of the legal process as an ex post review of specific violations of individual rights. Apart from this exception, however, German constitutional law mainly preserves its focus on individual cases and individualized procedures. The same is not true for India. Since the Indian Supreme Court enjoys significant discretion in PIL cases in determining who will be consulted and heard, this has sometimes led to the original petitioners in the case being 'shut out,' and silenced in favor of a court-appointed apparatus for lawmaking.[128] With its emphasis on cooperation and collaboration, a trial transforms itself from an effort of (factual and legal) truth-finding into an enduring negotiation. This new conception sharply contrasts with the traditional ideal that law must be consistent, certain, and autonomous of external, nonlegal considerations.

127 I am borrowing here from Christoph Möllers, *Die drei Gewalten* (Velbrück 2008).

128 See Chandra (n. 122), who points out that, for example, in *Vineet Narain v. Union of India*, AIR 1998 SC 889, the Court appointed an amicus curiae to assist it in the matter, and ended up 'shutting out' both the original petitioners and everyone else wanting to intervene in the case, who were instructed to approach the amicus if they wanted to make contributions. Moreover, as Chandra remarks, even when the original parties do formally consent to a settlement, this might not always be sufficient to protect their individual rights appropriately.

In a legal system that involves negotiation and cooperation, individual rights increasingly resemble bargaining positions whose legal protection will always depend on practical considerations.

E. What Insights?

The global trend toward courts being increasingly involved in policy-making tasks is unlikely to be reversed any time soon. Given that, the question looms large how lawyers should best approach the new tasks they are being confronted with. This debate has only just begun, but the diverging German and Indian responses to this question are worth taking into account. As we have seen, the German and Indian differences culminate in different understandings of judicial legitimacy and law. These different understandings come with their particular challenges and thus touch on broader global debates on how to make law a tool of change while holding onto ideas of legal autonomy and judicial independence.

1. Risks and Challenges

The Indian story demonstrates the risks that come with replacing ideas of legal autonomy and the separation of law and politics with good outcomes as a basis for judicial legitimacy. What are these risks? To begin with, I am not disputing that it is a good thing when courts strive for justice rather than merely administering the laws. Nor do I dispute that transformative systems must rid themselves of the kind of legal formalism that is based on a strict traditional conception of the separation of powers and concurrent restraints on courts in getting involved in any kind of 'policy-making.'[129] Yet if 'doing good' is courts' main source of authority, as it seems to be in the Indian case, this can become a problem—for a number of reasons. The first is a risk of arbitrariness. Justice takes on many meanings, and when judges derive their legitimacy from their contribution to justice, they may well be

129 For one among many examples for this kind of traditional approach, see *T.D. v. Minister of Education* (2001) IESC 86 (Ir.). Cf. Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press 2009), Ch. 2.

inclined to follow their own ideas of what is just.[130] Of course, legal realism tells us that, to some degree, this is always the case; but then 'to some degree' is the important point here. Even if judges give deep reasons for their understanding of justice, there is a risk of inconsistency and unfairness if professional constraints become less important and personal ideas of justice matter more.[131] However morally good they think their reasons are, individual courts and judges are still likely to disagree with each other about what is right.

A second problem with founding judicial authority on good outcomes is that judges will compete more directly with politicians who deal in a similar currency. This may be feasible in a more divided political system such as India where (at least until the recent electoral success of the Bhartiya Janata Party (BJP)) courts have enjoyed considerable political room for maneuver. But it can quickly create problems in systems with a dominant party such as the African National Congress (ANC) in South Africa or under an authoritarian government.[132] To secure their authority, courts then must align themselves with the political elites—as Theunis Roux suggests the South African Constitutional Court has done;[133] or they must occupy sufficiently popular positions that are not adequately represented by the political elites in power—as Baxi argued the Indian Supreme Court has done;[134] most often, courts do a bit of both. However, not only is this a risky gamble, as public opinion and political leeway are not always easy to assess in advance; it is also a strategy that is unlikely to help those who are politically marginalized in Southern societies and politics and thus most in need of judicial support. The Indian case, where PIL, with its initial concern for the

130 See, e.g., some of the research on self-fulfilling prophecies which has led some scholars to argue that judges' awareness of their hidden, non-positivist motivations for deciding cases might well incline them to cynicism, creating the impression that 'anything goes.' Scott Altman, 'Beyond Candor', Michigan Law Review 89 (1990), 296.

131 See also the more recent criticism of U.S. scholarship for destroying the distinction between law and politics and thereby inducing a crisis in U.S. law. Suzanna Sherry, 'Putting the Law Back in Constitutional Law', Const. Comment 25 (2008), 461.

132 I am thinking in particular of the Russian Constitutional Court. For an analysis, see Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics 1990–2006* (Cambridge University Press 2008). On the role of courts in authoritarian systems, see also Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008).

133 Roux (n. 9).

134 Baxi (n. 93), 121. See also Bhuwania (n. 101).

society's poorest and most marginalized, later ended up serving primarily middle-class interests, demonstrates that risk. There is evidence for similar effects of judicial activism in countries such as Brazil,[135] Argentina,[136] and even Colombia.[137]

Of course, whether we are right to be concerned about strong attacks on law and judicial authority is ultimately a political question: if constitutionalism is perceived not as an aim in itself, but merely as a means of bringing about certain results,[138] then we may not be interested in judicial legitimacy if it is not based on achieving substantial change. Some lawyers, in particular in South Africa, adopt this approach and prefer to wait for a revolution to come rather than working within the confines of the existing legal mechanisms. This is a valid political choice. If we do, however, seek to work within the existing system and preserve judicial authority, a merely outcome-based approach to judicial legitimacy is typically less stable than approaches based on procedural fairness. Not only are citizens bound to disagree with courts some of the time, empirical research also demonstrates that perceptions of *procedural* fairness shape how people will evaluate *results*[139]—creating a basis for diffuse popular support for courts even where individual decisions are not in accordance with the popular opinion. How important such legitimation is for courts will depend on the local political context. In the Global South, much suggests that a more pro-

135 For an analysis in the field of health, see Octavio L. Motta Ferraz, 'Brazil: Health Inequalities, Rights, and Courts' in: Siri Gloppen and Alicia Ely Amin (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011), 76. For a different assessment, see the study by Joao Biehl et al., 'Between the Court and the Clinic: Lawsuits for Medicines and the Right to Health in Brazil', Health & Human Rights 14 (2012), 36.

136 Paola Bergallo, 'Argentina: Courts and the Right to Health: Achieving Fairness Despite 'Routinization' in Individual Coverage Cases?' in: Siri Gloppen and Alicia Ely Amin (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011), 43.

137 Landau (n. 35). For a broader analysis of the beneficiaries of public interest litigation, see Daniel M. Brinks and Varun Gauri, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World' in: Varun Gauri and Daniel Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2009), 303. On the methodology of impact assessment with respect to especially the Colombian example, see Rodríguez-Garavito (n. 53).

138 See further Sibanda (n. 33).

139 Tom R. Tyler, *Psychology and the Design of Legal Institutions* (Wolf Legal Publishers 2007), 36.

cedural and less outcome-based legitimation of courts will become more, rather than less important. As the specter of populist politics is haunting many societies, founding judicial legitimacy along the lines of the Indian Supreme Court, primarily in terms of alleviating poverty or suffering, more broadly entails severe risks for those systems. Where there are dominant parties or strong authoritarian governments, a populist court with limited institutional capacities will have trouble out-doing political institutions, exposing itself not only to criticism but to political reprisals.[140] In contrast, where political fragmentation occurs, as is the case in India (at least for some time), courts may risk becoming substitute governments, thus devaluing and damaging the democratic process[141] and working ultimately against the ideal of an empowering, participatory democracy that Karl Klare and others have put forward.

All this raises the question whether the German approach is better suited to realize a transformative constitution. The German experience illustrates that a strong assault on traditional sources of judicial legitimacy may not be necessary to realizing transformation through law. Broad teleological/purposive arguments that make room for a realization of transformative constitutional aspirations can go a considerable way toward driving expansive judicial decision-making and still be perceived as sufficiently legal.[142] Yet, this approach, too, comes with significant downsides. To begin with, the German emphasis on traditional ideas of law as a science to be interpreted only by professionally trained experts takes the constitution out of the hands of the people, who lose their voice in determining what their most important political commitments imply.[143] This does not mean that the German Court will not take public opinion and shifting cultural understandings into account: like any other court, the German Constitutional Court is a strategic actor, and its open, flexible methodology allows it to behave

140 But see Jorge González-Jácome, 'In Defense of Judicial Populism: Lessons from Colombia', Iconnect Blog, May 3, 2017, http://www.iconnectblog.com/2017/05/in-defense-of-judicial-populism-lessons-from-colombia/. However, one of the problems with this line of argumentation is that it remains unclear how to distinguish judicial popularity with populism. Individual rhetorical appeals by some judges themselves in particular may not be enough to justify speaking of populism.

141 See especially Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty', Michigan Law Review 94 (1995), 245.

142 Hailbronner (n. 4).

143 Id. See also Michaela Hailbronner, 'We the Experts: Die geschlossene Gesellschaft der Verfassungsinterpreten', Der Staat 53 (2014), 425.

accordingly.[144] Nevertheless, its understanding of judicial authority leaves little room for other actors, such as the political branches or the people, to participate as legitimate constitutional interpreters in their own right in the enterprise of creating constitutional meaning, and other institutions, in particular the federal German parliament, accept the Court's hierarchical position.[145] In other words, the German model does not encourage popular empowerment or a participatory constitutional democracy.[146]

Yet, while German constitutional lawyers hardly argue in critical-legal-studies terms, the interpretive methods available in German constitutional law resemble quite closely what in particular South African writers are often advocating, while upholding ideas of legal autonomy and hence the most important basis for judicial legitimacy. The German focus on doctrinal, practice-oriented scholarship, however, also means that there is not much creative or original legal writing in the contemporary German academy that would bring a radically new perspective to bear, which limits, to some degree, the scope for more radical change. Much here depends on the early doctrinal turns a court takes. If they are sufficiently transformative, then a system that builds on them may be able to carry this spirit further even within the existing doctrinal constraints. Take as an example the adoption of a broad teleological style of reasoning in German constitutional law. Once such a method has become accepted and entrenched in a legal system, it is likely providing a basis for creative judicial action in the future.[147] To be sure, this is true only to a certain extent. We can easily imagine circumstances in which the German focus on doctrine would become problematic. In particular in the Global South, which faces recurring problems of good governance and a higher degree of institutional failure than most Northern countries, there may be a greater need for flexibility and judicial pragmatism to react to the real-life problems of implementing

144 Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press 2005). See also Kranenpohl (n. 65), 367–72.

145 Hailbronner (n. 4), ch. 6.

146 For the U.S. argument, see, e.g Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2004); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 2000). And more broadly about the value of political debate of judicial decision-making, see Jeremy Waldron, *Law and Disagreement* (Oxford University Press 2001).

147 Hailbronner (n. 4), Ch. 3–4.

judgments.[148] Previously developed doctrinal concepts may not always be sufficiently accommodating of the need for creative responses under such circumstances. The Indian judiciary's emphasis on collaborative problem solving and finding solutions that work on the ground may therefore be more useful to Global South tribunals than establishing the jurisprudential high ground.[149]

2. Taking the Best of Both Worlds?

Is there a way forward that might be able to combine the advantages and avoid the downsides of both models: the collaborative Indian approach, with its destructive consequences for legal autonomy, and the 'legal' German approach, with its exclusionary hierarchical conception of judicial authority?

A comprehensive answer to that question is beyond the scope of this Article, given the different political, institutional, and cultural conditions in the different societies. What I can do here, instead, is merely to set out some initial points to consider when thinking about the more concrete challenges faced by the courts in each society.

First, however, it is important to remember that the reason the cases of Germany and India are interesting to the broader debate is because they represent quite distinct models. Many other transformative legal systems seem to fall between those two 'extremes.' In countries such as South Africa, Brazil, and Colombia, the role of courts and in particular apex courts, still seems to be more of a work in progress.[150] This is partly (but not always) because the judicial activism of these courts is more recent than in India, and it will consequently take longer to do away with more traditional features of law and legal interpretation. Moreover, a continental legal culture prevails in Latin America which brings with it a strong emphasis on traditional legal values such as consistency and legal certainty. This, too, might prove beneficial for striking a balance between approaches that leave

148 On institutional failure as a problem in developing economies, see, e.g., Dwight H. Perkins et al., *Economics of Development* (7th edn, W.W. Norton 2012), 79 ff.

149 This is not to say that more dialogic approaches to constitutional justice may not have other normative advantages beyond those addressed here.

150 For South Africa, see sources cited (n. 13), particularly Davis and Klare. For Latin America, see Javier Couso, Alexandra Huneeus and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press 2010).

sufficient room for dialogic experimentation while at the same time acting in a sufficiently court-like manner by taking legal precedents or doctrines seriously and aiming for some consistency across cases.

One example of such an approach is the so-called engagement remedy the South African Constitutional Court has developed, a promising tool developed in the context of the right to housing in eviction cases,[151] which that court has used to require parties to engage in a meaningful way with each other, with the aim of coming to a mutually acceptable solution.[152] Engagement remedies ensure that the plaintiffs remain present not just in the trial, but indeed may often be taken more seriously by the government itself. The Colombian Constitutional Court has similarly made efforts for more dialogic approaches to problem solving in addressing the rights of displaced persons as well as health rights; unifying a number of individual complaints (*tutelas*), the Colombian Court provided for extensive hearings of stakeholders, civil society groups, and government, while ultimately taking a more active role in proposing a solution than the South African Court.[153] Both approaches share some of the Indian emphasis on negotiation and participation as well as its less individualistic and more publicly oriented approach. They come with certain risks, of course. The trend toward finding accommodations has generated problematic consequences in India, for example in domestic violence cases; due to social taboos, bargaining power is often unequal, and the wife's consent is therefore hard to assess freely of social and familial pressures.[154] Moreover, as some Indian scholars have pointed out, additional problems may arise in cases of group litigation due to the fact that it may not be clear who represents whom and on what basis. Group litigants may also sometimes have independent stakes in a given case, hindering them from protecting their real or supposed

151 See, e.g., *Occupiers of 51 Olivia Road, Berea Twp. and 197 Main St. Johannesburg v. City of Johannesburg & Others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Cmty., Western Cape v. Thubelisha Homes & Others* 2010 (3) SA 454 (CC).

152 Sandra Liebenberg, 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement', African Human Rights Law Journal 12 (2012), 1.

153 See Corte Constitutional [C.C.] [Constitutional Court], enero 22, 2004, *M.P: M. Espinosa*, Sentencia T-025/04 Gaceta de la Corte Constitucional [G.C.C.] available at http://www.corteconstitucional.gov.co/relatoria/2004/t%2D025%2D04.htm; C.C., julio 31, 2008, *M.P: M. Espinosa*, Sentencia T-760/08 G.C.C. available at http://www.corteconstitucional.gov.co/relatoria/2004/t%2D 025%2D04.htm.

154 Chandra (n. 122).

clients' best interests.[155] All this increases the risk that the social elites may take over the proceedings and that those of weaker social standing, whose rights are being negotiated, may be silenced.

That said, perfection is not a realistic goal. The risks of group litigation have to be weighed against those associated with more individualized approaches prevalent especially in Brazil and Colombia. Unlike in Germany's centralized system of constitutional review, the more decentralized approach in many Latin American states has led to an explosion of individual rights litigation, sometimes with problematic consequences.[156] Among those are problems of inconsistency between courts; a lack of regard for budgetary concerns, as judges only deal with individual cases; and privileged access of middle-class plaintiffs to lawyers and courts, skewing the system in favor of those classes rather than the poor and marginalized who do not have the same access to legal resources. The Colombian Court's attempts to unify cases and find more systemic solutions therefore makes sense, even if judicially prompted dialogue may not always generate the kind of ideal public discourse we would wish for.

Further, courts may be able to mitigate at least some of the risks of the more dialogic approaches to individual rights protection by controlling the results as well as by providing some a priori legal guidance for the negotiations to follow. Once the parties get a sense of how judges view their case, they are likely to be influenced by that in their engagement with each other. The emphasis on negotiation and consensual solution-finding may nevertheless make us wonder what happens to legal autonomy and demands for consistency and legal certainty. We might worry about law losing its normative force in such situations and about courts ultimately losing authority and credibility. There are no easy answers to the question how to preserve consistency and trust in law while at the same time allowing for flexibility and encouraging dialogue. Much depends on how individual judges frame their decisions. The dominant concern in the literature is

155 Owen Fiss, 'Against Settlement', Yale Law Journal 93 (1983), 1073, 1076.

156 On health rights in Colombia, see, e.g., Alicia Ely Yamin, Oscar Parra-Vera and Camila Gianella, 'Colombia, Judicial Protection of the Right to Health: An Elusive Promise?' in: Siri Gloppen and Alicia Ely Amin (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011), 103; on Brazil, see Motta Ferraz (n. 135), 76. This trend toward inconsistency and an explosion of individual cases is sometimes also linked to the civil law tradition in these countries. See Brinks and Gauri (n. 137), 303. Given the German example, I am skeptical about that explanation.

that an ad hoc approach offers little precedential protection to similarly situated persons and implies that they too must go to court.[157] But on what terms courts ask parties to engage with each other, and how courts conduct judicial proceedings during or after negotiation takes place will matter here, as will the writing of the final judgment. The substantive side of rights interpretation may become thinner, but a thicker procedural understanding of rights may at least partially compensate for that and ensure that law and values, such as consistency, are not thrown overboard.[158]

Proportionality analysis, with its content-neutral structure and applicability to a wide range of subjects, illustrates what sufficiently flexible, yet still legal doctrines might look like, and constitutional courts, such as the South African Court, have adopted proportionality in their reasoning, albeit often in a different, slightly less structured version than the German Court.[159] Even though room for experimentation would be crucial in such a system,[160] doctrinal scholarship can still make important contributions. With regard to proportionality, for example, the case of Germany shows that rights-specific analysis can help build a reasonably consistent and thick approach to the balancing of different rights (for example by setting out what the relevant considerations are), while still preserving sufficient room for legislatures to pursue their goals, if occasionally by slightly different means.[161] If this sort of mechanism nevertheless comes at a certain cost in

157 David Bilchitz, 'Avoidance Remains Avoidance: Is It Desirable in Socio-Economic Rights Cases?', Constitutional Court Review 5 (2013), 296. See also more broadly on remedies, Kent Roach, 'Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response', University of Toronto Law Journal 66 (2016), 3.

158 For a good discussion of engagement and the problems of substantive and procedural approaches, see Brian Ray, 'Evictions, Aspirations and Avoidance', Constitutional Court Review 5 (2013), 172.

159 For an analysis of South African proportionality analysis, see Kevin Iles, 'A Fresh Look at Limitations: Unpacking Section 36', South African Journal on Human Rights 23 (2007), 68; Niels Petersen, 'Proportionality and the Incommensurability Challenge in the Jurisprudence of the South African Constitutional Court', South African Journal on Human Rights 30 (2014), 405.

160 On the value of experimentalism, see more broadly Davis (n. 18); Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) available at https://www.researchgate.net/publication/313242066_The_Selfless_Constitution_Experimentalism_and_Flourishing_as_Foundations_of_South_Africa's_Basic_Law.

161 Canadian dialogue theory (see Allison Bushell and Peter Hogg, 'The Charter Dialogue Between Courts and Legislatures', Osgoode Hall Law Journal 35 (1997), 75) therefore always mentions proportionality as an important tool for creating dialogue between courts and other institutions.

terms of substantive consistency, insofar as judges will need to maintain a degree of flexibility in order find solutions that work in practice, solid, contextually aware scholarship can be helpful in finding the right procedural framework and ensuring that the plaintiff's core substantive rights are preserved.

No doubt, striking the right balance between judicial guidance and room for experimentation and dialogue will be difficult, and we are likely to disagree about the details. Approaches such as David Bilchitz's argument for a minimum core conception of socio economic rights, for example, sit well with stronger demands for judicial guidance and indeed to some degree with demands for legal autonomy: they let the judge elaborate her ideal conception of the minimum content any right should have, while enabling her, in a second step, to frame remedies in a way that takes real-life complexities into account.[162] As a result, the elaboration of the content of a right can remain a purely legal and philosophical enterprise, thereby strengthening values such as legal consistency and certainty. However, the German case demonstrates the risks of such approaches, namely that constitutional interpretation is relegated to the domain of legal experts. From a broader social perspective, judicial elaboration of the right interpretation of legal norms is—in Robert Cover's famous words—jurispathic: it 'kills' law insofar as any scholarly treatise or judicial decision says what law is not.[163] In doing so, it typically restricts the space for other communities as well as state institutions to elaborate their own ideas of what constitutional rights mean—not because they are not free to advocate alternative conceptions, but because judicial pronouncements typically carry considerable weight and are taken into account when potential plaintiffs are deciding to litigate and bureaucrats are making new laws.[164] As a result, the future

162 David Bilchitz, *Poverty and Fundamental Rights, the Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007), chs. 5–6. For the broader debate, see Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Company Ltd 2010), 163–73.

163 Robert M. Cover, 'The Supreme Court, 1982 Term—Foreword: Nomos and Narrative', Harvard Law Review 97 (1983), 53.

164 For the effects of the detailed style of reasoning of the German Constitutional Court on other branches in Germany, see Oliver Lepsius, 'Die maßstabsetzende Gewalt' in: Matthias Jestaedt et al. (eds), *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp 2019), 159. For a South African discussion of the jurispathic effects of court decisions, grounded in postmodern philosophy, see Johan Van der Walt, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (Routledge 2005). Finally, for a more general argument for judicial

space for democratic contest and deliberation will typically be limited. This is especially problematic in activist constitutional regimes, which aim to provide the conditions for comprehensive and permanent change. Not only is the involvement of courts in policy-making here typically greater than elsewhere, questions are also often newer and more polycentric, which makes it important to provide future avenues for engaging with judicial decisions in a critical manner. Like any other institution, courts do not always get things right, and there may also be no 'right' answer in many cases. And even when they push progressive causes for good reasons, it is important that courts carry their societies with them in order to achieve real change.

F. Conclusion

Transformative constitutionalism is still a new phenomenon in global legal history. Unlike the traditional model of constitutionalism, with its focus on preserving individual freedom from governmental interference, as it is best represented in the United States before the New Deal, transformative constitutionalism is broad and aspirational. It wants to drive state action as much as restrain it. To do this, individual rights must do more than preserve individual freedom understood in negative formal terms: they must shape private, as much as public, relationships and provide tools to call for as well as guide state action.

In debating how courts should best approach their tasks under this new conception of law, it is important to examine the currently available models more closely, without a priori restricting the inquiry to Global South countries. Some Northern legal systems, such as German system, cherish similar visions of law, but have often approached the judicial challenges of a broad transformative understanding of constitutional law in different, more legal ways than for example India did, with its emphasis on collaboration and pragmatic problem solving. As each of these approaches comes with its own particular advantages and disadvantages, the challenge for any country taking this path is to adopt the best of both worlds. That is not an easy task; nor is it one for which we can set out a general roadmap, independently of

minimalism, see Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 2001).

the local context, but it is surely unwise to begin by ruling out important instructive examples by geographic stipulation.