

New York University School of Law



*The Jean Monnet Center for  
International and Regional  
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

## Jean Monnet Working Paper Series



JMWP 24/13

Franz C. Mayer

**Constitutional Comparativism in Action  
The Example of General Principles of EU Law and How  
They Are Made –  
A German Perspective**

Cover: *Upper East Side Family*, Diana Chelaru, USA



*The Jean Monnet Center for  
International and Regional  
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

## THE JEAN MONNET PROGRAM

*J.H.H. Weiler, Director*

Jean Monnet Working Paper 24/13

Franz C. Mayer

**Constitutional Comparativism in Action  
The Example of General Principles of EU Law and How They Are Made –  
A German Perspective**

NYU School of Law • New York, NY 10011  
The Jean Monnet Working Paper Series can be found at  
[www.JeanMonnetProgram.org](http://www.JeanMonnetProgram.org)

All rights reserved.  
No part of this paper may be reproduced in any form  
without permission of the author.

ISSN 2161-0320  
Copy Editor: Danielle Leeds Kim  
© Franz C. Mayer 2013  
New York University School of Law  
New York, NY 10011  
USA

<p>Publications in the Series should be cited as: AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]</p>
---

**CONSTITUTIONAL COMPARATIVISM IN ACTION**  
**THE EXAMPLE OF GENERAL PRINCIPLES OF EU LAW AND HOW THEY ARE MADE –**  
**A GERMAN PERSPECTIVE**

By Franz C. Mayer\*

**Abstract**

This article deals with Constitutional comparativism in action. In contrast to a view in the US-debate that considers Constitutional comparativism to be futile, the Law of the European Union explicitly relies on comparison in the core issue of general principles of EU (constitutional) law. The case law of the ECJ includes constitutional law comparisons that matter. The article deals with questions such as the question whether the comparative efforts lead to better law, whether it is only about subjective views behind a smoke-screen and how the ECJ model of comparative constitutionalism in action affects players and their perspectives in the Member States. The answers help to better understand potentials and limits of comparative constitutionalism.

---

\* Professor, Dr. jur., LL.M. (Yale), Chair of Public Law, European Law, Comparative Law, Law and Politics, University of Bielefeld, Faculty of Law. Contact: franz.mayer@uni-bielefeld.de. I wish to thank the participants of the NYU Workshop on the Changing Landscape of German Public Law in April 2012, Mattias Wendel (Berlin) and Imke Stanik (Bielefeld) for helpful comments on an earlier version of this text. I also want to thank insiders of the workings of the European Court of Justice for offering insights into the reality of comparative law at the ECJ.

## **Introduction – comparativism that matters**

Why should it matter if Ruritania gives answer X to a given constitutional law question whereas Germany gives answer Y to the same question?

In a dissenting opinion, US Supreme Court Justice Antonin Scalia expresses his view of comparative law and its (ir-)relevance for a death penalty case which captures the essence of the traditional argument against constitutional comparison:

The Court [...] purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.<sup>1</sup>

Following this dissenting opinion,<sup>2</sup> law makers suggested to amend the law and to introduce a prohibition of comparisons into federal law. Title 28 of the US Code - On the Judiciary and Judicial procedure - would have read as follows:<sup>3</sup>

### **Sec. 201. Interpretation of the constitution**

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.

---

<sup>1</sup> US Supreme Court, *Roper v. Simmons*, Docket No. 03-633, 543 US (2005), 551 (608). See also p. 628: “What these foreign sources “affirm,” rather than repudiate, is the Justices’ own notion of how the world ought to be, and their dictat that it shall be so henceforth in America. The Court’s parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. “Acknowledgment” of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court’s judgment*— which is surely what it parades as today.”

<sup>2</sup> Scalia’s resistance to comparative law is unrelated to his original intent views expressed elsewhere. The founders of the US constitution were actually people looking abroad (I thank Rob Howse for making that point at the NYU Workshop on the Changing Landscape of German Public Law in April 2012).

<sup>3</sup> First introduced as Constitution Restoration Act of 2004, 108th Congress (2003-2004) HR 3799 IH, for the amended version see Constitution Restoration Act of 2005 109th Congress (2005-2006) S 520 IS.

This proposal never gained a majority in Congress.<sup>4</sup>

Quite in contrast to that debate, the Law of the European Union explicitly relies on comparison. It offers an example of comparative constitutional law that matters. For the European Court of Justice (ECJ), comparative law is not only an academic *Glasperlenspiel* or just an issue of theoretical reflection. The ECJ engages in a comparative effort of analyzing the constitutional traditions of the Member States and international treaties with a practical purpose: finding the law (I.). Constitutional comparativism in action raises a number of questions. Is it really more than a smoke-screen for subjective views (Scalia, *supra*)? Of course, there has been critique in the EU-context as well (II.). The relevance of the phenomenon may be measured by its effect - has the ECJ approach led to a general culture of comparativism in the EU? (III.). There is also a conceptual dimension related to the fact that the highest court in the EU engages in constitutional comparison (IV.).

## **I. The ECJ and comparative constitutional law**

The case law of the ECJ is one of the most visible examples of a systematic comparison of constitutional law with a relevant practical purpose. The ECJ has developed an EU law specific, comparative method to conceptualize general principles of EU law.<sup>5</sup>

With no bill of fundamental rights in the founding treaties of the 1950ies, this approach was mainly about fundamental rights forming an integral part of the general principles of law the observance of which the ECJ ensures, without being the only category of general principles, though.

---

<sup>4</sup> See for the background of this proposal and the Scalia-position *M. Tushnet*, The "Constitution Restoration Act" and Judicial Independence: Some Observations, 56 Case W. Res. L. Rev. 1071-1082 (2006); see also *M. Tushnet*, Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars, 35 U. Balt. L. Rev. 299-312 (2006).

<sup>5</sup> See for an early example an ECCS-case Case 7/56, *Algera*, [1957] ECR 85 (118). See also the leading cases Case 4/73, *Nold*, [1974] ECR 491; Case 44/79, *Hauer*, [1979] ECR 3727. See on the ECJ's approach in general *J. Wolf*, Kohärenz durch Rechtsvergleichung, in: J. Bröhmer et al. (eds.), Festschrift Ress, 2005, p. 893 (897 et seq.). *G. Gutmann/A. Mampel* (eds.), Probleme systemvergleichender Betrachtung, 1986. *A. Riles*, Wigmore's Treasure Box: Comparative Law in the Era of Information, 40 Harv. Int'l. L. J. 221 (1999). *M. Reimann*, Stepping out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda, 46 Am. J. Comp. L. 637 (1998). *J. Gordley*, Comparative Legal Research: Its Function in the Development of Harmonized Law, 43 Am. J. Comp. L. 555 (1995).

The ECJ's wording in this context has basically remained unaltered for more than 30 years. In the *Nold* case (1974) and the *Hauer* case (1979)<sup>6</sup> the ECJ states that

the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the Constitutions of those States.

Note that the Court considers this comparative effort a duty ("is bound").

The Court also draws inspiration

from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories.<sup>7</sup>

This means that the comparison also extends to public international law treaties. Apart from the European Convention on Human Rights (ECHR), which has been one of the most important references,<sup>8</sup> the ECJ has also turned to less known treaties such as the European Social Charter or the ILO Convention No. 111.<sup>9</sup>

With the 1992 Treaty of Maastricht, the Court's approach was codified:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.<sup>10</sup>

---

<sup>6</sup> Case 4/73, *Nold*, [1974] ECR 491; Case 44/79, *Hauer*, [1979] ECR 3727.

<sup>7</sup> See *supra*. See also Case 4/73, *Nold*, [1974] ECR 491 (507); Case 44/79, *Hauer*, [1979] ECR 3727, (3745 et seq.). For a more detailed account see Grabitz/Hilf-Mayer, Nach Art 6 EUV – Grundrechte, para. 304 et seq. See also J. Wolf, Kohärenz durch Rechtsvergleichung, in: J. Bröhmer et al. (eds.), Festschrift Ress, 2005, p. 893.

<sup>8</sup> The first reference occurs in Case 36/75, *Rutili*, [1975] ECR 1219 (1232). See also Case 44/79, *Hauer*, [1979] ECR 3727 (3750).

<sup>9</sup> Case 149/77, *Defrenne III*, [1978] ECR 1365 (1379). See for a reference to the Social Charter the ECJ in Case 173/99, *BECTU*, [2001] ECR I-4881, para. 39.

<sup>10</sup> Emphasis added. This article was initially Art. F of the EU Treaty. It is now Art. 6 para. 3 of the TEU.



Since then, the ECJ was able to use the primary law reference to the common constitutional traditions and the ECHR introduced with Article 6 TEU as a starting point.

The concept the ECJ applies actually stems from a different primary law provision, Art. 340 TFEU (ex Art. 288 EC), which has been in the treaties since the 1950ies. This provision deals with non-contractual liability of the EU and states that any damage shall be made good “in accordance with the general principles common to the laws of the Member States.”

The formula “draws inspiration” that the Court uses – the wording of Art. 6 TEU does not include that part of the ECJ’s concept – indicates that the ECJ does not engage in some kind of mathematical-empirical task. This is well captured by the German term “*wertende Rechtsvergleichung*”, which has been translated as evaluative legal comparison or critical legal comparison.<sup>11</sup>

This means that for the ECJ it is not necessary that a principle or a fundamental right must exist in each and every Member State constitutional order in order to qualify as an EU principle.<sup>12</sup> On the other hand, it is also true that not all fundamental rights of all Member States exist at the EU level. One example particularly obvious from a German perspective is the example of the general freedom of action (*allgemeine Handlungsfreiheit*), a cornerstone of the German fundamental rights architecture as it allows for the protection of activities that do not fall under the special guarantees, such as the freedom of speech, assembly etc. with a fundamental rights reasoning. It is not clear yet whether this general freedom of action is protected in a similar way at the EU level.<sup>13</sup>

---

<sup>11</sup> French: “étude pondérée de droit comparé” or “analyse critique de droit comparé”, “valuing or evaluative comparative law”, J. Kokott/C. Sobotta, The Charter of Fundamental Rights of the European Union after Lisbon. Academy of European Law - Distinguished Lectures of the Academy, EUI Working Paper AEL 2010/06, p. 2, with further references.

<sup>12</sup> Case 44/79, *Hauer*, [1979] ECR 3727 (3750).

<sup>13</sup> See on this *F.C. Mayer*, supra note 7, para. 75.

This mismatch of national and European fundamental rights is justified by the concept of analytical comparison: “drawing inspiration” as opposed to an empirical comparison.<sup>14</sup> As a result, the Court’s comparison is driven by a quest for the best solution, not the - lowest - common denominator of Member State constitutions. There is a substantial element of balancing, assessing and interpreting the respective constitutional traditions, always with a view to perspectives, potentials and possible developments at the European level. National constitutional orders form some kind of raw material for developing European law further. The question that underlies the ECJ’s approach could be rephrased as follows: ‘What elements in national constitutional orders are of use for European law?’

## **II. The ECJ’s analytical comparison – an assessment**

There is one obvious recent objection related to the ECJ’s comparative activities. The Court has conducted comparative activities mainly in the context of fundamental rights protection. For lack of a written bill of rights, the judges had to “invent” these rights. Now, however, the Charter of Fundamental Rights of the Union has become binding law with the Lisbon Treaty of 2009.<sup>15</sup> With this Charter, which to a large extent is based on the case-law of the ECJ and is therefore already a product of comparative constitutional law, isn’t the entire issue of the ECJ having to engage in a comparative effort just legal history?

No. The Charter does not replace the fundamental rights established by means of comparing the Member States’ constitutional orders. It complements them. This is suggested by the wording of Art. 6 TEU as amended by the Treaty of Lisbon. Para. 1 of that article refers to the Charter and makes it binding primary EU law. Para. 3 upholds fundamental rights as they result from the common traditions of the Member States.<sup>16</sup> In any case, the general principles emerging from common constitutional traditions are

---

<sup>14</sup> See on that already AG *Roemer*, Conclusions, Case 29/69, *Stauder*, [1969] ECR 428.

<sup>15</sup> See on that *J. Kokott/C. Sobotta*, The Charter of Fundamental Rights of the European Union after Lisbon. Academy of European Law - Distinguished Lectures of the Academy, EUI Working Paper AEL 2010/06.

<sup>16</sup> See in this context *L. Burgogue-Larsen et al.* (eds.), *Traité établissant une Constitution pour l’Europe*. Partie II, 2005.

not confined to fundamental rights. They also include elements that are not contained in the Charter. So there is still room for comparative activities of the Court, and there is still a justification for reflection on it.

There is no doubt that the ECJ's analytical approach – as opposed to a strictly empirical concept – has tremendous advantages for the Court: It enables it to pick and choose from national constitutional orders without being obliged to explain in detail its “inspiration”.

This comes with a price. Most commentators seem to agree that there are no reliable criteria that allow to predict what the ECJ will consider a principle or right.<sup>17</sup> And there have been cases such as the *Mangold* case<sup>18</sup> where there was open resistance to the ECJ claim that a given fundamental right resulted from common constitutional traditions of the Member States. And indeed, a fundamental right prohibiting age discrimination, detected by the ECJ in *Mangold*, was explicitly laid down in only a few Member State constitutions. The case involves several issues, such as the horizontal effect of directives, in addition to the methodological question of what qualifies a common constitutional tradition and is therefore only of limited use in the present context. Ultimately, even the German Constitutional Court did not openly confirm that the ECJ had it wrong in its assessment of a common constitutional tradition.<sup>19</sup>

One must not get carried away with the lack of precision of a concept that relies on “inspiration”. Overall, the resistance to the Court's findings in the present context has remained limited. Obviously, the more detailed and advanced a Member State's concept of a principle or fundamental right is, the more likely it appears that the ECJ will turn to that Member State's experience. Over time and encouraged by the reference in Art. 6 TEU, the ECJ has increasingly emphasized the importance of the European Convention on Human Rights, which all Member States have signed, as an indication of common constitutional ground.

---

<sup>17</sup> For an attempt to bind the ECJ see *Pescatore*, RIDC 1980, 353 et seq.

<sup>18</sup> Case 144/04, *Mangold*, [2005] ECR 9981.

<sup>19</sup> BVerfGE 126, 286 – *Honeywell*.

What also appears to be obvious is that the ECJ cannot simply engage in a copy-paste effort. Typically, the ECJ will not try to transplant the Member States' doctrinal concepts of a given fundamental right, e.g. the specific proportionality concepts developed for, say, the freedom to choose and pursue an occupation in German constitutional law. Mere transplants don't work. Detailed doctrinal concepts are often too much the result of historical developments and tailored to the specific Member State constitutional order. The ECJ would rather use the Member State traditions to detect a fundamental rights theme.

A more general strand of critique targets the lack of transparency and visibility of the Court's comparative efforts. And it is true that there is not much comparative analysis in the text of ECJ decisions. The ECJ does not cite national courts, only decisions of the European Court of Human Rights. The latter is easy to explain with the specific link between EU fundamental rights protection and the ECHR mentioned earlier.<sup>20</sup> The case law of the Strasbourg court, by the way, is increasingly turning to comparative law, albeit in the context of establishing minimum standards and generally recognized principles.<sup>21</sup> It is too easy, though, to look only at the final text of an ECJ decision. First, there is simply a tradition of keeping ECJ decisions close to the Cartesian style of French law with a Court just saying what the law is, without dissenting opinions, not explaining too much where the insight comes from, as opposed to the Anglo-American approach of narrative, epic court decisions.

Secondly, the comparative substance of the ECJ case law is much richer than the text of a given ECJ decision reveals. Major comparative studies are prepared by the Research division of the ECJ at the request of the judges. These notes form an impressive

---

<sup>20</sup> See *supra*.

<sup>21</sup> For a more detailed account see *L. Wildhaber*, The Role of Comparative Law in the Case-Law of the European Court of Human Rights, in: J. Bröhmer et al. (eds.), *Festschrift Ress*, p. 1101; see in this context also *K. Zemanek*, Was kann die Vergleichung staatlichen öffentlichen Rechts für das Recht der internationalen Organisationen leisten?, *ZaöRV* 1964, p. 453; *G. Ress*, Die Bedeutung der Rechtsvergleichung für das Recht Internationaler Organisationen, *ZaöRV* 1976, p. 227; *M. Bothe*, Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte, *ZaöRV* 1976, p. 280.

comparative law base for the actual decision, remaining invisible in the final ruling.<sup>22</sup> The notes are not published and they are not cited, neither by the Court nor by the Advocates General. Conclusions of the respective Advocate General add to the comparative law base of a decision. And of course statements by the Member States in the case and by the Commission Legal Service also bring comparative law aspects to the attention of the ECJ.

Considering all this, the ECJ appears in a unique position. It benefits from what could be called perfect conditions for comparative work. It is not only the infrastructure of legal translators that ensures that basically any given legal text, no matter what language, can be made accessible for all the judges. There are also unique sociological conditions at the Court: There is a unique know-how when it comes to contextualize legal culture, as there will be at least one representative of a Member State legal order – a judge –, and in most cases, there will be many more working at the *référéndaire* or staff level. There is hardly any other place where so many lawyers - the Commission's Legal Service being much smaller - from the 27 Member States work next to each other on legal issues. This makes it possible to have a comparative law exchange in a very informal way without having to wait for research notes to be finalized.

At the same time, even under nearly optimal conditions for comparative law at the ECJ, certain questions remain unresolved. Even with the resources of the ECJ, it appears that a comprehensive comparison of all 27 Member States' legal order is an exception. This may have to do with the fact that the more Member States are included in a comparison, the longer the preparation takes. For a given case, the inclusion of all Member States will not be mandatory for the Court anyway. The relevant legal orders will become visible in most cases with the respective Member States participating and explaining their legal situation. But what if the depiction of the Member State conflicts with the results of the reasearch done at the Court to prepare the case? Speaking of conflicts: What if common constitutional traditions of the Member States emerge from a

---

<sup>22</sup> Former ECJ-President *Kutscher* underlines that there is a considerable internal comparative research effort, *H. Kutscher*, in: H. Mosler/R. Bernhardt/M. Hilf (eds.), *Grundrechtsschutz in Europa*, 1977, p. 89. See also *Pescatore*, RIDC 1980, 338 (346 et seq.).

comparison which clearly conflict with what the ECJ also takes into account, the ECHR or other international treaties?

Against this background, it is probably true that the Court should do more to share its knowledge. The least would be to make the preparatory work that currently remains inside the Court available to the public. It should be published as a matter of transparency and also as a contribution to comparative law knowledge.

The fact that unresolved issues subsist even under the most favorable conditions for legal comparison indicate that comparative law will always have to deal with imperfections. There will always remain a doubt on whether the relevant legal orders are included in a given comparison and whether the law in question was correctly contextualized. This is not a bug of comparative law, it is a feature. Openly addressing this is probably the best strategy to counter those who associate comparative law with “arbitrariness”.<sup>23</sup>

The reluctance to fully embrace comparative law may sometimes be motivated not only by a general suspicion of “arbitrariness” but also by a suspicion of tactical use of comparative law arguments. And maybe it is true that it is not possible to exclude that legal comparison is used as some kind of rationality shield, a cover-up for preferences that are motivated by other reasons. This is why openness, transparency and justification are crucial when it comes to comparison in order to counter the argument that it is all about pseudo-rationality and hidden agendas, Scalia’s “subjective views”. This includes openly addressing and to some extent accepting random elements in legal comparison.<sup>24</sup>

---

<sup>23</sup> “Willkürlichkeit”, U. Di *Fabio*, *Das Recht offener Staaten*, 1998, p. 11. On comparative law critique see also *D. Kennedy*, *New Approaches to Comparative Law: Comparativism and International Governance*, 2 *Utah L. Rev.* 1997, p. 545; *A. Peters/H. Schwenke*, *Comparative Law Beyond Post-Modernism*, 49 *ICLQ* 2000, p. 800. See also *G. Frankenberg*, *Critical Comparisons: Re-Thinking Comparative Law*, 26 *Harvard Int'l L.J.* 1985, p. 411.

<sup>24</sup> *A. Watson*, *Aspects of Reception of Law*, 44 *AJCL* 1996, p. 335 (339 et seq.) mentions the example of the reception of Scottish law in Botswana, Lesotho and Swaziland because of the coincidence of the University of Edinburgh accepting students from there.

The formula of the ECJ about drawing inspiration from comparison turns out to be quite appropriate, as it captures the (inevitable) incompleteness of comparative law.

### **III. The Member State perspective**

Did the ECJ model of comparative constitutionalism in action have an impact on the Member States? Did it foster a more general comparative culture among domestic courts (1) or the national executive and legislative branches (2) or legal science (3)?

#### **1. National Courts**

According to conventional wisdom, constitutional courts are not the champions of comparativism. The standard argument here is that their task is to interpret the *domestic* constitution.<sup>25</sup>

It is slightly more complicated than that. Even a court that has been considered a particularly unwilling court – compared to other courts in Europe – when it comes to comparative efforts,<sup>26</sup> the German Constitutional Court, engages in an impressive comparative analysis under certain circumstances. When the structure of international law calls for comparison, even the German Constitutional Court has to follow. Thus, the question of whether a principle may be considered a general principle of public international law leads the German Constitutional Court to looking in great detail into various legal orders.<sup>27</sup> In the famous Iranian Embassy-Case for example,<sup>28</sup> the German Court looks at the legal situation and court practice in Belgium, Italy, Switzerland, Austria, France, Greece, Egypt, Jordan, the Netherlands, Sweden, Latin America, England, the US, the Philipines, Japan, Russia, Rumania, Poland, Bulgaria, Czechoslovakia, and Croatia. Examples like this will exist in the case law of most constitutional or supreme courts. For those courts, these examples prove that

---

<sup>25</sup> See *supra* Justice *Scalia*.

<sup>26</sup> *H. Kötz*, *Alte und neue Aufgaben der Rechtsvergleichung*, JZ 2002, p. 257 (258), gives the example of the House of Lords.

<sup>27</sup> The question is typically a question of the reach of Art. 25 of the German constitution, it may be brought to the Court by a procedure laid down in Art. 100 para. 2 of the German Constitution.

<sup>28</sup> BVerfGE 16, 27.

comparing legal orders is possible, and that the comparison can even extend to legal orders that appear difficult to access because of linguistic barriers.

As a general trend it appears to be correct that beyond cases where the norm in question calls for comparison, comparative efforts remain few and far between in the case law of constitutional and supreme courts in the EU. This is even true in the context of European constitutional law. There are occasional references of a comparative nature, though. One of the earliest decisions of national constitutional courts on the relationship between EU law and national law uses references to other courts' cases: The German Constitutional Court's 1974 "Solange I"-decision contains a reference to Italian constitutional law.<sup>29</sup> The 1986 decision "Solange II" refers to the Italian constitutional order, again.<sup>30</sup> But one single reference – in the dissenting opinion, in Solange I – against the background of 12 (in 1986) Member States cannot be considered a serious comparative effort.

The lack of comparative energy is surprising considering the fact that domestic courts in the EU face increasingly similar constitutional challenges. The implementation of the Framework decision on the European Arrest Warrant was brought to constitutional courts in different Member States.<sup>31</sup> The implementation of the Directive on Data retention is another example of the fact that national constitutional courts are confronted with the same kind of constitutional law questions, typically on how to uphold the domestic constitution's guarantees while fulfilling obligations to implement and execute EU law.<sup>32</sup>

---

<sup>29</sup> BVerfGE 37, 271 (299) - *Solange I*.

<sup>30</sup> BVerfGE 73, 339 (376) - *Solange II*.

<sup>31</sup> Poland: Trybunał Konstytucyjny P 1/05, 27.4.2005; Germany 2 BvR 2236/04, 18.7.2005, BVerfGE 113, 273; Cyprus: Supreme Court 294/2005 7.11.2005; see also in the Czech Republic: Ústavní soud 66/04 3.5.2006.

<sup>32</sup> There have been cases in Germany (BVerfGE 125, 260 - *Vorratsdatenspeicherung*), Romania (Romanian Constitutional Court, Decision No. 1258 of 8 October 2009, published in the Romanian Official Monitor No. 789 of 23 November 2009) and the Czech Republic (Czech Constitutional Court, Pl. ÚS 24/10, Decision of 22 March 2011, available at <http://www.concourt.cz/view/pl-24-10>). For a treaty infringement procedure against a Member State unwilling to implement the directive see ECJ Case C-189/09, Commission vs. Austria, Decision of 29 July 2010.



A comprehensive horizontal exchange between courts should be an obvious strategy to deal with this situation. On an informal level, meetings, reciprocal visits and personal contacts between constitutional and supreme courts and their respective judges may increasingly offer opportunities for such an exchange. If an exchange exists, it is not reflected yet in the wording of court decisions, though. It would be a question of transparency and rationality of decisions to clearly spell out inspirations and impulses based on constitutional comparison.

Recent developments in the interaction between the highest courts of the Member States seem to point to an increased interest in using other courts' decisions.<sup>33</sup>

Just take the increased number of English language translations of Member State Supreme or Constitutional Court decision made available by these courts on the Internet: Why would they do that if not to have some impact on other courts?<sup>34</sup>

The caricature version is a 2012 case of the Czech Constitutional Court and its reference to the German Constitutional Court's ultra vires-doctrine.<sup>35</sup> The Czech court distorts the German case law and clearly uses it to make its own implausible – not to say illegal – position more plausible.

An example of a more promising perspective is the line of cases that deals with the concept of national constitutional identity in the context of European integration. This may be due to the specific issue of identity.<sup>36</sup> But here, decisions of the French Constitutional Council, the Spanish Constitutional Tribunal and, to some extent, the

---

<sup>33</sup> I will not go into the details of these cases in the present context.

<sup>34</sup> The German Constitutional Court issued an English translation of the 140 pages Lisbon-decision the same day they published the German version. The initial translation was replaced later by a more accurate version. English translations prevail, but there are also German or French translations.

<sup>35</sup> Czech Constitutional Court, Pl. US 5/12, Decision of 14 February 2012, see also the comment by J. Komarek, *Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution*, *Verfassungsblog*, 22 February 2012, available at <http://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/>.

<sup>36</sup> See on that *F.C. Mayer*, *Rashomon in Karlsruhe. A reflection on Democracy and Identity in the European Union*, 9 *ICON* 2011, 757. See. Also *M. Walter*, *Integrationsgrenze Verfassungsidentität*, *ZaöRV* 2012, 177, with further references.

German Constitutional Court and the ECJ allow to trace a line of conversation between the courts.<sup>37</sup>

But still, it appears fair to say that generally speaking, there has not been a spill over of the ECJ's comparative efforts to member State courts (yet) – neither in substance, nor even in terms of infrastructure and logistical capacities necessary to engage with comparative law.<sup>38</sup>

## **2. National executives and national legislators**

The same is true for the Member State institutional players that play a role in making and applying the law, national governments and legislatures.

As a general rule, comparative efforts are not the hallmark of government action in the EU. Although government agents interact with each other on a day to day basis in Council Working Groups and in similar settings, there is no systematic exchange on how to deal best with the challenge of a supranational legal order in general and specific questions of implementation.<sup>39</sup>

And legislators? There may be occasional counterexamples. But the general assessment is that for them, comparative efforts in the EU context are, again, not particularly high on the agenda.<sup>40</sup> This is surprising, as there are numerous and regular contacts between national parliaments nowadays. The interaction reaches from the more traditional

---

<sup>37</sup> Tribunal Constitucional, Case 6603/2004, Declaration 1/2004; Conseil constitutionnel, Decision 2004/505 DC, *Traité établissant une Constitution pour l'Europe*, Journal officiel No. 273 24 november 2004, 19885. See on this *F. C. Mayer*, *Europarecht als französisches Verfassungsrecht*, EuR 2004, p. 925 and *A. C. Becker*, *Vorrang versus Vorherrschaft*, Anmerkung zum Urteil des spanischen Tribunal Constitucional DTC 1/2004, EuR 2005, p. 353. See also the German Constitutional Court's Lisbon decision, BVerfGE 123, 267 and the ECJ Case 208/09, *Sayn-Wittgenstein*, [2010] ECR 00000.

<sup>38</sup> There may be occasional exceptions such as a clerk specifically responsible for comparative and European developments at the Polish Constitutional Tribunal.

<sup>39</sup> An example for that lack of exchange is the question of how to best organize the Member State government decision-making process related to EU matters. Although Germans know roughly how the French or the British organize themselves, there is no systematic effort to find out about best practices with a view to enhancing the decision-making process. For more detail see *F. C. Mayer*, *Nationale Regierungsstrukturen und europäische Integration*, EuGRZ 2002, p. 111.

<sup>40</sup> That is the general assessment of national parliaments, the question of if and how the EP uses comparative law is a different one, also worth exploring.

forum of COSAC<sup>41</sup> to the day-to-day exchange related to the activities of national parliaments and their representatives in Brussels. Increasingly, there are also joint bilateral sessions of EU affairs committees of Member State parliaments.<sup>42</sup> Nevertheless, a genuine, systematic and consistent comparative effort e.g. on the question of how to implement a specific piece of EU legislation best – an obvious idea, one would think – has not emerged yet.<sup>43</sup>

Looking at constitutional amendment and improving domestic constitutional provisions, horizontal interaction is easier to detect than in everyday legislation. Examples include horizontal exchange and interaction on the shape and form of national constitutional law provisions dealing with European integration. The relevant article of the German constitution seems to have inspired the respective article of the Portuguese constitution; the Swedish constitution received an article modeled after the rationale of a decision of the German Constitutional Court.<sup>44</sup>

### **3. Academia**

When it comes to comparative constitutional law research related to the EU, the academic landscape is a mixed bag.

On the one hand there is a significant quantity of work that has been done. A typical example may be the 1980ies study led by *Jürgen Schwarze* on European administrative law attempting to establish a body of European administrative law based on a comparison of Member State legal orders.<sup>45</sup> This method, which consists of looking at the national legal and constitutional orders in order to detect something new and

---

<sup>41</sup> Conference of EU-Committees.

<sup>42</sup> The Committee on EU Affairs of the German Parliament, for example, conducts joint sessions with other EU Affairs Committees almost regularly.

<sup>43</sup> An example of a largely isolated national discourse is the implementation of the e-commerce directive, which even kept the French Conseil Constitutionnel busy. See Entscheidung Nr. 2004-496 DC vom 10. Juni 2004 über das Gesetz über das Vertrauen in den digitalen Wirtschaftsverkehr, EuR 2004, p. 921; see also *F. C. Mayer*, Europarecht als französisches Verfassungsrecht. Anmerkung zu den Entscheidungen des Verfassungsrates vom 10. Juni 2004 und vom 19. November 2004, EuR 2004, p. 925.

<sup>44</sup> See for this example in more detail *F. C. Mayer*, Kompetenzüberschreitung und Letztentscheidung, 2000, p. 239; see also *M. Wendel*, Permeabilität im europäischen Verfassungsrecht, 2011, p. 104 et seq.

<sup>45</sup> *J. Schwarze*, Europäisches Verwaltungsrecht, 2 vol., 1988; on comparative law see vol. 1, p. 74 et seq.

European, can be applied to all kinds of specific questions.<sup>46</sup> In the 1990ies, studies by *Jörg Gerkrath*, *Constance Grewe* and *Helene Ruiz Fabri* have applied this method to describe the emergence of a European constitutional order.<sup>47</sup> There are numerous comparative studies dealing with major issues of EU constitutional law, such as primacy, for example.<sup>48</sup> Further examples of comparative approaches in the European integration context include studies that put European integration as a whole in a comparative context, with EU-US comparisons prevailing.<sup>49</sup>

*Eberhard Schmidt-Aßmann* was one of the first to emphasize that a comparative approach should not be confined to a mere juxtaposition of national law with a description of ensuing European trends. According to him, comparativism appears as a medium of legal development, not only as an analytical tool, with repercussions of European developments on national legal orders and the horizontal interaction between national legal orders fostered by European law.<sup>50</sup> According to *Schmidt-Aßmann*, the impact of a given legal order depends on the plausibility of its assumptions and the practicability of its legal mechanisms.

Applying this test, German administrative law – *Schmidt-Aßmann* worked in the field of European administrative law - appeared to be over-dogmatic and difficult to explain and to understand abroad.<sup>51</sup> Not only German administrative law, one may add. *Schmidt-Aßmann's* analysis may well extend to German constitutional law as well. This kind of comparative law feedback to a given national legal order – ‘we don’t understand you,

---

<sup>46</sup> See e.g. on the prohibition of a participation in the crime of aggression *F. C. Mayer*, *Angriffskrieg und europäisches Verfassungsrecht. Zu den rechtlichen Bindungen von Außenpolitik in Europa*, 41 AVR 2003, p. 394.

<sup>47</sup> *J. Gerkrath*, *L'émergence d'un droit constitutionnel pour l'Europe: modes de formation et sources d'inspiration de la constitution des Communautés et de l'Union européenne*, 1997; *C. Grewe/H. Ruiz Fabri*, *Droits constitutionnels européens*, 1995.

<sup>48</sup> See for example *A. M. Slaughter/A. Stone Sweet/J.H.H. Weiler* (eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in Its Social Context*, 1998.

<sup>49</sup> See on this especially the multi-volume research project *Integration through Law*, edited by *M. Cappeletti/M. Seccombe/J.H.H. Weiler*, from 1985 onwards, or the resounding contribution of *E. Stein*, *On Divided-power Systems: Adventures in Comparative Law*, LIEI 1983/1, p. 27.

<sup>50</sup> *E. Schmidt-Aßmann*, *Deutsches und Europäisches Verwaltungsrecht – Wechselseitige Einwirkungen*, DVBl. 1993, p. 924 (929). Similar *G. F. Schuppert*, *Staatswissenschaft*, 2003, p. 866.

<sup>51</sup> *E. Schmidt-Aßmann* (supra note 50), p. 924 (929).

and it's your fault' – may be extremely helpful. It has not had a significant effect in Germany so far, though.

Maybe this is a paradigmatic example of how insights stemming from comparative efforts are often dealt with. They encounter persistence of national law – and of national lawyers and legal academics.

But the obstacles to comparative law efforts are not only related to established ways of thinking and arguing. There is also a major, ever increasing problem of resources.

Some issues appear rather easy to solve, when it comes to access to case-law and literature of other Member States. At the end of the day, these problems depend on financial resources available to buy books and access. Today, the Internet also helps in accessing other Member States' legal resources in an unprecedented way.

The more difficult kind of resource problem concerns immaterial aspects. Even a library full of all of the standard textbooks and law revues of all the Member States' constitutional law will be useless if nobody is able to read that material for lack of language skills. And reading is not tantamount to understanding, as comparative law requires the capacity to put norms and court decisions into a cultural context.

It is probably fair to say that there is no academic place inside or outside the EU that matches the resources of the European Court of Justice in Luxemburg. Here are a few examples: Outside the EU, the Harvard Law School International Law Library has probably the most impressive collection of material on EU Member States' constitutional orders, but neither the human resources to work with that material nor an interest matching the resources in doing so. Inside the EU, one could think of the EUI in Florence. Their library is decent, but it is not a library that brings together fully fledged public law material from all 27 current Member States. And thus most of the academic institutions in the EU lack either the material or the human resources necessary to match the resources of the ECJ.

This is why the privileged position of the ECJ, when it comes to comparing law, may even be a problem. It bears the risk of a certain imbalance in the development of EU law. To the extent that academia is unable to match the resources of the ECJ in terms of comparative law, a critical dialogue between legal science and academia is difficult or impossible. In this case, the Court will be the dominating player, for lack of resources elsewhere.

#### **IV. A deeper justification for comparative constitutionalism in the EU: Mutual constitutional stabilization**

The capacity of legal science to engage with comparative constitutional law in a meaningful way appears particularly important as there is a substantial dimension to constitutional comparison in the EU context beyond mere comparison for the sake of comparison. Interpreting the European constitutional order as a system of multilevel constitutionalism<sup>52</sup> is helpful to understand the coupling mechanism triggered by the comparative approach of the ECJ.

In a nutshell: EU law imposes a certain number of constitutional law constraints on the Member States: Art. 7 TEU provides for sanctions against Member States that violate the constitutional principles referred to in Art. 2 TEU. Art. 49 TEU states that observance of these principles is a pre-condition for membership in the EU. Because of the Wachauf/ERT-case law Member States are also bound to observe EU fundamental rights when acting within the scope of European Union law.<sup>53</sup>

This way, the general principles of law that the ECJ generates by comparing the Member State constitutional traditions feed back on the Member States.<sup>54</sup>

---

<sup>52</sup> See for that concept *I. Pernice*, Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and “Multilevel Constitutionalism”, in: E. Riedel (ed.), German Reports. XV. International Congress on Comparative Law, 1998, p. 40 et seq.; see also *I. Pernice*, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2001), p. 163 et seq., *I. Pernice/F.C. Mayer*, De la constitution composée de l’Europe, RTDE 2000, p. 623; *I. Pernice/F.C. Mayer*, La Costituzione integrata dell’Europa in: G. Zagrebelsky (ed.), Diritti e Costituzione nell’Unione Europea, 2003, p. 43.

<sup>53</sup> Case 260/89, *ERT*, [1991] ECR I-2925.

<sup>54</sup> See in this context e.g. *F.C. Mayer*, Angriffskrieg und europäisches Verfassungsrecht. Zu den rechtlichen Bindungen von Außenpolitik in Europa, AVR 41 (2003), p. 394.

It was the German Constitutional Court who in the 1986 Solange II-decision<sup>55</sup> coined the formula of *normative Verklammerung*, normative bracketing/interlocking of guarantees laid down in the Member State constitutions, the ECHR and the general principles of EU law. The emerging common constitutional law<sup>56</sup> consists of overarching constitutional principles. This is not about superficial or coincidental parallels. This is about common ground and culturally deeply enrooted affinities.<sup>57</sup>

This common European constitutional law does have a specifically European substance. It is not simply the common denominator of Western democracies. This is illustrated by the fact that the US stands outside this common European constitutional law because of the constitutionality of the death penalty in the US. Because of the death penalty the US could never become a Member State of the EU as long as Art. 2 and 49 TEU exist.

A substantial result of this approach to comparative constitutionalism is the reciprocal stabilization of the European and the Member State constitutional orders. This also means that there is no unlimited constitutional autonomy of EU Member States anymore.<sup>58</sup>

But this is not the full picture yet: comparison also reveals what is not common ground and thus has the function to highlight differences that have to be upheld and protected, by means of constitutional law.

---

<sup>55</sup> BVerfGE 73, 339 (384 et seq.) – *Solange II*.

<sup>56</sup> P. Häberle, Gemeineuropäisches Verfassungsrecht, EuGRZ 1991, p. 261; *ibid.*, Gemeineuropäisches Verfassungsrecht, in: R. Bieber/P. Widmer (eds.), *L'espace constitutionnel européen*, 1995, p. 361 et seq.; see also M. Heintzen, Gemeineuropäisches Verfassungsrecht in der Europäischen Union, EuR 1997, p. 1.

<sup>57</sup> “den einzelnen Verfassungsstaaten in der Tiefe ihrer Rechtskultur Gemeinsames, Übereinstimmendes, Wahlverwandtes jenseits des Rechtstechnisch-Positiven”, P. Häberle, *supra*.

<sup>58</sup> See on this I. Pernice, Art. 23, in: H. Dreier (eds.), *Grundgesetz. Kommentar*. vol. II, 2<sup>nd</sup> ed. 2006, para. 20 et seq. See also M. Wendel, *Permeabilität im europäischen Verfassungsrecht*, 2011, p. 57 et seq. and 556 et seq., on the pull towards legal unity by comparison.

## V. Conclusion

Comparing constitutions appears to be an obvious approach, representing a simple human problem solving strategy which consists of using prior experience to deal with a given problem. In even more general terms, it stems from human curiosity.

Still, public law and in particular constitutional law has not been the forerunner in comparative law. This is also true for Germany. Most commentators would nevertheless agree that comparing constitutions has gained momentum in recent years, in spite of views such as the one expressed by Justice Scalia mentioned earlier. Public law seems to be less confined to a given territory than in earlier times – not only in Europe. Arguing against public law comparison is also less and less plausible with the mere advantages of comparative efforts in public law speaking for themselves: Comparing law can enhance the effectiveness and the authority of a given legal order as a result of looking elsewhere, it also helps to better understand the nature of law at home and to further improve it. Comparing legal orders results in better law. It is not only about subjective views behind a smoke-screen.

This justification of comparative law is contrasted by a rather sober reality, in Germany and elsewhere. In that reality, comparative constitutional law is not high on the agenda of courts and other legal players.<sup>59</sup> A gap between an insight, that there should be more comparison, and a reality that emphasizes that this task is for the future is not new. Already 19<sup>th</sup> century academics such as *Ihering* considered legal comparison an important task - for the future.<sup>60</sup> Maybe the call for “more comparison” will always be primarily a call on future generations, as it is so much more convenient to leave the present state of affairs unaltered.

There is no doubt that comprehensive comparative work still encounters problems related to resources. This applies to courts and to academia. At least one of the core

---

<sup>59</sup> According to *F. Müller/R. Christensen*, *Juristische Methodik Vol II. Europarecht*, 2003, p. 104, legal comparison has no significant role in the methodological culture of the EU Member States.

<sup>60</sup> See on that *I. Lipowicz*, *Rechtsvergleichende Perspektiven der Verwaltungsrechtswissenschaft*, *Die Verwaltung* 1999 (Beiheft 2), p. 155.



logistical problems, the access to the information any comparison has to start out from, has become much easier with the internet.

Still, comparative law will remain a challenge not only because of the resource issue in general and the language issue in particular. The legal culture contextualization of results generated by comparison is extremely demanding, too.<sup>61</sup> Then, there are the risks of comparative law. *Alan Watson* points to the risk of superficiality, the risk of misunderstanding a foreign legal order, the risk to be too anecdotic and not systematic enough and the risk to detect only patterns familiar to oneself in any legal order.<sup>62</sup>

The comparative approach of the ECJ stands for opportunities and for risks. It is true that the ECJ is in a specific situation: there is not much need to justify the ‘if’ of comparison, in the ECJ context it is much more about the ‘how’ of comparison.

It is true that comparative legal analysis existed and exists before and outside European integration. Still, the context of European integration contributes to a climate that makes comparative perspectives more and more obvious and plausible. This kind of comparative law culture may spill over into areas that are unrelated to EU law. There is some evidence that comparative perspectives are part of the modes of internationalization of domestic law.<sup>63</sup>

There is so much more that could be done easily: On the teaching side, classes on comparative constitutional law are basically still inexistent in German legal education. Making them mandatory would open the perspectives of entire generations of lawyers. In the practice of law, parties could be much bolder in making comparative law arguments, forcing the courts to react to this kind of argument.

---

<sup>61</sup> Cf. *S. Baer*, Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz, *ZaöRV* 2004, p. 735 and p. 739 on “Rechtsvergleichungsschocks”.

<sup>62</sup> *A. Watson*, *Legal Transplants*, 2<sup>nd</sup> ed. 1993, p. 10 et seq.

<sup>63</sup> For more detail on this see *F. C. Mayer*, Die Internationalisierung des Verwaltungsrechts. Modi und Strukturen der Einwirkung auf das nationale Recht in Zeiten der Europäisierung und Globalisierung, 2005.

One small caveat, though: According to some, the comparative work of the ECJ stands for a natural tendency to use comparison to explain or justify harmonization or a pull towards unity.<sup>64</sup> In the long run, such an approach would be self-destructive: If everything looked the same, there was no point in comparing anymore. This is why a critical reflection of the ECJ's comparative work by academia is particularly important. The academic discipline of European constitutional law has a responsibility to insist on developing the material and immaterial resources necessary to cope with comparative challenges. This is probably even the primary task of a future-proof European legal science.

---

<sup>64</sup> See on that *S. Baer* (supra note 61), p. 735 (754).

