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Comparative Reasoning and the Making of a
Common Constitutional Law —
The Europe-Decisions of National Constitutional
Courts in a Transnational Perspective

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**COMPARATIVE REASONING AND THE MAKING OF A COMMON CONSTITUTIONAL LAW—
THE EUROPE-DECISIONS OF NATIONAL CONSTITUTIONAL COURTS
IN A TRANSNATIONAL PERSPECTIVE**

By Mattias Wendel*

Abstract

This contribution argues that recent Europe-decisions of national constitutional courts demonstrate a new quality of comparative legal reasoning. Whereas classic EU related case-law reflects comparative law dimensions at best by sporadic references to foreign case law, some constitutional courts in Europe have now taken a path towards a more elaborate use of comparative reasoning, including in-depth and sometimes even critical evaluations of foreign jurisprudence in the ratio decidendi. Beyond the traditional motives for courts to rely on comparative law, one particular reason for this intensification seems to be the aim to take an active role in an EU-wide process of shaping a common constitutional law. Seen in a transnational perspective, comparative reasoning by judges can be more than a mere reference to foreign law as such: In fact, the judicial evaluation of foreign Europe-decisions can simultaneously be an evaluation of propositions on common constitutional standards. Comparative reasoning by courts then becomes an active contribution to a transnational dialogue of judges on the making of a common constitutional law in Europe.

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1. Introduction

While it is hardly revolutionary in Europe that judges rely on comparative law, recent decisions demonstrate a new quality of comparative legal reasoning. A jurisprudence particularly characterized by this development is the EU related case law of national constitutional and highest courts. These “Europe-decisions” at national level are of major importance, given that they address the core issues of European constitutionalism, namely the democratic legitimation of EU public authority, the effective protection of fundamental rights in a multi-levelled setting, the preservation of national constitutional identity, the (modern) role of sovereignty and, last but not least, the relationship between supranational and national law.

Certainly, in this area of European constitutionalism the mutual influence of national jurisprudence has already been remarkable in the past. Above all, the classic Europe-decisions of the German Federal Constitutional Court (though being far from uncontroversial) have had a significant impact on the jurisprudence of other national courts. Several constitutional or highest courts of other EU Member States have subsequently taken up key concepts developed by their German equivalent. Some of these concepts have even made their way into the text of constitutions of several EU Member States. In turn, the German Federal Constitutional Court itself referred to decisions of its European counterparts occasionally, providing thus a classic example of judicial dialogue and reciprocal interaction in a polycentric legal world.

For the longest time, however, express recourse to comparative law remained limited to a sporadic use of cross-references to other courts’ decisions in order to support the own line of argument. Here is where new life has been breathed into comparative law. Recent Europe-decisions demonstrate a development towards a more elaborate use of comparative law arguments, including relatively comprehensive analyses of foreign decisions and sometimes even critical evaluations of concepts developed by foreign judicial authorities.

The most striking examples in this respect are the decisions regarding the ratification of the Treaty of Lisbon.¹ Delivered by several constitutional and highest courts, these

¹ In chronological order: French Constitutional Council, case 2007-560 DC, Treaty of Lisbon (December 20, 2007); Austrian Constitutional Court, case SV 2/08-3 et al., Treaty of Lisbon I (Sept. 30, 2008);

leading cases add up to one of the most important transnational lines of jurisprudence in the history of European constitutionalism, not only in terms of the number of decisions but particularly in terms of conceptual ambition and comparative methodology. Subsequent Europe-decisions also appear to confirm the trend towards a more intense use of comparative reasoning.

In a first step, we will analyze *how* the courts use comparative law in their Europe-decisions (2). Secondly, we will address the question of *why* courts explicitly make comparative legal reasoning part of their argument. We will argue that by substantively evaluating foreign decisions and making them part of their own argument, the courts simultaneously refer to conceptual propositions of common constitutional standards, thus initiating a transnational dialogue on a common constitutional law of Europe, which may be guided either by a spirit of cooperation or by a spirit of competition (3). In a final step, we will take a brief look at the broader context of this dialogue, concerning the evolution of a common constitutional law of Europe and draw conclusions as to the potential future role of comparative reasoning by constitutional courts (4).

This contribution deals with comparative law in a double sense. It is, on the one hand, a piece on comparative public law, particularly on the question of how the explicit use of comparative reasoning by courts can contribute to the transnational making of a common constitutional law in Europe and thus also to the changing landscape of German constitutionalism. But it is, on the other hand, also a contribution which itself relies on the comparative method as it analyzes the comparative reasoning of constitutional courts in a comparative way.

Czech Constitutional Court, case Pl ÚS 19/08, Treaty of Lisbon I (Nov. 26, 2008); Latvian Constitutional Court, case 2008-35-01, Treaty of Lisbon (Apr. 7, 2009); German Federal Constitutional Court, Case 2 BvE 2/08 et al. Treaty of Lisbon, BVerfGE 123, 267 *et seq.* (June 30, 2009); Czech Constitutional Court, case Pl ÚS 29/09, Treaty of Lisbon II (Nov. 3, 2009); Hungarian Constitutional Court, case 143/2010, Treaty of Lisbon (July 12, 2010); Austrian Constitutional Court, case SV 1/10-9, Treaty of Lisbon II (June 12, 2010); Polish Constitutional Tribunal, case **K 32/09, Treaty of Lisbon (Nov. 24, 2010); Danish Supreme Court, Treaty of Lisbon** (Jan. 14, 2011). **See also the opinions of the** Dutch State Council, case Wo2.07.0254/II/E, Lisbon-Mandate (Sept. 12, 2007) and the Danish Ministry of Justice (Dec. 4, 2007) as well as the report by the British House of Lords (Mar. 13, 2008).

By the term “comparative reasoning” we mean the *explicit* use of comparative law, i.e. the recourse to legally non-binding foreign (case) law,² by a judicial body in the decision’s *ratio decidendi*.³ It is true that the open use of comparative arguments may only be the tip of the iceberg, while a considerable part of comparative activity and the ensuing “migration of constitutional ideas”⁴ are performed beneath the surface. To rely on comparative methods but not to display this fact in the decisions’ grounds is a phenomenon which can be observed even in areas where comparative methods play a key role, as is particularly the case with the interpretation of EU law by the Court of Justice (CJEU).⁵ However, the particular quality of comparative reasoning in the above sense is not the mere fact that a court relies on comparative law, but that it deliberately makes comparative law part of its argument. While comparative reasoning in this sense has been rather rare in the EU related⁶ jurisprudence of national constitutional courts during the first decades of European integration, the number of decisions containing an open recourse to foreign national law has significantly augmented in recent years.

2. Types of comparative reasoning in EU-related decisions

Several types of comparative reasoning can be distinguished in the Europe-decisions of national constitutional courts.⁷

² Not covered by the notion of “comparative reasoning” in the above sense is the obligation to deal with foreign national (case) law which might be induced by domestic law (e.g. private international law) or by EU law (e.g. under the principle of mutual recognition).

³ For a broader use of the term see MARKKU KIIKERI, *COMPARATIVE LEGAL REASONING AND EUROPEAN LAW* 35 *et seq.* (2001).

⁴ Sujit Choudhry, *Migration as a new metaphor in comparative constitutional law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 1 *et seq.* (Sujit Choudhry ed., 2006).

⁵ Although comparative law is generally considered as being essential for the legal practice of the CJEU (see also below, note 90), the comparative dimension is scarcely displayed in the judgments’ grounds. Also the comparative research notes of the Court’s internal Research and Documentation Directorate are not published.

⁶ For a study evaluating the jurisprudence of selected European supreme jurisdictions in a broader sense, apparently covering more than the EU related case-law, see now MICHAL BOBEK, *COMPARATIVE REASONING IN EUROPEAN SUPREME COURTS*, *forthcoming*. For other fields in which comparative constitutional law plays or has played an important role in Europe see already Karl-Peter Sommermann, *Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa* [The Significance of Comparative Law for the Development of Constitutional and Administrative Law in Europe], 52 *DIE ÖFFENTLICHE VERWALTUNG (DÖV)* 1017, 1024 *et seq.* (1999).

⁷ For a general classification of “comparative constitutional interpretation” see Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *Ind. L. J.* 819, 833 *et seq.* (1999). For types of “comparative law influence” see Jan

2.1. Sporadic and supportive references

Seen from an empirical perspective, the first category of comparative reasoning is the oldest and (still) most common way of displaying comparative law in EU related decisions. Strictly speaking, it is not a mode of legal reasoning in the narrow sense of the word, but in fact a mere technique of quotation, serving the purpose of supporting and supplementing the domestic court's argument.

Usually such cross-references begin with a short introductory remark like “an analogous approach has been taken by...” or “similarly...”, highlighting the conceptual parallels between the domestic and the foreign decision. While this approach indicates at least that there is (or ought to be) some kind of similarity, it neither describes or contextualises nor evaluates the decision referred to in more detail. In other words, the classic comparative reference to a foreign adjudication seems to be limited to the statement that there is an external authority following a similar approach.

This type of comparative “reasoning” dominates the EU related decisions of the German Federal Constitutional Court.⁸ The Court has made use of short, supportive references from the early days of its *Solange* jurisprudence⁹ until recent times, including its Lisbon judgment and its decision of September 12, 2012 on the European Stability Mechanism (ESM) and the Fiscal Treaty.¹⁰

M. Smits, *Comparative Law and its influence on national legal systems*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 513, 525 *et seq.* (Mathias Reimann & Reinhard Zimmermann eds. 2008).

⁸ Similarly Heiko Sauer, *Verfassungsvergleichung durch das Bundesverfassungsgericht [Comparative Constitutional Reasoning in the Practice of the Federal Constitutional Court]*, JOURNAL FÜR RECHTSPOLITIK 194, 199 (2010). A more elaborate comparative reasoning can be observed in case 2 BvM 1/62, *Iranian Embassy*, BVerfGE 16, 27, 36 *et seq.* (Apr. 30, 1963). However, in this context, comparative efforts serve the particular purpose of proving the existence of a general rule of international law by state practice.

⁹ German Federal Constitutional Court, case 2 BvR 197/83, *Solange II*, BVerfGE 73, 339, 375 *et seq.* (Oct. 22, 1986) with reference to the Italian constitutional jurisprudence (as analyzed by legal scholarship). See also the dissenting opinion of judges Rupp, Hirsch und Wand in case BvL 52/7,1 *Solange I*, BVerfGE 37, 271, 299 (May 29, 1974) with reference to the Italian Constitutional Court, case 183/73, Frontini (Dec. 18, 1973).

¹⁰ German Federal Constitutional Court, case 2 BvR 1390/12, ESM and Fiscal Treaties, temporary injunction (Sept. 12, 2012), paras. 311 and 315 (not translated yet) with reference to French Constitutional Council, case 2012-653 DC, Fiscal Treaty (Aug. 9, 2012) and Lisbon, *supra* note 1, at paras. 312 and 338 with reference to the prior Lisbon decisions in France and the Czech Republic. See also case 1 BvF 1/05, *Greenhouse Gas I*, BVerfGE 118, 79, 96 (Mar. 13, 2007) with reference to French State Council, case 287110 Ass., *Arcelor* (Febr. 8, 2007). In case 2 BvR 2134 *et al.*, Treaty of Maastricht, BVerfGE 89, 155 *et seq.* (Oct. 12, 1993,) the German Federal Constitutional Court refers to the Europe-Article of the French constitution (Article 88-1). However, it does not refer to the Maastricht decisions which had been rendered previously in France, Spain and the UK, French Constitutional Council, case

The comparative cross-references in these decisions are not only sporadic in the sense that they are rare in number, but above all because they relate to singular and specific aspects. For instance, in its Lisbon judgment the German Federal Constitutional Court refers to the French *Conseil constitutionnel* (Constitutional Council) which, like its German counterpart, ruled that the ratification of a simplified treaty revision under Article 48 (6) TEU requires parliamentary involvement.¹¹ However, unlike its German counterpart, the French *Conseil* did not demand for a prior assent of the national parliament for the application of other treaty provisions, particularly the general passerelle clause, Article 48 (7) TEU, or the flexibility clause, Article 352 TFEU. This significant difference between the two judicial bodies as regards the necessity of prior parliamentary assent is not at all reflected in the Federal Constitutional Court's sporadic comparative reasoning. Punctual similarities are thus highlighted without being contextualized or contrasted to the apparent differences. Even the two references to the French Conseil in the German decision on the European Stability Mechanism (ESM) and the Fiscal Treaty do not go beyond punctual indications of similarity, although both courts seem to argue congruently to a large extent regarding the evaluation of the Fiscal Treaty.

In addition, several of the Federal Constitutional Court's leading Europe-decisions do not contain any (open) reference to foreign judgments at all, although they have been preceded by decisions on the same issue in other countries. The most striking examples of such an absence of comparative reasoning in recent times are the Federal Constitutional Court's decision on the European Arrest Warrant¹² and on the domestic

No 92-308 DC, Maastricht I (Apr. 9, 1992); case 92-312 DC, Maastricht II (Sept. 2, 1992) and case 92-313 DC, Maastricht III (Sept. 23, 1993); Spanish Constitutional Tribunal, case 108/1992, Maastricht (July 1, 1992) and High Court, Regina v. Secretary of State, ex parte Lord Rees-Mogg [1993] EWHC Admin 4 (July 30, 1993).

¹¹ French Constitutional Council, Lisbon, *supra* note 1, at para. 26.

¹² German Federal Constitutional Court, case 2 BvR 2236/04, European Arrest Warrant, BVerfGE 113, 273 *et seq.* (July 18, 2005). Previously, a decision had been delivered by the Polish Constitutional Tribunal, case P 1/05 European Arrest Warrant (Apr. 27, 2005). Afterwards, decisions have been rendered by the Cypriot Supreme Court, case No 294/2005, European Arrest Warrant (Nov. 7, 2005) and the Czech Constitutional Court, case ÚS. 66/04, European Arrest Warrant (May 3, 2006). For a comparative analysis see Jan Komárek, *European constitutionalism and the European Arrest Warrant—in Search of the Limits of “Contrapunctual Principles”*, 44 C.M.L.Rev. 9, 16 *et seq.* (2007).

implementation of the Data Retention Directive.¹³ These cases would have given the court a good opportunity to refer to other constitutional or highest courts facing similar proceedings.

2.2. Elaborate and supportive analysis

Beyond the classic mode of sporadic cross-references, there is a trend towards a more elaborate use of comparative law by the judiciary. Unlike the first category, this type of comparative reasoning entails a descriptive and sometimes even an analytical element. The judgments of other courts do not only serve as a simple point of reference, but are described and analyzed in more detail.

An illustrative example of the gradual evolution in this direction can be found in the jurisprudence of the Polish Constitutional Tribunal. In a first step of its jurisprudence, the decision on the Accession Treaty delivered in 2005, the Court referred to the German and Danish Maastricht decisions, identifying a general consensus as regards the acknowledgment of constitutional limits to the conferral of competencies to the EU.¹⁴ It did so very briefly and without exploring the other courts' concepts in detail. In a second step, the Polish Constitutional Tribunal changed over to a much more extensive form of comparative evaluation. In its decision on the Lisbon Treaty of 2010 the Tribunal analyzed all foreign decisions on the Lisbon Treaty that had been rendered until that date, namely the decisions in France, Austria, the Czech Republic, Latvia, Germany and Hungary. The Polish Constitutional Tribunal conducted its analysis in a remarkably comprehensive manner. Roughly one eighth of the judgment's substantial grounds¹⁵ are dedicated exclusively to comparative considerations.¹⁶ Despite several substantial

¹³ German Federal Constitutional Court, case 1 BvR 256/08 et al., Data Retention, BVerfGE 125, 260 (Mar. 2, 2010). Previously, decisions had been delivered by the Bulgarian Supreme Administrative Court, case No 13627, Data Retention (December 11, 2008) and the Romanian Constitutional Court, case No. 1258, Data Retention, (Oct. 8, 2009). Afterwards, decisions have been rendered by the Cypriot Supreme Court, case 65/2009 et al., Data Retention, (Febr. 1, 2011) and the Czech Constitutional Court, case ÚS 24/10, Data Retention (March 22, 2011) with references to all other decisions at para. 52.

¹⁴ Polish Constitutional Tribunal, case K 18/04, Accession Treaty (May 11, 2005), at para. III.4.5.

¹⁵ 5 pages (part III.3. of the judgment) out of 40 (part III of the judgment).

¹⁶ Polish Constitutional Tribunal, Lisbon, supra note 1, at para. III.3.

discrepancies between the Lisbon decisions,¹⁷ the Polish Constitutional Tribunal interestingly focuses on their similarities with respect to the protection of sovereignty and constitutional identity, thus supporting its own line of argument as to the protection of certain constitutional principles. Similarly, in its judgment of November 16, 2011, the Court undertook a quite elaborate comparative exercise, drawing largely on the German Federal Constitutional Court's approach of judicial self-limitation developed in the so-called *Solange* ("as long as") jurisprudence as well as in the Honeywell decision of 2010.¹⁸ Here, the Tribunal again underpinned its own line of argument by relying on an external voice.

The Polish Tribunal is not the only constitutional court switching to more elaborate forms of comparative reasoning. Further examples can be found in the recent jurisprudence of the French *Conseil d'Etat* (State Council),¹⁹ the Czech Constitutional Court²⁰ and the Hungarian Constitutional Court.²¹

It should be underlined that the differences between the first and second category are more gradual than principled in nature, an observation illustrated i.a. by the decision of the Spanish Constitutional Tribunal on the Constitutional Treaty. Its comparative argument – again relating to national constitutional limits to European integration – goes beyond a simple cross-quotation, but stays behind the analysis conducted by the other courts just mentioned.²²

2.3. Dissenting comparative reasoning

The youngest—and still rarest—type of comparative reasoning goes beyond the purely descriptive dimension and involves a critical review of other EU related decisions. The most explicit example in this respect is the second Lisbon judgment of the Czech

¹⁷ Mattias Wendel, *Lisbon before the Courts: Comparative Perspectives*, 7 EUR. CONST. L. REV. 96, 123 *et seq.* (2011).

¹⁸ Polish Constitutional Tribunal, case SK 45/09, Enforcement of foreign judgments (Nov. 16, 2011), at para. III.2.

¹⁹ Conclusions of the *commissaire du gouvernement* (now *rapporteur public*) at the French State Council Mattias Guyomar in case 287110 Ass., Arcelor, REVUE TRIMESTRIELLE DU DROIT EUROPÉEN (RTDE) 378, 385 *et seq.* (2007).

²⁰ Czech Constitutional Court, case Pl ÚS 50/04, Sugar Quotas II (Mar. 8, 2006), para. VI.A; case Lisbon, *supra* note 1, at paras. 116 *et seq.*; case ÚS 5/12, Slovak Pensions—Landtová (Jan. 31, 2012).

²¹ Hungarian Constitutional Court, Lisbon, *supra* note 1, at para. III.1.

²² Spanish Constitutional Tribunal, case 1/2004, Constitutional Treaty (Dec. 13 2004), para II.3.

Constitutional Court.²³ Here, the Czech constitutional judges clearly signalled that judicial dialogue does not necessarily (if at all) lead to positive reception. The Court examined the approach taken by its German counterpart and expressly objected to two of the latter's conclusions.

The first objection relates to the judicial view of democratic legitimization of EU public authority. The German Federal Constitutional Court takes the distinct view that the necessary degree of genuine democratic legitimization of EU public authority can, today, only be derived from the national *Staatsvolk* (state people).²⁴ The democratic mechanisms at EU level, so the argument goes, have a complementary character at best, but not a constitutive one.²⁵ The Federal Constitutional Court particularly considers the European Parliament to be structurally incapable of providing a sufficient degree of democratic legitimization, given its degressively proportional composition.²⁶ In contrast, the Czech Constitutional Court underlines the multi-levelled structure of democracy in the EU as well as the ability of the European Parliament to provide for a direct, albeit not exclusive link of democratic legitimization. The Czech Court takes the view that Article 10 (1) TEU, according to which the functioning of the Union shall be founded on representative democracy, should not be understood in a way suggesting that representative democracy has to be fulfilled exclusively by the European Parliament in the sense of a representation of the European “people”. Rather, and in open contrast to what the German Federal Constitutional Court stated in its Lisbon judgment, Article 10 (1) should be understood as being “directed at processes both [at] the European and [at] the domestic level, not only at the European Parliament, as stated by the German Constitutional Court in point 280 of its decision” (sic).²⁷ The Czech Constitutional Court also rejects the conceptual degradation the German Federal Constitutional Court

²³ In its first Lisbon decision, the court had limited its scrutiny to those provisions of the Lisbon Treaty expressly contested by the petitioner and thus left the door open for another petition, see the case note by Petr Bříza, 5 EuConst 143, 147 *et seq.* (2009).

²⁴ German Federal Constitutional Court, Lisbon, *supra* note 1, at paras. 231 *et seq.*, 246 *et seq.* and 275 *et seq.* As a major consequence, the German Federal Constitutional Court ties the application of certain norms of EU law, which it considers as enabling a dynamic evolution of EU law, to the prior and constitutive assent of the German parliament, *ibid.*, at paras. 411 ff.

²⁵ *ibid.*, at paras. 278–297.

²⁶ *ibid.*, at paras. 284–289.

²⁷ Czech Constitutional Court, Lisbon II, *supra* note 1, at para. 137; with reference (para. 138) to the conclusions of AG Poiares Maduro in case C-411/06, *Commission v. Parliament and Council*, [2009] ECR I-7585.

undertook vis-à-vis the European Parliament because of its digressively proportional composition. According to the Czech judges, there is no conflict of Article 14 (2) TEU, which concerns the number of members of the European Parliament, with the principle of equality. As the democratic legitimization of decisions adopted at EU level is “derived from a combination of structures existing both [at] the domestic and [at] the European level” and not exclusively from the European Parliament, one could “not insist on a requirement of absolute equality among voters in the individual Member States.”²⁸

The second point of dissent concerns the interpretation of constitutional stipulations which impose limits on the constitutional legislator. In Germany the so-called eternity clause, Article 79 (3), protects the core principles of the Basic Law in their essential content against a possible revision by the constitutional legislator.²⁹ According to the Federal Constitutional Court, the eternity clause also establishes absolute limits to the conferral of competencies to the EU.³⁰ In a remarkably detailed, albeit apodictic manner,³¹ the German Federal Constitutional Court designates five key areas within which the future conferral of competencies to the EU would bear a high risk of violating the material core of the principle of democracy.³² While no other court in Europe followed suit in spelling out an eternity clause in such a detailed, catalogue-style way,³³ the Czech Constitutional Court in its second Lisbon judgment even openly objects to the demand of establishing an abstract catalogue of non-transferrable rights deduced from

²⁸ *ibid.*, at para. 140.

²⁹ Article 79 (3) of the German Basic Law, according to which amendments affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Article 1 (human dignity—essence of human rights—legally binding force of basic rights) and Article 20 (constitutional core principles) are inadmissible. This clause was drafted primarily in order to prevent a slide back into dictatorship.

³⁰ According to the Court (Lisbon, *supra* note 1, at paras. 179, 232 and 263) these limits could, however, be overcome by superseding the German Basic Law, i.e. by creating a new constitution as foreseen in Article 146. However, it is more than doubtful that Article 146 can be construed as the normative basis for overcoming the limits protected by Article 79 (3), see Tobias Herbst, *Legale Abschaffung des Grundgesetzes nach Art. 146 GG?* [Legal Abrogation of the Basic Law under Article 146?], ZEITSCHRIFT FÜR RECHTSPOLITIK 33 *et seq.* (2012).

³¹ Vividly criticized, see Daniel Halberstam & Christoph Möllers, *The German Constitutional Court says “Ja zu Deutschland”*, 10 GERMAN L. J. 1241, 1249 *et seq.* (2009); Daniel Thym, *In the Name of Sovereign Statehood*, 46 COMMON MARKET L. REV. 1795, 1801 (2009); Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht’s Epigones at Sea*, 10 GERMAN L. J. 1201, 1208 *et seq.* (2009).

³² German Federal Constitutional Court, Lisbon, *supra* note 1, at para. 252.

³³ For more details concerning the interpretation of eternity clauses by national constitutional courts in Europe see MATTIAS WENDEL, PERMEABILITÄT IM EUROPÄISCHEN VERFASSUNGSRECHT [Permeability in European Constitutional Law] 331 *et seq.* (2011).

the Czech eternity clause.³⁴ The petitioners had asked the Constitutional Court to set “substantive limits to the transfer of powers”, a demand which was, in the words of the Court, “evidently inspired by the decision of the German Constitutional Court”.³⁵ However, the Court replies that it does “not consider it possible, in view of the position that it [the Court] holds in the constitutional system of the Czech Republic, to create such a catalogue of non-transferrable powers and authoritatively determine ‘substantive limits to the transfer of powers’”.³⁶ It reiterates what it has stated (with reference to the Polish Constitutional Tribunal!) in its first Lisbon decision, saying that such limits “should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion.”³⁷ Following this general line, the Court also does not consider itself authorized to concretize in advance the precise content of the eternity clause. According to the Court, this “does not involve arbitrariness, but, on the contrary, restraint and judicial minimalism, which is perceived as a means of limiting the judicial power in favour of political processes” (sic).³⁸ In essence, the Czech Constitutional Court raises the question of the separation of powers, i.e. of “institutional choice” between the judiciary and the (constitutional) legislator.³⁹ The answer given by the Court is clearly in favor of the political process.

The Polish Constitutional Tribunal likewise does not follow its German counterpart when it comes to the question of the separation of powers. Also in the Polish case, the applicant had voiced an expectation that the Constitutional Tribunal should follow its German counterpart. Unlike in the Czech case, this demand did not concern the definition of constitutional limits, but the specification of the responsibility of the national parliament and “the tasks of the legislator related to the ratification of the Treaty of Lisbon.” The Tribunal emphasized an alleged difference between the Polish

³⁴ According to Article 9 (2) of the Czech constitution, the “substantive requisites of the democratic, law-abiding State may not be amended”. According to Article 1 (1), the “Czech Republic is a sovereign, unitary and democratic, law-abiding State, based on respect for the rights and freedoms of man and citizen”.

³⁵ Czech Constitutional Court, Lisbon II, *supra* note 1, at paras. 110.

³⁶ *ibid.*, at para. 111.

³⁷ Czech Constitutional Court, Lisbon I, *supra* note 1, at para. 109 and Lisbon II, *supra* note 1, at para. 111.

³⁸ *ibid.*, at para. 113.

³⁹ See in particular Miguel Poiares Maduro, *Contrapunctual law: Europe’s Constitutional Pluralism in Action*, in SOVEREIGNTY IN TRANSITION 501, 530 (Neil Walker ed., 2003) and Komárek, *supra* note 12, at 38 *et seq.* within the context of the European Arrest Warrant cases.

and the German constitution in this respect and held that it was “the task of the Polish constitution-maker and legislator to resolve the problem of democratic legitimation of the measures provided for in the Treaty, applied by the competent bodies of the Union.”⁴⁰

Certainly, the objection to certain concepts was not an overall one. Both constitutional courts, the Czech as well as the Polish, also adopted some of the Federal Constitutional Court’s findings, particularly concerning judicial reservations.⁴¹ However, the open objection to arguments defended by another constitutional court in Europe without doubt constitutes a new level of intensity of comparative reasoning.

3. Motives

Having explored how constitutional courts make comparative reasoning part of their argument in the Europe-decisions, the question arises as to why they are doing so.

3.1. Customary motives: from *fantaisie impromptu* to persuasive authority

There are several customary motives why constitutional courts may find it appropriate or even necessary to rely on comparative law. Unlike in the US, where the Supreme Court is deeply divided on the question of whether foreign law may serve as a point of reference in domestic judgments at all,⁴² national constitutional courts in Europe do not openly question or challenge the judicial use of comparative law. In German scholarship it now⁴³ seems widely accepted that comparative law can be a legitimate guide for courts in interpretation, be it as a special form of teleological interpretation⁴⁴ or as a genuine

⁴⁰ Polish Constitutional Tribunal, Lisbon, *supra* note 1, at III.2.6.

⁴¹ Czech Constitutional Court, Lisbon II, *supra* note 1, at para. 150 (insofar as it relates to para. 120 of Lisbon I) and Polish Constitutional Tribunal, Lisbon, *supra* note 1, at III.3.

(1) ⁴² See particularly *Printz v. US*, 521 US 898 (1997) 2377 and *Roper v. Simmons*, 543 US 551 (2005) 1200, with the dissenting opinion of Justice Scalia at 1226. On the debate between Justice Breyer and Scalia see Norman Dorsen, *The relevance of foreign legal materials in U.S. constitutional cases*, 3 INT’L. J. CONST. L. (I·CON) 519 *et seq.* (2005).

⁴³ But see Hans Nawiasky, *Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung* [Equality Before the Law in the sense of Article 109 of the (Weimar) Constitution of the German Reich], 3 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDStRL) 25, 26 (1927).

⁴⁴ Christian Starck, *Rechtsvergleichung im öffentlichen Recht* [Comparative Legal Reasoning in Public Law], JURISTENZEITUNG 1021, 1024 (1997).

method of interpretation.⁴⁵ The debate is thus focused not (anymore) on the question if the courts may rely comparative law at all, but to what extent they may do so. Hence, the discussion shifts back to the more general question of where the limits of judicial “interpretation” lie, particularly in relation to the legislator.⁴⁶

In exceptional cases, courts can be explicitly authorized by the constitution to refer to foreign (national) law when interpreting constitutional rights or principles.⁴⁷ In the constitutional law of EU Member states, however, such an authorization does not exist as far as foreign national law is concerned.⁴⁸ But even if there was such an explicit authorisation, it would neither compel the courts to rely on comparative law, nor explain why the use of comparative law arguments could be an appropriate approach.

aa) *Fantaisie impromptu* and hermeneutics

Searching for motives is not an easy task, given that European courts rather scarcely express themselves on the normative (ir)relevance of comparative law. One of the rare examples is the first Lisbon decision of the Czech Constitutional Court. According to the Court, it uses foreign case law “as inspiration”, considering the German *Solange II* and Maastricht decisions as being “fundamental” in this respect.⁴⁹

⁴⁵ Peter Häberle *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat* [Validity and Interpretation of Fundamental Rights in the Constitutional State], JURISTENZEITUNG 913, 916 *et seq.* (1989). Similarly Axel Tschentscher, *Dialektische Rechtsvergleichung* [Dialectic Comparative Law], JURISTENZEITUNG 807, 812 *et seq.* (2007). More differentiated Karl-Peter Sommermann, *Funktionen und Methoden der Grundrechtsvergleichung* [Functions and Methods of Comparative Fundamental Rights Law], in HANDBUCH DER GRUNDRECHTE IN DEUTSCHLAND UND EUROPA, VOL. I (Detlef Merten & Hans-Jürgen Papier eds., 2004) 631, 652.

⁴⁶ Christoph Schönberger, *Verfassungsvergleich heute: der schwierige Abschied vom ptolemäischen Weltbild* [Comparative Constitutionalism Today: The Difficult Shift Away from the Ptolemaic Model], VERFASSUNG UND RECHT IN ÜBERSEE (VRÜ) 6, 20 (2010). Characteristic in this respect are also the contributions in issue 4 of the JOURNAL FÜR RECHTSPOLITIK (2010), particularly by Anna-Bettina Kaiser, at 205 *et seq.* and Konrad Lachmayer, at 168.

⁴⁷ The classic example is Section 39 (1) lit. c) of the South African Constitution: “When interpreting the Bill of Rights, a court, tribunal or forum (...) may consider foreign law.” This encompasses national as well as international law.

⁴⁸ Article 10 (2) of the Spanish, Article 16 (2) of the Portuguese and Article 20 of the Romanian constitution relate to international, not to foreign national law. The same is true for Article 1 (2) of the German Basic Law as interpreted by the jurisprudence, see already Karl-Peter Sommermann, *Völkerrechtlich garantierte Menschenrechte als Maßstab der Verfassungskonkretisierung* [Human Rights guaranteed by Public International Law as Standards for the Concretization of Constitutional Law], 114 ARCHIV DES ÖFFENTLICHEN RECHTS (AÖR) 391 *et seq.* (1989).

⁴⁹ Czech Constitutional Court, Lisbon I, *supra* note 1, at para. 116.

Since “inspiration” is not quite a methodological category, one might associate this *fantaisie impromptu* with an act of interpretation of national law by which specific regard is given to the dogmatic framework already developed in another state. Relying on the experiences made in a country which faced similar problems before, might rationalize the search for an adequate solution. This is particularly the case for states in transition.⁵⁰ If it is true that national public law in general is undergoing a period of fundamental transition and conceptual discontinuity in which theoretical achievements get lost during a process of abandoning traditional terms and premises,⁵¹ the need for compensational mechanisms such as comparative law might be ever greater.⁵² But then again the question arises as to what extent it should be up to a court to design the new constitutional paradigm itself, as a more restrictive understanding of constitutional jurisdiction would suggest that the court leaves this question to be decided by the constitutional legislator.

Nonetheless, the epistemic or hermeneutic value seems to be a principal “customary” motive for courts to rely on comparative law. Domestic law can be better understood through the lens of or in contrast to foreign law. Comparative law may not only create an illuminating distance vis-à-vis the domestic legal order.⁵³ Specific need for a comparative approach can particularly arise when it comes to the concretization of abstract constitutional principles.⁵⁴

⁵⁰ For a comparative approach towards the impact on EU accession on the see particularly the contributions in EU-ENLARGEMENT – THE CONSTITUTIONAL IMPACT AT EU AND NATIONAL LEVEL (Alfred E. Kellermen *et al.* eds., 2001). THE IMPACT OF EU ACCESSION ON THE LEGAL ORDERS OF NEW MEMBER STATES AND (PRE-) CANDIDATE COUNTRIES (Alfred E. Kellermen *et al.* eds., 2006).

⁵¹ Cf. Rainer Wahl, *Die zweite Phase des öffentlichen Rechts in Deutschland* [The Second Phase of Public Law in Germany], 38 DER STAAT 495 *et seq.* (1999).

⁵² Walter Pauly, *Wissenschaft vom Verfassungsrecht* [Constitutional Law Scholarship], in IUS PUBLICUM EUROPAEUM, VOL. 2, § 27, para. 24 (Armin von Bogdandy, Pedro Cruz Villalón & Peter M. Huber eds., 2008).

⁵³ Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, in COMPARATIVE CONSTITUTIONAL LAW 147 *et seq.* (Vicki C. Jackson & Mark Tushnet eds., 2005²); Sommermann, *supra* note 6, at 1020.

⁵⁴ Jörg M. Mössner, *Rechtsvergleichung und Verfassungsrechtsprechung* [Comparative Law and Constitutional Jurisprudence], 99 ARCHIV DES ÖFFENTLICHEN RECHTS (AÖR) 193, 213 (1974) and ARMIN V. BOGDANDY, GUBERNATIVE RECHTSSETZUNG 19 (2000).

bb) EU-wide genealogical correlation

Furthermore, the use of comparative law can be enlightening in the case of a genealogical correlation of both domestic and foreign legal provisions.⁵⁵ In the realm of European constitutionalism, a general connection between the national constitutional orders can already be derived from the overarching cultural-historic background, associating all European constitutional systems.⁵⁶

Yet the transnational correlation is notably strong in the case of the “national constitutional law relating to the EU”⁵⁷ which was, from the beginning, developed in EU wide waves of cross-border reception.⁵⁸ The integration clauses, i.e. the constitutional stipulations addressing the foundations of participation in the EU and thus being the normative focal point of the Europe decisions, have been developed in a Europe-wide context ever since the first steps of European integration were taken. There is plenty of evidence in the *travaux préparatoires* as well as in positive law that national integration clauses are the product of mutual reception, shaped on the basis of the comparative experience of different EU Member states. The history of mutual reception and cross-border migration of model solutions already begins in the late 1940s and continues until today. Classic examples are Article 11 of the Italian constitution, being a direct (affirmative) response to the 15th consideration of the preamble of the French Constitution of 1946 (4th Republic), the codification of the German *Solange*-formula in the (former) Swedish integration clause as well as the drafting of the Europe-clauses in the Middle and Eastern European countries with a view to accession, sometimes accompanied by extensive reports or legislative materials documenting the comparative dimension.⁵⁹

⁵⁵ For a theoretical approach towards the genealogical interpretation see in detail Choudhry, *supra* note 3, at 866 *et seq.*

⁵⁶ PETER HÄBERLE, *EUROPÄISCHE VERFASSUNGSLEHRE* [European Constitutional Doctrine] 4 *et seq.* and 250 *et seq.* (2011⁷).

⁵⁷ For the notion see Christoph Grabenwarter, *National Constitutional Law Relating to the European Union*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 83 *et seq.* (Armin von Bogdandy & Jürgen Bast eds., 2009²).

⁵⁸ In detail WENDEL, *supra* note 33, at 104–143.

⁵⁹ In detail Wendel, *supra* note 17, at 104 *et seq.* As regards specifically the MEECs, see Anneli Albi, „Europe“ *Articles in the Constitutions of Central and Eastern European Countries*, 42 *COMMON MARKET L. REV.* 399 *et seq.* (2005).

Against this backdrop, the proper understanding of a constitutional integration clause, say Article 23 (1) of the German Basic Law, is not only facilitated by but even demands a comparative approach.⁶⁰

cc) Adequate solutions for similar problems

While a classic methodological problem of comparative law consists of identifying the adequate objects of comparison—for instance by relying on a functional approach and therefore looking for functional equivalents in other legal orders⁶¹—this task seems to cause less trouble as far as EU related case law is concerned.

Often several courts are confronted with similar questions relating to identical phenomena at EU level which may then serve as the *tertium comparationis*. Take the example that the ratification of a reform treaty, like the Treaty of Lisbon, is challenged under national constitutional law or that a domestic act implementing EU law is challenged, as was the case with the transposition of the European Arrest Warrant. Even if the procedural setting and the applicable constitutional law differ from country to country, the key problem often turns out to be similar, thus making comparative efforts a promising exercise. Or to frame it differently, comparative law offers adequate solutions for similar, if not identical problems.

This does not mean, of course, that foreign EU related case law is easily accessible in general. Some of the Europe-decisions are in fact characterized by a degree of conceptual ambiguity which should not be underestimated by those who are engaged in comparative law. A decision like the Lisbon judgment of the German Federal Constitutional Court is to be seen rather as the expression of partially dissonant voices within the court than as a monolithic product of judicial reasoning.⁶² Such ambiguities make it difficult, particularly for foreign observers, to access “one” judgment, which in

⁶⁰ *ibid.*, at 57.

⁶¹ The classic debate on functionalism cannot be dealt with in detail here, see on this – critically commented – *Michaels, The functional method of comparative law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 339 *et seq.* (Mathias Reimann & Reinhard Zimmermann eds. 2008). For an overview over the different approaches cf. Mark Tushnet, *Some reflexions on method in comparative constitutional law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 67, 68 *et seq.* (Sujit Choudhry ed., 2006).

⁶² See on this Franz C. Mayer, *Rashomon in Karlsruhe: A reflection on democracy and identity in the European Union. The German Constitutional Court's Lisbon decision and the changing landscape of European constitutionalism*, 9 INT'L J. CONST. L. (I·CON) 757, 757-758 (2011).

fact turns out to be a polymorphic piece. The classic methodological problem that two constitutions do not necessarily mean the same when they say the same,⁶³ is then accompanied by the additional difficulty that one constitutional court puts forward different, and even antithetic lines of argument regarding one constitution.⁶⁴

However, this particular difficulty does not generally call into question the conceptual and epistemic value of foreign EU related decisions which essentially constitute a legal “laboratory” for the search of constitutional solutions to certain EU-wide challenges of EU law.

dd) Persuasive authority

There is also another motive, which appears to be less epistemic than tactical. As seen already, comparative cross-references are commonly used to support an argument already developed by the referring court on the basis of national constitutional (and sometimes EU) law. The use of comparative law then fulfils a supportive function.⁶⁵

Seen this way, the recourse to comparative law in the Europe-decisions is a reference to “persuasive authority” in the sense that comparative law plays a complementary role, strengthening the persuasiveness of the argument.⁶⁶ The need to rely on such an argument becomes the greater the less a constitutional court holds a strong institutional position within the domestic constitutional system. This might explain why relying on comparative reasoning seems to be more important for relatively “young” courts which are still struggling to hold their ground against other domestic actors than for courts which traditionally have a strong position, like the German Federal Constitutional

⁶³ For this classic dictum see Rudolf Smend, *Staat und Kirche nach dem Bonner Grundgesetz* [State and Church under the Bonn Basic Law], 1 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 4 (1951).

⁶⁴ Take, for example, the sections of the Lisbon judgment dealing with the principle of *Europarechtsfreundlichkeit* (literally “friendliness” towards European Law, but officially translated with “openness” towards European law), *supra* note 1, particularly paras. 225, 240 *et seq.* and 340. They leave enough margin of interpretation to draw almost antithetic conclusions, as demonstrated by the dissenting opinion of judge Landau in case 2 BvR 2661/06, Honeywell, BVerfGE 126, 286 (July 6, 2010), para 102. For possible meanings of the concept see Andreas Voßkuhle, *Multilevel cooperation of the European Constitutional Courts*, 6 EUR. CONST. L. REV. 175 *et seq.* (2010) and Franz C. Mayer, *Europarechtsfreundlichkeit und Europarechtsskepsis in der Rechtsprechung des Bundesverfassungsgerichts* [Openness and Scepticism Towards EU Law in the Jurisprudence of the Federal Constitutional Court], in DER OFFENE VERFASSUNGSSTAAT DES GRUNDGESETZES NACH 60 JAHREN 237, 256 *et seq.* (Thomas Giegerich ed., 2010).

⁶⁵ Sauer, *supra* note 8, at 198.

⁶⁶ For the concept see H. Patrick Glenn, *Persuasive Authority*, 32 McGill L. J. 261 *et seq.* (1987).

Court. However, such an approach is not to be confounded with “persuasive authority” in the radical sense, i.e. the exclusive reliance on legally non-binding standards against existing binding law. Such a radical approach cannot be accounted for in the EU related jurisprudence, since in all decisions the central standard of review is national constitutional law, interpreted in the light of but never replaced by foreign national (case) law.

Speaking of tactical motives, we should not forget that the reference to an external persuasive authority can also be subject to misuse within the framework of a strategy of deception. In this scenario a court relies on comparative law in order to underpin its own argument which in reality is not supported by the foreign decision referred to. An example is the judgment of the Czech Constitutional Court of 31 January 2012, in which the Court ruled (as the first constitutional court ever) that the Court of Justice had acted *ultra vires* in a case relating to social security issues. In order to support this open and intransigent challenge to EU law,⁶⁷ the Czech Constitutional Court i.a. referred to the case law of the German Federal Constitutional Court, albeit completely ignoring the restrictive conditions for the exercise of *ultra vires review* established therein. Under the Federal Constitutional Court’s case law, an *ultra vires* review, i.e. to review whether or not an act of EU law has transgressed the Union’s competences and to declare it inapplicable in case it has,⁶⁸ would have been clearly excluded under the given circumstances.⁶⁹

3.2. Shaping a common constitutional law in Europe?

The customary motives provide an insight as to why constitutional courts may decide to rely on comparative law. Yet they do not fully explain why courts consider it appropriate

A. ⁶⁷ See Jan Komárek, EUR. CONST. L. REV. 2012, *forthcoming* and *id.*, *Playing With Matches: The Czech Constitutional Court’s Ultra Vires Revolution*, available at <http://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/> (last visited May 5, 2012).

⁶⁸ For a comparative perspective cf. FRANZ C. MAYER, KOMPETENZÜBERSCHREITUNG UND LETZTENTSCHEIDUNG (2000); Wendel, *supra* note 17, at 128 *et seq.*

⁶⁹ German Federal Constitutional Court, Honeywell, *supra* note 64, at paras. 58 *et seq.* The Court held that a decision by which an act of EU law is qualified as being *ultra vires* must necessarily be preceded by a reference to the Court of Justice. In terms of substance, the Court develops a double test according to which an act of Union law may only be declared *ultra vires* (and therefore inapplicable in Germany) if the act firstly constitutes an evident violation of competences and secondly entails a significant impact on the system of distribution of competences between the Member States and the Union to the detriment of the former. Neither the formal nor the material conditions are fulfilled in the Czech case.

to make comparative reasoning part of their argument in a *distinct and explicit* manner. In particular, they do not provide an explanation for why courts even bother to openly object to concepts or conclusions of their European counterparts.

a) Judgments as transnational propositions of common constitutional standards

An answer to the question as to why courts even openly object to their European counterparts may lie in the fact that comparative reasoning by judges can, under certain conditions, be more than a mere reference to foreign (case) law as such. Certainly, constitutional courts relying on comparative law in their Europe judgments refer, *prima facie*, to the legal situation in other Member States. However, by evaluating legal approaches adopted in other Europe decisions, the courts simultaneously evaluate model solutions to key problems of European constitutional law. To frame it differently, a Europe decision of a national court can be perceived not only as a judgment on national constitutional law, but also as a proposition of common constitutional standards in Europe. Such model solutions or propositions can, for instance, be the conditions under which a national constitutional court claims to be competent to review if an act of EU violates national fundamental rights or the national constitutional identity or constitutes an act *ultra vires*. To make the comparative evaluation of such propositions part of the *ratio decidendi* is a way of expressly responding to them. Such a response is nothing less than itself an active contribution to a process which ultimately becomes a transnational dialogue of judges on the making of a common constitutional law in Europe. It is the particular nature of a dialogue not only to produce consensus, but sometimes also dissent.

Hence, the role of comparative reasoning cannot be reduced to that of an auxiliary hermeneutic instrument or a reference to persuasive (external) authority. Seen in a transnational perspective, comparative reasoning particularly appears to be a mode of judicial dialogue at the “horizontal level”⁷⁰ by which the constitutional courts take an active role in a Europe-wide process of shaping common constitutional standards.

⁷⁰ The notion “horizontal” as used in this context refers to the relationship between the national constitutional and highest courts and does not imply, vice versa, that the “vertical” relationship, i.e.

An articulate confirmation of the reading that the comparative exercise undertaken by the courts relates to a (future) common constitutional law in Europe, which may have a normative and not only a cognitive relevance, can be found in the Polish Lisbon decision. After having examined the other Lisbon decisions in detail, the Polish Constitutional Tribunal draws the conclusion that, despite the differences arising from the procedural setting and other factors, the Lisbon decisions in an overall perspective confirm “the solemn character of constitutional traditions, which are common to the Member States, and which constitute a vital premise (sic) of adjudicating in the present case”.⁷¹ According to the Tribunal, the constitutional courts of the Member States share “as a vital part of European constitutional traditions” the general view that the national constitution “is of fundamental significance as it reflects and guarantees the state’s sovereignty” and also that “the constitutional judiciary plays a unique role as regards the protection of constitutional identity of the Member States, which at the same time determines the treaty identity of the European Union”,⁷² i.e. the term national identity as “respected” under article 4 (2) TEU.⁷³

There are good reasons for disagreeing with the conservative conception of sovereignty as advocated by the Polish Constitutional Tribunal. However, it is not the substantial well-foundedness of the argument which matters in the present context. It is the emphasis the Tribunal puts on the alleged existence of common constitutional traditions, seen as a “vital premise of adjudicating”. As demonstrated above, the decision of the Polish Constitutional Tribunal also reveals dissent, that is to say the partial absence of common standards, particularly as regards the separation of powers between the constitutional court and the legislator. Nonetheless, as far as they (allegedly) exist, common standards serve as a key argument supporting the approach taken by the Polish Constitutional Tribunal and reducing the necessity to justify it further. Principally, the supportive function of comparative reasoning is not a new tool,

between the CJEU and national courts, has to be construed in a hierarchical way, see Ingolf Pernice, *Die horizontale Dimension des europäischen Verfassungsverbundes* [The Horizontal Dimension of Multilevel Constitutionalism], in *FREIHEIT, SICHERHEIT UND RECHT* 359 *et seq.* (Hans-Jörg Derra ed., 2006).

⁷¹ Polish Constitutional Tribunal, Lisbon, *supra* note 1, at para. III.3.8.

⁷² *ibid.*

⁷³ i.e. the national identities inherent in the Member States’ fundamental structures, political and constitutional, inclusive of regional and local self-government.

as we have seen. But in the present context, the argument is intended to be normatively more compelling, as it is based not only on a punctual and coincidental similarity to the approach of another court, but on a common, Europe-wide (normative!) standard having the “solemn” aura of uniform values.

Even more important is that by evaluating the other courts’ case law and by relying on common standards, the Polish Constitutional Tribunal itself actively contributes to the identification and recognition of common European standards.

b) Premises of judicial dialogue: audience and language

This contributive or performative dimension of comparative reasoning raises the question as to what the premises of transnational judicial dialogue are. Two aspects seem to be predominantly important in this respect: audience and language.

aa) Audience

First of all, which audience do national courts want to address with their Europe-decisions and particularly with comparative legal reasoning?

It is a matter of fact that the judicial findings primarily address the parties or petitioners of the case as well as the national legal community. The latter may not only include the legislative, executive and judicial institutions at the national level, but also legal scholarship. Whoever read the German Lisbon decision will understand the perception of many scholars that key parts of the judgment were written with the intention of having a lasting impact on the academic debate.⁷⁴

A further member of the audience directly or indirectly addressed by national constitutional courts is (or can be) the Court of Justice in Luxembourg. This becomes particularly evident when national constitutional courts openly claim to be competent to submit EU law to constitutional scrutiny under restrictive conditions. The comparative exercise of highlighting a certain degree of unity amongst the national constitutional courts in this matter is certainly to be understood as a message to Luxembourg. Such a demonstration of collective opposition might sometimes even be driven by a spirit of

⁷⁴ In that sense, exemplary, Daniel Thym, *In the Name of Sovereign Statehood*, 46 COMMON MARKET L. REV. 1795, 1821 (2009).

confrontation, even if this does not have to be the predominant motive of constitutional courts to indirectly address the Court of Justice. In other cases, a national constitutional court's interpretation of (future) EU law or national constitutional law relating to the EU can also be meant as a conceptual offer to Luxembourg, made in a spirit of cooperation and aiming at an appropriate separation of judicial tasks within a multi-levelled setting.⁷⁵

The audience of primary interest in our context, however, is the foreign legal community, including particularly national constitutional courts. With the notable exception of some judicial conferences and academic networks,⁷⁶ this audience is, in general, neither sufficiently acquainted with the legal specificities of the national constitutional order in question, nor does it regularly have the linguistic skills to understand the official language in which the respective judgment is promulgated.

bb) Language

The linguistic challenges raise a second question regarding the premises of judicial dialogue, i.e. the question of language and mutual (mis)understanding.

In recent years, European national courts increasingly provide English translations of their leading cases, not exclusively but particularly of their Europe decisions. While the German Federal Constitutional Court provided an English translation for the very first time in its 2005 Arrest Warrant case, all major Europe decisions since then have been translated into English by the Court. In the case of the Lisbon decision, a (preliminary) translation was even published the very day of the judgment's promulgation. Moreover, the promulgation of the recent decision on the ESM and the Fiscal Treaty was accompanied by an English translation, though this preliminary version covered only

⁷⁵ As this contribution does not primarily deal with the dialogue between national constitutional courts and the CJEU we cannot go into detail here. For a recent „offer“ in the sense of judicial cooperation see particularly German Federal Constitutional Court, case 1 BvL 3/08, Investitionszulagengesetz (Oct. 4, 2011), not yet reported. The decision places a new emphasis on the responsibility of German ordinary and specialised courts within the multi-levelled system of fundamental rights protection in Europe. Under certain conditions, the Federal Constitutional Court requires these courts to refer a preliminary question to the CJEU before a concrete review of constitutionality under Art. 100 (1) of the German Basic Law may be declared admissible.

⁷⁶ Cf. Conference of European Constitutional Courts, <http://www.lrkt.lt/conference5.html> (last accessed May 10, 2012) or the European Constitutional Law Network (ECLN), amongst whose members are several constitutional judges.

248 out of 319 paragraphs.⁷⁷ Almost all other constitutional and highest courts, including the French Constitutional Council, have published English translations of their recent Europe judgments as well.

This practice clearly indicates an intention to be understood outside the national legal community and to influence the discussion abroad. English translations would not be necessary with regard to the CJEU which, like no other judicial institution in Europe, disposes of an outstanding linguistic service. As Europe decisions are transnational propositions of common standards, the courts have an interest to make them accessible to a Europe-wide community.

Unfortunately, translations may produce more confusion than understanding, heat without light, when they are not made carefully enough and do not semantically capture the key concepts on which the court's arguments are founded. In this respect, the German Lisbon decision may once again serve as an example, regarding its preliminary translation into English. One might pity the translator(s), though, who had the most difficult task of translating a conceptually ambiguous decision of more than 140 pages in length, which was written predominantly in a hardly translatable style of legal scholarship. A look at the English translations of other Lisbon judgments confirms that the quality of translations constitutes a general problem for constitutional courts.⁷⁸ Here, it seems, there is room for future improvement. Instead of strengthening the capabilities of each court individually, one might even think—at least as a long-term perspective—of a common linguistic service, attached to the Conference of European Constitutional Courts.⁷⁹

Finding a common language does not only concern the task of overcoming linguistic barriers in multilingual Europe, but also of shaping common legal terms. Although the judicial discourse of constitutional courts seems to have identified substantial common

⁷⁷ The fact that the preliminary translation did not cover some sections of the original decision's grounds, notably paras. 189–206 (scope of review for the temporary injunction procedure and admissibility), 223–238 (i.a. reform of Article 136 TFEU) and 280–219 (accompanying domestic legislation and Fiscal Treaty; this is why, ironically, also the two references to the French Conseil constitutionnel were not translated immediately), might be seen as an indication that particularly these paragraphs were heavily debated amongst the judges until the end. However—and beyond the fact that such an assumption can hardly be verified anyway—most of the non-translated sections do not seem to concern the most sensitive and debatable points of the decision.

⁷⁸ Perhaps with the exception of the decisions by the French Constitutional Council.

⁷⁹ For the Conference of European Constitutional Courts see already *supra* note 76.

standards only in very general and vague terms, it already shows a remarkable tendency towards the use of such “universal terms”.⁸⁰ The most striking example in this respect is the concept of constitutional identity, used not only by the German Federal Constitutional Court and the Polish Constitutional Tribunal as already mentioned above, but literally by almost every court which has rendered a decision on the Constitutional Treaty or the Lisbon Treaty.⁸¹ Though being conceptually highly obscure⁸² and varying significantly from country to country,⁸³ the term “national (constitutional) identity” has, on the basis of Article 4 (2) TEU, an interface with EU law and thus a common point of reference for all Member States. If one construes Article 4 (2) TEU as an integration clause at the Union level, ensuring the legal permeability⁸⁴ of EU law with regard to national constitutional law, the term turns out to be a genuine concept of multilevel constitutionalism.⁸⁵ By means of the identity clause, EU law revokes its own claim of primacy to some extent—and not in an unlimited way—within its scope of application.⁸⁶ Hence, the task of protecting national constitutional identity is

⁸⁰ For the notion see Maduro, *supra* note 39, at 527 f.

⁸¹ French Constitutional Council, case 2004-505 DC, Constitutional Treaty (Nov. 19 2004), para. 13 and case 2006-540 DC, Information Society (July 27, 2006), para. 19; Spanish Constitutional Tribunal, Constitutional Treaty, *supra* note 22, at II-3 with case note of Castillo de la Torre, 42 COMMON MARKET L. REV. 1169, 1195 *et seq.* (2005); German Federal Constitutional Court, Lisbon, *supra* note 1, paras. 218 *et seq.*, 234 *et seq.*, 239 *et seq.* and 340; Polish Constitutional Tribunal, Lisbon, *supra* note 1, at paras. III.2.1 and III.3.8; Hungarian Constitutional Court, Lisbon, *supra* note 1, at para. III.1; Czech Constitutional Court, Lisbon I, *supra* note 1, at para. 120 and Lisbon II, *supra* note 1, at para. 150; Latvian Constitutional Court, Lisbon, *supra* note 1, at para. 16.3.

⁸² Cf. already Armin v. Bogdandy, *Europäische und nationale Identität: Integration durch Verfassungsrecht?* [European and national identity: integration through constitutional law?], 62 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDStRL) 156, 164 (2003).

⁸³ See Jan-Herman Reestman, *The Franco-German Constitutional Divide*, 5 EUR. CONST. L. REV. 374 *et seq.* (2009); and Maja Walter, *Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive* [Constitutional Identity as a Limit to Integration: Concept and Judicial Review from a European, German and French Perspective], 72 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 177, 179 *et seq.* (2012) both with respect to Germany and France.

⁸⁴ In legal terms, permeability can be defined as the capacity of a given legal order to limit its own claim of normative exclusivity in order to enable legal rules or principles which emanate from a formally separated legal order to integrate, WENDEL, *supra* note 33, at 7 *et seq.*

⁸⁵ For the concept see Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, 36 COMMON MARKET L. REV. 703, 706 *et seq.* (1999) and *id.*, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349 *et seq.* (2009).

⁸⁶ See Wendel, *supra* note 17, at 131 *et seq.*; Franz C. Mayer, *The European Constitution and the Courts*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, 399, 431 (Armin von Bogdandy & Jürgen Bast eds., 2009²); Armin von Bogdandy & Stephan Schill, *Overcoming absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 COMMON MARKET L. REV. 1417, 1432 (2011).

distributed between the national level (definition of what national identity is) and the supranational level (extent of the Union's duty to respect national identity in the concrete case⁸⁷). This multi-levelled dimension illustrates how important it might be from the perspective of a national constitutional court to "shape" the debate with conceptual propositions not only with a view to the CJEU, but also with a view to other courts.

The concept of constitutional identity demonstrates that the use of universal terms does not necessarily mean that the courts generally agree on the substance or content of such a concept. But they use the universal term "constitutional identity" as a common denominator in the proper sense of the word, i.e. as a linguistic "focal point" for the discussion on certain constitutional key principles that are protected (in different ways) under national constitutional law and respected according to Article 4 (2) TEU. The analysis of the jurisprudence on the protection of constitutional identity in several Member States, such as the Polish Lisbon case, reveals that comparative reasoning is connected to a universalized denomination of constitutional key aspects.

c) The dialectics of comparative reasoning

As an element of a transnational judicial dialogue, comparative reasoning is part of a dialectic process. When the courts rely on dissenting comparative reasoning, the evolving dialectics between national constitutional courts become particularly visible. By objecting openly to key arguments of its German counterpart, the Czech Constitutional Court disproved not only the commonly expressed thesis that constitutional courts of Eastern and Central European countries abidingly stick to the German Federal Constitutional Court as a sort of archetype court, but also demonstrated the dialectical dimension of comparative reasoning. The thesis of the German Federal Constitutional Court—concerning a certain concept of the democratic

⁸⁷ Even if Article 4.2 TEU is an auto-limitative response of EU law to the claims of national jurisdictions that certain core principles of national constitutions are not subject to the principle of primacy, then the question of how far EU law limits its own claim of primacy still remains a question of EU law. This is a logical consequence of the formal separation of national and supranational law. Consequently, the extent to which the identity-claim is normatively relevant within the realm of EU law, is a question to be decided by EU law and thus by the Court of Justice. This reading is now confirmed by ECJ, case C-208/09, Sayn-Wittgenstein, [2010] ECR I-13693, paras 83 *et seq.* and case C-391/09, Runevič-Vardyn, [2011] not yet reported, paras. 86 *et seq.*

legitimation of supranational authority—was not confirmed, but contrasted with an anti-thesis.

Expressing dissent is thus more than using comparative law in order to highlight differences. The critical evaluation of propositions of a common constitutional law in Europe turns out to be a new contribution to the discourse itself, creating a reciprocal dialogue, the lack of which has been criticized regularly⁸⁸ until today. The dialectics of comparative reasoning allow to “even out” the different approaches and to reach a certain level of reconciliation or synthesis at the horizontal level.⁸⁹ “Dissenting” comparative reasoning might therefore be considered a veritable step forward in the transnational dialogue of national constitutional courts.

Whether the transnational dialogue at the horizontal level, i.e. between national constitutional courts, is led predominantly by a spirit of cooperation or, on the contrary, by a spirit of competition, is a question that cannot be answered in a clear-cut way. If the judicial contributions to this dialogue had to be understood primarily as efforts to play the *primus inter pares* or even to maximize the “export” of domestic constitutional ideas into constitutional orders abroad, one would indeed have to speak of a spirit of competition. However, such a conclusion falls short of capturing the whole picture. The fact that courts refer openly to each other, highlighting (punctual) similarities and even claiming the existence of common standards, demonstrates that the contributions aim at finding the legal solution which is considered “best”, be it a solution “imported” or “exported”. Dissenting comparative reasoning can be understood in this sense as well. According to this interpretation, expressing dissent is a way of openly arguing in favour of a certain legal solution which is considered, for normative reasons, to be better than another one. The discourse of constitutional courts on a common constitutional law in Europe thus seems to be based on the assumption that the “right” argument can be found within and by discourse, a discourse in which all participants are open to the most convincing argument. Comparative reasoning constitutes the visible element of this discursive framework.

⁸⁸ Lachmayer, *supra* note 46, at 170.

⁸⁹ For the role of stabilization in the context of general principles of law cf. Mayer, *supra* note 5, at 180.

4. Outlook: The making of a common constitutional law in Europe

One should not idealize the power of comparative legal arguments and thus the power of comparative reasoning. The extent to which courts rely on comparative law depends on a variety of factors, notably the national constitutional culture, the institutional position of the constitutional court, the degree of consolidation of the constitutional order, the political background, and last but not least human nature, that is to say the character and the individual (academic) background of the judges. And whenever courts do rely on comparative legal arguments, the latter generally do not play a determining role for the decisions' outcome. However, if exercised, comparative reasoning constitutes a vital transnational contribution to the judicial dialogue on common European standards.

Seen in a broader context, the judiciary is not the only branch shaping the evolving common constitutional law in Europe by means of mutual dialogical interaction. Horizontal interaction is particularly intense as far as the (constitutional) legislators are concerned. As shown above, the transnational correlation is notably strong when it comes to constitutional provisions relating to membership in the EU. Beyond the national level, particularly the Court of Justice relies on comparative law intensely when identifying general principles of EU law—though rarely in an open way.⁹⁰

Against this background, one might ask what the future role of comparative reasoning by national constitutional courts will be. A preliminary answer suggests that as the importance of comparative constitutional law in Europe continues to increase, the

⁹⁰ Regarding the importance of comparative law for the interpretation of EU law see Hans Kutscher, *Thesen zu den Methoden der Auslegung des Gemeinschaftsrechts aus der Sicht eines Richters* [Propositions regarding the methods of interpretation of community law from the perspective of a judge], in BEGEGNUNG VON JUSTIZ UND HOCHSCHULE I-23 (Court of Justice ed., 1976); INGOLF PERNICE, GRUNDRECHTSGEHALTE IM EUROPÄISCHEN GEMEINSCHAFTSRECHT [Elements of Fundamental Rights in European Community Law] 209 *et seq.* (1979); Koen Lenaerts, *Le droit comparé dans le travail du juge communautaire* [Comparative Law in the Practice of the Community Judge], in L'UTILISATION DE LA METHODE COMPARATIVE EN DROIT EUROPEEN 111 *et seq.* (François van der Mensbrugghe ed., 2003); Ninon Colneric, *Die Rolle der Rechtsvergleichung in der Praxis des EuGH* [The Role of Comparative Law in the Practice of the ECJ], in DIE HERAUSFORDERUNG VON GRENZEN—FESTSCHRIFT FÜR ROLAND BIEBER 316, 317 *et seq.* (Astrid Epiney, Marcel Haag & Andreas Heinemann eds., 2007); Franz C. Mayer, *Die Bedeutung von Rechts- und Verfassungsvergleichung im europäischen Verfassungsverbund* [The Significance of Comparative Constitutional Law within Multilevel-Constitutionalism], in VERFASSUNGSWANDEL IM EUROPÄISCHEN STAATEN- UND VERFASSUNGSVERBUND 167, 172 *et seq.* (Christian Calliess ed., 2007); Thomas v. Danwitz, *Der Einfluss des nationalen Rechts und der Rechtsprechung der Gerichte der Mitgliedstaaten auf die Auslegung des Gemeinschaftsrechts* [The Impact of National Law and the Jurisprudence of Member States' Courts on the Interpretation of Community Law], ZEITSCHRIFT FÜR EUROPÄISCHES SOZIAL- UND ARBEITSRECHT (ZESAR) 57 *et seq.* (2008).

same will be true for the use of comparative law by judges. A more profound reason for a future increase of comparative reasoning, however, may be the potential of developing a veritable *ius commune europae* in the decades to come. Such a *ius commune* would go beyond a mere empirical “intersection” of the EU Member States’ constitutions and have normative relevance.

One thing remains clear: Comparative reasoning by constitutional judges in Europe will only be able to participate in such a process if it is provided with the intellectual “breeding ground” of a veritable “European Area of Constitutional Scholarship”⁹¹, transcending the borders of legal orders and traditions, thus changing not only the landscape of German constitutionalism, but of constitutionalism in Europe as a whole.

⁹¹ See for more detail on this idea (oder: concept) Armin von Bogdandy, *Vergleich: Wissenschaft vom Verfassungsrecht* [Comparison: Constitutional Law Scholarship], in *IUS PUBLICUM EUROPAEUM*, VOL. 2, § 39, paras. 90 *et seq.* (Armin von Bogdandy, Pedro Cruz Villalón & Peter M. Huber eds., 2008); *id.*, *National legal scholarship in the European legal area—A manifesto*. 10 INT’L J. CONST. L. (I·CON) 614 *et seq.* (2012).

