Abhandlungen

Comparative Public Law for European Society

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Abstract

This contribution theorises European comparative public law as a special way of comparative legal thinking. European comparative public law is special as it can use a legal lodestar, the 'ever closer union among the peoples of Europe' of Article 1 para. 2 Treaty on European Union (TEU). It is special as it compares within a specific body of law, namely European law that unites European Union (EU) law, European Convention on Human Rights (ECHR) law, and the law of the 27 Member States. It is special as it can rely

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on common values, those enshrined in Article 2 clause 1 TEU. And it is special as it can serve a specific social entity ushered by 'ever closer union', namely European society (Article 2 clause 2 TEU). European comparative law, so conceived, helps develop that society as well as understand, assess and protect its diversity. This contribution discusses the specific role of comparative arguments as well as their legal and methodological bases. A comparative reconstruction of constitutional adjudication, a bulwark of diversity, illustrates this theorisation. Finally, this article shows how the European comparative setting furthers an academic mindset that mirrors a diverse European society characterised by common constitutional principles.

Keywords

European law – European comparative public law – bases and methods for comparison – European values – European society – constitutional courts – judicial authority – judicial dialogue – legal academia

I. Claim and Programme

Comparative legal thinking (comparative law) is about transcending the focus on just one legal order. This contribution presents European comparative public law as a special way of doing so. By theorising its special nature, I aim to deepen its understanding and to contribute to its purpose. By contrasting it with other comparative efforts, I hope to contribute to their understanding as well.

European comparative public law is special as it can use a legal lodestar, the 'ever closer union among the peoples of Europe' of Article 1 para. 2 TEU. It is special as it compares within a specific body of law, namely European law that unites EU law, the law of the European Convention on Human Rights, and the law of the 27 EU Member States. It is special as it can rely on common constitutional values, those enshrined in Article 2 clause 1 TEU. And it is special as it serves a specific social entity ushered by 'ever closer union', namely European society (Article 2 clause 2 TEU). European comparative law, so conceived, helps develop that society as well as understand, assess and protect its diversity. The 'ever closer union', properly understood, does not aim at ever more centralisation, but at democratic constitutionalism, peace and well-being, as per Article 3 para. 1 TEU.

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This contribution theorises European comparative public law by exploring its special nature. It starts by reconstructing European law as its legal frame (II. 1.) and European society as its social reference (II. 2.). This is followed by a discussion of the specific role of comparative arguments (II. 3.), their legal and methodological bases (II. 4.) as well as a comparison between the new and the old *Jus Publicum Europaeum* (II. 5.). A comparative reconstruction of constitutional adjudication, a bulwark of diversity, illustrates this theorisation (III.). Finally, I show how the European comparative setting furthers an academic mindset that mirrors a diverse European society characterised by common constitutional principles (IV.).

But first, a preliminary note on *publicness* that distinguishes the research object from comparative private law: I read that distinction as responding to a fundamental differentiation in modern societies.[1] Private action and public action belong to different social spheres with different operational logics and justificatory requirements. Public law mostly operates in relationships not justified by direct consent, unlike what is usually the case under private law. At the same time, private law mostly allows subjects to act solely in pursuit of self-interest, whereas action under public law is bound by higher standards such as those of Article 2 TEU. Of course, the border runs differently in different legal orders, the two spheres relate to each other in different ways, and the practical distinction between the two spheres is sometimes difficult. But all that does not affect the private-public distinction as such. Few will dispute that the International Society of Public Law has a meaningful focus.

II. Theorising European Comparative Public Law

1. European Law

European comparative public law is part of the vibrant field of public-law studies that look beyond one legal order.[2] After having spent decades in an academic niche existence in many countries,[3] barely noticed by mainstream

1 For the argument in detail, Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law. Translating World Public Opinion into International Public Authority', EJIL 28 (2017), 115-145.

2 For a discussion of possible understandings Lucio Pegoraro, *Diritto costituzionale comparator. La scienza e il metodo* (Bologna: Bononia University Press 2014), 19-42; Uwe Kischel, *Comparative Law* (Oxford: Oxford University Press 2019), 3-10, 27-31.

3 Italy being one important exception with a chair of comparative constitutional law in many law and political-science departments.

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scholars, comparative efforts have by now gone mainstream. Though the statement that 'we are all comparativists now'[4] remains a bit of a hyperbole for public-law scholarship, it captures a true spirit and a real thrust.

The rise of comparative public law studies regards first and foremost constitutional law scholarship. This success came with a process of differentiation. Global or cross-regional comparisons stand next to comparisons focussing on a specific region.[5] The global discourse has flourished ever since the Iron Curtain came down and many states introduced an entrenched liberal constitution.[6] The advent of illiberal constitutionalism did not break this trend,[7] not least as governments defend their illiberal measures often with comparative arguments.[8] For all these reasons, associations, such as the 'International Association of Constitutional Law' or the 'World Conference on Constitutional Justice', are thriving. Comparative administrative law too has acquired a new significance. GAL, the acronym for 'Global Administrative Law', is public-law scholarship's first global brand in the twenty-first century.[9] The founding of the already mentioned 'International Society of Public Law' in 2014 represents a milestone, as it joins the administrative and the constitutional strand in an overarching public-law discourse that includes transnational phenomena and interdisciplinary perspectives.[10]

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4 Charles Lees, 'We Are All Comparativists Now. Why and How Single-Country Scholarship Must Adapt and Incorporate the Comparative Politics Approach', Comparative Political Studies 39 (2006), 1084; Ran Hirschl, 'On the Blurred Methodological Matrix of Comparative Constitutional Law' in: Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press 2007), 39-66 (63).

5 Michel Rosenfeld and András Sajó, 'Introduction' in: Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012), 1-22 (10-11).

6 Bruce Ackerman, 'The Rise of World Constitutionalism', Va. L. Rev. 83 (1997) 771-797; Sabino Cassese, 'Fine della solitudine delle corti costituzionali, ovvero il dilemma del porcospino' in: Accademia delle Scienze di Torino (ed.), *Inaugurazione del 232° anno accademico dell'Accademia delle Scienze di Torino* (Torino: Accademia delle Scienze 2014), 17-33 (20).

7 See Günter Frankenberg, *Autoritarismus. Verfassungstheoretische Perspektiven* (Frankfurt a. M.: Suhrkamp 2020).

8 See Iustitia (Polish Judges Association), "Response to the White Paper Compendium on the reforms of the Polish justice system, presented by the Government of the Republic of Poland to the European Commission", 17 March 2018, <https://twojsad.pl/wp-content/uploads/2018/03/iustitia-response-whitepaper.pdf> last accessed 19 February 2023.

9 Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law', Law & Contemp. Probs. 68 (2005), 15-61. See also several contributions to the 'Symposium: Through the Lens of Time: Global Administrative Law After 10 Years', I.CON 13 (2015), 463-506.

10 Joseph H. H. Weiler, 'The International Society for Public Law – Call for Papers and Panels', I.CON 12 (2014), 1-3; Sabino Cassese, An International Society of Public Law', ICON.S Working Paper – Conference Proceedings Series 1, no. 1/2015, <https://images.ir pa.eu/wp-content/uploads/2011/10/1_An-International-Society-of-Public-Law2.pdf>, last accessed 15 February 2023.

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Comparisons within regions differ from global comparisons as they can often build on political agendas and wider affinities. Latin America provides a vivid example: here, much of comparative constitutional scholarship is part of a regional political push for democratic constitutionalism and trustworthy public institutions. Moreover, the region has common institutions, most importantly the Inter-American Court of Human Rights. It helps that the region's legal orders show significant affinities: the shared legacy of Iberian conquest, the *Corpus Iuris Civilis,* the *Corpus Iuris Canonici*, the United States (US) Constitution and US scholarship, the Constitution of Cádiz and French public law. They also exhibit, no less important, common problems: the marginalisation of large segments of the population, the legacy of authoritarian regimes, the shadow cast by US interests, *presidencialismo,* the weakness of many public institutions, and attacks on democratic constitutionalism. On that basis, a comparative argument holds greater sway in practical legal discourses, which is key for legal scholarship as a mostly practice-oriented endeavour.

No surprise then that Latin-America shows a rich regional discourse on public law, in particular constitutional law. The *Instituto Iberoamericano de Derecho Constitucional* provides a pivot of comparison in the service of constitutional democracy.[11] The idea of a regional discourse informs journals such as the *Revista Latinoamericana de Derechos Humanos*, the *Anuario de Derecho Constitucional Latinoamericano*, or the *Revista Latinoamericana de Derecho*. Some reconstruct a common Latin American law of human rights.[12] However, these legal phenomena do not rely on political decisions and institutions like those that underpin European law, and thus allow for a specific European comparative public law.[13]

To understand European comparative public law as part of European law requires theorising European law, i. e. a fitting concept must be developed. If the words *European law* are to embody a concept, they must identify (or distinguish) something and tie various phenomena, experiences, theoretical

11 See <https://iidc.juridicas.unam.mx/> last accessed 8 December 2022.

12 Alexandra Huneeus, 'The Inter-American Court of Human Rights: How Constitutional Lawyers Shape Court Authority' in: Karen J. Alter, Laurence R. Helfer and Mikael Rask Madsen (eds), *International Court Authority* (Osford: Oxford University Press 2018), 196-220; Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Flavia Piovesan (eds), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune* (Oxford: Oxford University Press 2017).

13 This is also true for European comparative private law, Reinhard Zimmermann, 'Comparative Law and the Europeanization of Private Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford: Oxford University Press 2019), 557-598; Andreas Schwartze, 'Comparative Law' in: Karl Riesenhuber (ed.), *European Legal Methodology* (1st edn, Cambridge: Intersentia 2017), 61-63.

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insights, or data into a connection providing insights that transcend the mere designation of issues.[14]

I suggest a concept of European law that includes EU law, the European Convention on Human Rights as well as the domestic laws that respond to European integration. Hermann Mosler was the first to articulate such a concept. As a legal architect of Germany's *Westbindung*, Mosler was important in terms of both scholarship and practice. The Frankfurt law professor served as legal advisor to Adenauer and Hallstein and later as the director of the Max Planck Institute for Comparative Public Law and International Law. In recognition of his achievements, he became the first German judge at the European Court of Human Rights (ECtHR) in 1959 and the first German judge at the International Court of Justice (ICJ) in 1976.[15] His international career symbolises the Federal Republic's successful integration into the West.

Mosler developed his concept in the context of European integration, more particularly within the major conflict personified by the sovereigntist Charles de Gaulle and the federalist Walter Hallstein. Hallstein's early successes led defenders of national sovereignty to oppose him. The French *chaise vide* policy from 30 May 1965 to 30 January 1966, which the French government used to block the transition to majority voting in the Council, is the most famous example of this opposition.[16]

The conflict between Hallstein's and de Gaulle's vision has many aspects. Here, I focus on Mosler's mediating concept of European law that encompasses Community law (now Union law), the European Convention on Human Rights as well as domestic law that responds to European integration, namely all domestic acts of implementation as well as autonomous Member State acts issued with a view to the objectives of European integration.[17] Thus, EU law is not alone in defining European law, because domestic law enjoys a constitutive function already on the conceptual, one might even say ontological level.

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14 This is, of course, but one of many ways to conceptualise concepts; this understanding relies on Reinhart Koselleck, 'Einleitung' in: Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland. Bd. 1* (Stuttgart: Klett-Cotta Verlag 1972), I-XXVII (XXIII).

15 On Mosler, see Felix Lange, 'Between Systematization and Expertise for Foreign Policy: The Practice-Oriented Approach in Germany's International Legal Scholarship (1920-1980)', EJIL 28 (2017), 535-558.

16 In detail Luke van Middelaar, *The Passage to Europe. How a Continent Became a Union* (New Haven, Connecticut: Yale University Press 2014), 54 ff.

17 Hermann Mosler, 'Begriff und Gegenstand des Europarechts', HJIL 28 (1968), 481-502; Hermann Mosler, 'European Law – Does it Exist?', Current Legal Probs. 19 (1966), 168-191.

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Mosler's move posits a body of law that spans different legal orders. He admitted that his concept was radical, writing that '[i]t breaks down the boundaries between international and domestic law'. His concept is similarly radical in that it also 'breaks down' the boundaries between different domestic legal orders, e. g. between French law and Italian law. The radical nature of the concept therefore lies in its upheaval of those distinctions that are foundational for most modern understandings of law.[18] Of course, there were holistic theories before Mosler, such as Kelsen's monism and Schmitt's *Jus Publicum Europaeum* (II. 5.).[19] But it is Mosler's holistic understanding that is tailored to the European law of the post-war order.

How does this relate to the aforementioned political conflict? Hallstein's vision of federal European institutions stood against de Gaulle's *Europe des patries*. Mosler's concept mediates between these two because it stresses that both levels are important and serve a common purpose. In other words, Mosler anticipated what would happen in the coming decades. In 1992, the framers of the Maastricht Treaty would proclaim a process for an 'even closer union among the peoples of Europe' (then Article A, para. 2 TEU; currently Article 1 para. 2 TEU). This includes a union of the various peoples' legal orders, but not one domineering legal order of the European people in a European federal state.

In 1996, Ingolf Pernice's concept of constitutional union (*Verfassungsverbund*) developed Mosler's notion and turned it into a cornerstone of the European constitutional debate of the late 1990 s and 2000 s.[20] His 'multilevel constitutionalism' seeks to articulate the manifold experiences of deep interaction between the various legal orders. Most strands of European legal pluralism, European network theories, or European federalism have similar objectives.[21] Though these theories differ from one to the other, all see the national and European legal orders so deeply entangled that their entangle-

18 Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: C. L. Hirschfeld 1899), 12-22; Pierre-Marie Dupuy, 'International Law and Domestic (Municipal) Law' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2011), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1056>,(last accessed 15 February 2023.

19 Hans Kelsen, *Pure Theory of Law (1934)*, (2nd edn, Berkely: University of California Press 1967), 320 ff.; Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum (1950)*, (Candor, NY: Telos Press 2006).

20 Ingolf Pernice, 'Die Dritte Gewalt im europäischen Verfassungsverbund', EuR 31 (1996), 27-43; see further Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?', CML Rev. 36 (1999), 703-750.

21 For a reconstruction of these debates, see Ferdinand Weber, 'Formen Europas. Rechtsdeutung, Sinnfrage und Narrativ im Rechtsdiskurs um die Gestalt der Europäischen Union', Staat 55 (2016), 151-179; for multilevel constitutionalism, see Antonio D'Atena, Costituzionalismo multilivello e dinamiche istituzionali (Torino: Giappichelli 2007).

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ment forms part of these orders' identity. Along these lines, one of the Court of Justice of the European Union's (CJEU) most important doctrines considers every Member State court as an '"ordinary" [court] within the European Union legal order'.[22]

European law encompasses a body of law that transcends the individual legal orders. It articulates what today occurs in countless legal operations throughout European society. Union law depends on national law for a myriad of reasons, not least in order to become effective in millions of legal relationships. At the same time, many legal operations under the Member States' legal orders depend on European law's transnational components.

For a long time, scholars observed this phenomenon primarily between the individual Member States and the European Union, i. e., in the vertical dimension. Yet by now, it has become clear that the horizontal interweaving of Member States' legal orders is also important and indeed transformative.[23] Even apex courts, once lonely by definition, have integrated into horizontal European networks that constitute one facet of European society (see II. 2., III. 4.).

Approaching legal phenomena with this concept of European law differs from traditional legal thinking in that the concept brings together norms that come from various legal orders[24] and continues to address its constituent parts as different legal orders (which is a presupposition for comparative law). Indeed, in principle, any decision under European law on the validity, legality, legal effects, and legitimacy of an act requires attributing this act to a specific legal order. European law does not fuse its parts but rather stands for adequate complexity. The concept suggests a relational, dynamic structure, a thick and continuous legal communication between public institutions under different legal orders, be they of various countries, the EU, or the Council of Europe. All this is European law, but not one legal order.

This adds to the distinguishing force of the concept. European law stands, on the one hand, against the traditional approach to public law according to

22 CJEU, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, Opinion 1/09, EU:C:2011:123, para. 80; see also *Amministrazione delle finanze dello Stato v. Simmenthal*, case no. C-106/77, EU:C:1978:49; Allan Rosas, 'The National Judge as EU Judge: Opinion 1/09' in: Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System. Essays in Honour of Pernilla Lindh* (Oxford; Portland, Oregon: Hart 2012), 105-122.

23 Ingolf Pernice, 'La Rete Europea di Costituzionalità – Der Europäische Verfassungsverbund und die Netzwerktheorie', HJIL 70 (2010), 51-71.

24 On this concept, see Dana Burchardt, *Die Rangfrage im europäischen Normenverbund. Theoretische Grundlagen und dogmatische Grundzüge des Verhältnisses von Unionsrecht und nationalem Recht* (Tübingen: Mohr Siebeck 2015), 15 ff., 220 ff., 242 ff.

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which 'everything can be explained through sovereignty'[25] and that strives to keep the national legal order supreme.[26] On the other hand, it is distinct from understandings that read the European developments as an instance of global governance, as similar to legal phenomena under the World Trade Organization (WTO), the United Nations, North American Free-Trade Area (NAFTA), or the Mercosur.[27] Put succinctly, European law is not the law of a national society, nor of world society, but the law of European society. Trivial as this may sound, it comes with huge repercussions, not least for comparative legal thinking.

2. European Society

European society is not a scholarly fantasy, but a legal concept. According to Article 2 TEU, all individuals living in the European Union are today part of *one* society.[28] European integration may not have produced a European state or people, but it has led to a European society. This society is intimately interwoven with European law, and particularly with EU constitutional law, for the Treaty legislator — that is, the 27 Member States' political systems in cooperation with EU institutions — avails itself of constitutional principles to characterize it. Article 2 TEU states that European society is one 'in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail' and in which the values of 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' apply. Notwithstanding the autonomy of EU law, developing these principles requires insights from the domestic legal orders.

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25 Georg Jellinek, *Die Lehre von den Staatenverbindungen (1882). Herausgegeben und eingeleitet von Walter Pauly* (Goldbach: Keip 1996), 16 ff., 36.

26 See Christian Hillgruber, 'Souveränität – Verteidigung eines Rechtsbegriffs', JZ 57 (2002), 1072-1080 (1077-1079); Agostino Carrino, *Il problema della sovranità nell'età della globalizzazione: da Kelsen allo Stato-mercato* (Soveria Mannelli: Rubbettino 2014).

27 For sophisticated elaborations, see Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, Cambridge: Cambridge University Press 2015), 14 f.; Bruno de Witte, 'The European Union as an International Legal Experiment' in: Grainne de Búrca and Joseph H. H. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press 2012), 19-56.

28 Stelio Mangiameli, 'Article 2' in: Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Berlin, Heidelberg: Springer 2013), paras 35-41; Loïc Azoulai, 'The Law of European Society', CML Rev. 59 (2022), 203-214 (203, 209).

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There are many European societies. Consider the 3000 European companies in the legal form of *Societas Europaea* and thousands of civil society organisations, ranging from the European Society of International Law to the European Society of Cardiology to the *European Society* for Spiritual Regression. The term *society* in Article 2 TEU encompasses all of these, but it refers to much more – namely, the social whole constituted by the EU Treaty, including all public institutions (supranational and domestic) with their staff, procedures, instruments, and practices, as well as all individuals under their authority.

This is a well-established meaning of society. Article 16 of the French Declaration of the Rights of Man and Citizen of 1789, one of the most important provisions of European constitutionalism, states: 'Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.' The same meaning underlies the European Convention on Human Rights. Many of its provisions feature the words 'a democratic society' (e. g. Article 6 para. 1, Article 8 para. 2, Article 9 para. 2, Article 10 para. 2, Article 11 para. 2 ECHR). In doing so, they mainly refer to the Convention states' public institutions. Of course, there are further concepts to address this social whole, such as the nation, the republic, or the state. Of these, the concept of the state is the most important, particularly in continental European constitutional traditions that are often statist.[29]

The concepts of *society* and *state* can designate the same social totality, but choosing one or the other is anything but immaterial. To mark one difference: the concept of society conceives the social whole rather from the vantage point of interacting individuals whereas the concept of state conceives it rather from the vantage point of public authority. Society is also more open on possible forms of public authority that provide for political unity. Focusing on society might help overcome statist thinking.

Article 2 refers to *European* society[30] – and not to the societies of the Member States[31] – because it uses the singular 'society'. It does not allude to the global (or world) society because it refers to the EU Member States. The reference to values also underscores that Article 2 does not understand

29 Seminal Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right (1821)* (Cambridge: Cambridge University Press 1991), para. 258. But also see Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press 2010), 208.

30 CJEU, *Centro Hospitalar de Setúbal and SUCH*, Opinion of AG Mancini, case no. C-574/12, EU:C:2014:120, para. 40; path-breaking Mangiameli (n. 28).

31 Thus Pierre-Yves Monjal, 'Le projet de traité établissant une Constitution pour l'Europe. Quels fondements théoriques pour le droit constitutionnel de l'Union européenne?', RTDE 40 (2004), 443-476 (453 ff.).

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society as only transactional as opposed to a normatively thick *community*. The European Treaties' path and terminology exhibit an almost opposite logic. In 1957, the Treaty legislator started with the *Community* of the European Economic Community (EEC) Treaty; in 2007, after half a century of integration, they postulated a society based on values.

The Treaty makers address today's quantity and quality of interaction and communication between the 27 national societies as one European society. This use of the word is sociologically robust.[32] Of course, numerous questions remain as to how to theorise European society and how to observe it. As a basic concept of European thought, society has been theorised in many different ways, and the relevant data can be reconstructed in similarly various forms. But all rely on social interaction or communicative practice.[33] Legal scholars observe such interaction or practice mainly through the study of certain texts: constitutions, treaties, laws, decrees, directives, judgments, and scholarly publications. European comparative public law has much to offer in that respect, not least because Article 2 TEU characterises European society via its pluralism. To grasp this pluralism, comparative law is essential.

Lawyers concentrate on legal disputes, which are an especially intense form of social interaction and communicative practice. Accordingly, European society is realised in the many conflicts involving the terms of Article 2 TEU, conflicts in which *European* rights, *European* justice, *European* solidarity, *European* democracy, or the *European* rule of law become contentious. Indeed, European society creates itself in these disputes.[34] European law plays a constitutive role inasmuch as it conceptualises the conflicts as European conflicts, cabins them, and renders their legal outcomes valid, effective, and legitimate. For European law to do this adequately, it takes

32 See, e. g. Orietta Angelucci von Bogdandy, *Zur Ökologie einer Europäischen Identität. Soziale Repräsentationen von Europa und dem Europäer-Sein in Deutschland und Italien* (Baden-Baden: Nomos 2003); William Outhwaite, *European Society* (Cambridge, Malden, MA: Polity 2008); Hartmut Kaelble, *Eine europäische Gesellschaft? Beiträge zur Sozialgeschichte Europas vom 19. bis ins 21. Jahrhundert* (Göttingen:Vandenhoeck & Ruprecht 2020); see also many contributions in the journal *European Societies*, e. g. Fridolin Wolf, Henning Lohmann and Petra Böhnke, 'The Standard of Living Among the Poor Across Europe. Does Employment Make a Difference?', European Societies 24 (2022), 548-579; Xavier Rambla and Rosario Scandurra, 'Is the Distribution of NEETs and Early Leavers from Education and Training Converging Across the Regions of the European Union?', European Societies 23 (2021), 563-589.

33 Hans-Peter Müller, 'Auf dem Weg in eine europäische Gesellschaft? Begriffsproblematik und theoretische Perspektiven', Berliner Journal für Soziologie 17 (2007), 7-31 (24).

34 Jiří Přibáň, 'Introduction: On Europe's Crises and Self-Constitutions' in: Jiří Přibáň (ed.), *Self-Constitution of European Society. Beyond EU Politics, Law and Governance* (2016), 1-10 (3).

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comparative law as most European legal operations involve various legal orders.

European comparative public law, in supporting such operations, not only serves European law. Comparative arguments provide a way for different parts of European society to meet and to deepen mutual knowledge. Thus, European comparative legal thinking contributes to the development of European society, however small its contribution.

3. The Role of Comparison

The consideration of domestic laws of various countries is anything but alien to transnational law.[35] Comparison has had a legal footing in international law ever since Édouard Descamps penned what is now Article 38 para. 1 lit. c ICJ Statute.[36] Yet, comparative public law is not terribly important to international law. Moreover, domestic law is traditionally understood as a 'fact' under international law; it is not considered part of it.[37]

European law scholarship, while building on international law, has always been more comprehensive. From the beginning, it has incorporated those parts of domestic law that implement and respond to the transnational parts of European law. Expositions of European law often go beyond EU law (and the European Convention on Human Rights) and extend to domestic law. Of course, scholars often only look at the domestic order they know best. But it is self-evident that European law calls for a broader reach.

In Mosler's understanding, the comparison of domestic laws serves to generate common principles that (a) help interpret transnational law, (b) help institutions make law, and (c) help identify a common *ordre public* that centres on individual rights, the rule of law, and democratic govern-

35 By transnational law, I understand legal phenomena that apply to various domestic legal orders, such as the old *Jus Publicum Europaeum* (II. 5.), international law, or European law. As I continue to distinguish between public and private law as well as between domestic, EU and international law, I do not follow the main theories of transnational law; on the latter, see Peer Zumbansen (ed.), *The Oxford Handbook of Transnational Law* (Oxford: Oxford University Press 2021).

36 Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press 2001), 161.

37 This is the traditional perspective embodied by the Permanent Court of International Justice (PCIJ)'s reasoning in *Case concerning Certain German Interests in Polish Upper Silesia*, PCIJ Ser. A No. 7, at p. 19. While this proposition still holds true in principle at a conceptual level, contemporary appraisals of the practice of international law are becoming more nuanced: see Dupuy (n. 18), paras 27 ff. The area in which the conventional understanding has been most strained is arguably that of international investment law, see Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford: Oxford University Press 2017).

ment.[38] Compared with the traditional private-law orientation of international law,[39] European law started out with a strong orientation towards public law.

Along Mosler's lines, comparative law is far more important to the European courts (the Court of Justice of the European Union, CJEU, and the ECtHR) than to the International Court of Justice or the International Tribunal for the Law of the Sea. Both institutions have special research units on comparative law. Comparison is used, for example, to determine a so-called European consensus, a weighty argumentative tool that the ECtHR uses to develop convention law.[40] Similarly, the CJEU uses 'evaluative comparison' to support its holdings.[41] Important as they are, such (rather rare) arguments in court decisions are only the tip of an iceberg.

Comparative research has flourished for the entire process of ever closer union.[42] In the 50 years since Mosler's theorisation, EU law has transformed public law in Europe. It may seem paradoxical, but the very success of integration implies a much more prominent role for domestic public laws and their comparison. Today, the study of domestic laws and their comparison has outgrown the role that Mosler assigned it in the 1960 s, when he qualified

38 Mosler (n. 17).

39 The comparison with Mosler's thought on international law is revealing; see Hermann Mosler, 'General Principles of Law' in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law. Bd. II* (1995), 511-527 (518 ff.); for a seminal analysis, see Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green and Co. Ltd. 1927).

40 Kanstantsin Dzethsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press 2015); for a view from inside the ECtHR, see Luzius Wildhaber, Arnaldur Hjartarson and Stepehn M. Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights', HRLJ 33 (2013), 248-263.

41 Ever since CJEU, *Zuckerfabrik Schöppenstedt v. Council*, Opinion of AG Roemer, case no. C-5/71, EU:C:1971:96; seminal Konrad Zweigert, 'Der Einfluß des Europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedsstaaten', RabelsZ 28 (1964), 601-643 (610 ff.).

42 Important contributions include L.-J Constantinesco, *Rechtsvergleichung* (1971); Jürgen Schwarze, *Europäisches Verwaltungsrecht* (Baden-Baden. Nomos 1988); Constanze Grewe and Hélène Ruiz Fabri, *Droits constitutionnels européens* (Paris: Presses Universitaires de France 1995); Ann-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds), *The European Court and National Courts. Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford; Portland, Oregon: Hart 1998); Peter Häberle, *Europäische Verfassungslehre* (Baden-Baden: Nomos 2002); Michel Fromont, *Droit administratif des États européens* (Paris: Presses Universitaires de France – Thémis 2006); Paolo Ridola, *Diritto comparato e diritto costituzionale europeo* (Torino: Giappichelli 2010); Albrecht Weber, *European Constitutions Compared* (Baden-Baden: Nomos 2019); Claus Dieter Classen, *Nationales Verfassungsrecht in der Europäischen Union. Eine integrierte Darstellung von 27 Verfassungsordnungen* (Baden-Baden: Nomos 2021); Enzo Di Salvatore (ed.), *Sistemi costituzionali europei* (Milano: Giuffrè 2021).

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it as a mere *Hilfswissenschaft* (ancillary science) evocative of a *Hilfsarbeiter*, i. e. a subordinate helper.[43] Four developments seem of particular importance: the formation of an EU public (constitutional and administrative) law, the Europeanisation of domestic public law, the horizontal networking of domestic institutions and the issue of national identity.

The process of ever closer union has brought about EU constitutional law and EU administrative law. Both EU constitutional law as well as EU administrative law did not develop in a vacuum, but in a field defined by the various domestic public law systems. That suggests comparative thinking, between the EU and the national level as well as between the various domestic systems. Similarly, political science has moved beyond studying integration solely through the disciplinary approach of international relations, using interests, theories and methods of comparative politics.[44]

Comparison is necessary because EU public law, to avoid conflicts, needs to be aware of the different domestic realities. Just consider the constitutional diversity among Member States. There are republics and monarchies, parliamentary and semi-presidential systems, strong and weak parliaments, strong and weak party structures, unitary, regionalised and federal orders, strong, weak as well as non-existent constitutional courts, significant divergences in institutional guarantees of judicial independence, fundamental rights, and electoral systems, and, last but not least, Catholic, Protestant, secular, socialist, statist, anarcho-syndicalist, civic, Ottoman, and post-colonial constitutional traditions. EU public law cannot aim for a homogenising modernisation.[45] Rather, it has to reflect the diversity of EU Member States (see III. 2.). To do so, it takes comparison. That is also true for public law theory: to do so convincingly, it must account for that diversity.

The frontier of that research is when EU law puts limits to that diversity under the values of Article 2 TEU, as for Hungary since 2010 and Poland since 2015. Mosler already saw a role of comparative public law for the *ordre public européen*. Today, there is sharp dispute in European society on what falls under the common constitutional traditions that feed the principles of Article 2 TEU. In that dispute, comparative arguments are playing a role.[46]

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43 Mosler (n. 17), 489.

44 Wilhelm Knelangen, 'Ist die Europäische Union ein Fall für die Vergleichende Regierungslehre?' in: J. Varwick and Wilhelm Knelangen (eds), *Neues Europa, alte EU? Fragen an den europäischen Integrationsprozess* (Wiesbaden: Springer 2004), 113-132.

45 Wolfgang Zapf, 'Die Modernisierungstheorie und unterschiedliche Pfade gesellschaftlicher Entwicklung', Leviathan 24 (1996), 63-77.

46 See Opinion no. 833/2015 of the Venice Commission of 11 March 2016, available at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29001-e> last accessed 4 November 2022, in particular 16, 17, 21 and 22.

The second dimension of comparative arguments regards the 'Europeanisation' of domestic public law.[47] In the process of ever closer union, the domestic legal orders are transforming. Yet, EU law mostly leaves many options open: national public law can adapt in various ways. In such a situation, many domestic institutions and academics consider how the institutions and academics of other domestic systems are considering to respond. The set-up of many conferences organised by the International Federation of European Law (FIDE) has served that type of comparative learning, which explains the prominence of national reports. Tedious as they often are, they are key to the operation of European law.

Comparative reasoning has further gained importance for the networking among domestic institutions. Once, domestic public law created a self-contained sphere of legal communication; contacts with public institutions of other countries went mostly through the foreign ministry. Today, things are starkly different: it is normal that members of government and of parliament, public officials, administrators, and judges engage with their European peers when preparing to exercise their powers, and they do so often within institutionalised networks. Even institutions such as supreme and constitutional courts – once at the lone peak of their branch of government – have formed institutionalised networks that inform their jurisprudence.[48] Though sometimes required by EU law, much of this activity among domestic institutions is autonomous.

This horizontal opening of national legal spaces transcends the original understanding of European law and stresses its comparative dimension. To compare one's own domestic setting with that of another legal order has become a routine experience for many practitioners in Europe. Accordingly, knowledge of other legal systems and comparative reasoning helps lawyers, civil servants, or judges interacting in European society to understand their colleagues and adjust their line of argument accordingly.

Domestic courts, in particular apex courts, provide a well-studied example. They increasingly employ researchers with a comparative brief, as important domestic court rulings are often of interest across Europe. Many courts want to be heard abroad and thus publish decisions in English. It seems normal by now that verdicts of foreign colleagues inform the judges' work, even if that

47 See Michael Bobek, 'Europeanization of Public Law' in: Armin von Bogdandy, Peter M. Huber and Sabino Cassese (eds), *The Max Planck Handbooks in European Public Law, Volume I: The Administrative State* (Oxford: Oxford University Press 2017), 631-673.

48 Christoph Grabenwarter, 'Summary of the Results for the Previous Sessions' in: Verfassungsgerichtshof der Republik Österreich (ed.), *The Cooperation of Constitutional Courts in Europe: Current Situation and Perspectives, Volume 1* (Vienna: Verlag Österreich 2014), 169, 170 f.

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source is not always cited.[49] Domestic courts use the comparative argument in particular to justify far-reaching decisions. As a sound use requires some systemic knowledge to avoid misreading, this calls for academic texts that provide *structural* knowledge, illuminate critical issues and monitor comparative practice.

The horizontal networking is important for an ever closer union as it thickens European society. This does not imply that horizontal networking always supports European institutions. Indeed, it also operates to constrain centralisation, as shown by the reciprocal citing of constitutional courts in rulings that control European institutions.[50] This leads to a further aspect: early European comparative law seemed partisan to advancing integration, but its success also led to a renewed emphasis on constraints. Today, comparative European public law is not only about advancing but also about resisting top-down Europeanisation. The *ever closer union* is no synonym for *ever more centralisation*, but about European democratic constitutionalism, peace and well-being (Article 3 para. 1 TEU).

Ironically, and coming to the fourth factor, the 'identity' protection has a strong comparative element, as it has developed in a European discourse.[51] In that process, domestic public law has developed a new function, that of expressing national identity. More than ever, it appears politically, legally, and normatively unfeasible that EU law dominates European law in the way that federal law reigns over the law of the federated states (provinces, *Länder*). Member State public law has certainly not become a second-tier topic as state/*Länder*/canton law in the US, Austria, Germany or Switzerland. Most Europeans feel too diverse for such centralisation. Studying other legal orders helps understand valued differences, while such studies, in a dialectical twist, increase mutual knowledge, and, often, understanding.

All these developments have built comparative arguments into the fabric of European law. Some focus on operational logics, be they common or divergent, others on how specific issues are tackled under the various legal systems of European society. Often, the interest in other

49 See Andreas Voßkuhle, 'Constitutional Comparison by Constitutional Courts – Twelve Observations from Twelve Years of Constitutional Practice', ELTE Law Journal 5 (2023), forthcoming.

50 Mattias Wendel, 'Die Europa-Entscheidungen der Verfassungsgerichte' in: Christoph Grabenwarter and Erich Vranes (eds), *Kooperation der Gerichte im europäischen Verfassungsverbund – Grundfragen und neueste Entwicklungen* (Zürich: Dike, Wien: Manz, Baden-Baden: Nomos 2013), 134.

51 See the contributions in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge: Cambridge University Press 2020).

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domestic legal orders involves the objective to adjust one's own system, as its embedding in European society requires reconstructing those domestic legal orders in light of the new, larger context. European integration has led historians to reconsider national histories in a common frame;[52] studies of literature have undertaken similar work.[53] Likewise, legal scholars review domestic law for which European comparative public law is an important tool.[54]

Along these lines, comparative arguments have become an established and ever more expected element of legal scholarship in European society. This furthers a common European legal culture. By common culture, I mean that legal actors from multiple and diverse legal systems operating within a shared framework of knowledge, arguments, practices, values, and understanding.[55] That emerging European culture, however, does not seem to fuse legal minds into one mindset, but rather to support a diverse European society (IV.).

4. The Bases and Standards for European Comparative Arguments

Fortunately, European comparative arguments can rely on a sound legal foundation and rather straightforward methods. I start with the first element, the legal foundation, as it is the key to the specialty of European comparative public law compared to comparative public law in general. The second step will then discuss what I consider the most important methodological standards. Finally, I address the possible uses of comparative arguments.

Comparativists have forever pleaded to give comparative law a key practical role. The Paris *Congrès international de droit comparé* of 1900 advocated

52 For a masterpiece, see Tony Judt, *Postwar. A History of Europe Since 1945* (Munich: Penguin 2005); however, Judt gets some details of European integration wrong. Similar comparative studies can be found in the journal *Comparative Studies in Society and History*.

53 See Piero Boitani and Massimo Fusillo (eds), *Letteratura europea* (Torino: UTET 2014); César Domíngez, *Literatura europea comparada* (Madrid: Arco Libros 2013).

54 For a fine example Christoph Schönberger, *Der "German Approach". Die deutsche Staatsrechtslehre im Wissenschaftsvergleich* (Tübingen: Mohr Siebeck 2015).

55 Susana de la Sierra, *Una metodología para el Derecho comparado europeo: Derecho público comparado y Derecho administrativo europeo* (Madrid: Civitas 2004), 67 ff.; Peter Häberle and Markus Kotzur, *Europäische Verfassungslehre* (8th edn, Baden-Baden: Nomos, Zürich: Dike 2016), 104-111.

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that it should harmonise the law of peoples *de même civilisation*.[56] In 1949, Konrad Zweigert, the founder of the functional method of comparative law, presented it as a 'universal interpretive method'. In 1989, Peter Häberle declared comparison the 'fifth' method of interpretation.[57] In 2016, Jürgen Basedow considered it 'obligatory'.[58]

Yet, global comparative arguments have not become pervasive, and I think for a good reason.[59] Their normative foundations are too weak. Eduard Gans, perhaps Germany's first true legal comparativist, believed that universal reason is the foundation of comparative law.[60] Today's equivalent might be a global constitutionalism that posits the United Nations Charter of 1945 and the two Covenants of 1966 as the constitutional law of humankind. In my opinion, such constitutionalism lacks a legal, political, and societal basis.[61] World society, if that is a meaningful concept, is certainly not characterised by the principles of the United Nations (UN) Charter and the Covenants.

Accordingly, I agree with those contemporary public-law comparativists who do not consider that global comparisons are embedded in or leading to a general law that rules the various legal orders. Vicki Jackson sums it up well. This leading advocate of global comparison suggests 'engagements' between legal orders to argue for the relevance of global comparisons.[62] However, she does not assert a layer of common legal normativity, not even among democratic countries such as Denmark, Israel, and the United States of America. This fits well with the general understanding of Article 38 para. 1 lit. c ICJ Statute that links global comparative law with international law: there are only few (public-)law principles in universal international law.

56 See Édouard Lambert, 'Théorie générale et méthode' in: Congrès International de Droit Comparé (ed.), *Procès-verbaux des séances et documents, tome 1* (Paris: LGDJ 1905), 26-61 (38 ff.)

57 Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als "fünfter" Auslegungsmethode', JZ 44 (1989), 913-919 (916 ff.).

58 Jürgen Basedow, 'Hundert Jahre Rechtsvergleichung. Von wissenschaftlicher Erkenntnisquelle zur obligatorischen Methode der Rechtsanwendung', JZ 71 (2016), 269-280.

59 Karl Riesenhuber, 'Rechtsvergleichung als Methode der Rechtsfindung?', AcP 218 (2018), 693-723.

60 See Heinz Mohnhaupt, 'Universalrechtsgeschichte und Vergleichung bei Eduard Gans' in: Reinhard Blänkner, Gerhard Göhler and Norbert Waszek (eds), *Eduard Gans (1797-1839). Politischer Professor zwischen Restauration und Vormärz* (Leipzig: Leipziger Universitätsverlag 2002), 339-366; Stefan Vogenauer, 'Rechtsgeschichte und Rechtsvergleichung um 1900: Die Geschichte einer anderen "Emanzipation durch Auseinanderdenken"', RabelsZ 76 (2012), 1122-1154 (1127).

61 von Bogdandy, Goldmann and Venzke (n. 1), 126 f.

62 Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press 2010).

There is at best a very thin layer of a common public law for world society. This does certainly not detract from the epistemic legitimacy of a global comparative law in the context of scholarly endeavours. However, the robust use of comparative arguments in the very practice of public law, which is implicit in the accounts referred to above, seems to lack sufficient normative grounding.

The situation is very different in European society. It displays conditions that can accommodate Zweigert's, Häberle's, and Basedow's pleas for a mainstreaming of comparative arguments. EU Member States have formed a union (Article 1 para. 2 TEU) and one society, (Article 2 sentence 2 TEU). That union includes the domestic legal orders. Article 2 TEU subjects these legal orders to a common set of constitutional standards. Any legal act of any public authority in European society is bound by these standards.[63] Thus, European legal comparison operates within one society and one constitutional frame, contrary to comparisons even with other democracies, such as Israel, the United Kingdom, or the United States of America.

The standards for doing comparative research are, however, basically the same between European comparative public law and other comparative endeavours. A comparative exercise has to answer the question whether the laws it compares are comparable.[64] Article 2 TEU answers that question for the legal orders that the Treaty on European Union unites, as it posits that these legal orders are part of one society under one set of constitutional principles. Under Article 2 TEU, a legal solution under one legal order can be presumed to be, in principle, legitimate throughout European society.[65] For Article 2 TEU, legal comparisons in European society compare apples with apples. Moreover, most European comparative research shares a common framework as it mostly relates, in some way or the other, to the process of 'an ever closer union among the peoples of Europe' (Article 1 para. 2 TEU).

A further important methodological issue is whether a comparative study must consider all 27 Member States, as the principle of equality (Article 4 para. 2 TEU) seems to suggest. Indeed, the procedures for all EU law-making involves all Member States, and the European courts employ considerable staff for comparative studies (III. 3.). However, such

63 In detail on Article 2 TEU, see Luke Dimitrios Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (Oxford: Oxford University Press 2023).

64 For the established understanding of this point, see Giuseppe De Vergottini, *Diritto costituzionale comparato* (5th edn, Padua: CEDAM 1999), 42 ff.

65 Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine. How to Protect Checks and Balances in the Member States', CML Rev. 57 (2020), 705-740.

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research requires library, financial, human, and time resources that only the European institutions can usually provide.[66] Scholarly practice is generally selective, and that is fine. I have never heard that any academic comparative study is flawed simply because it did not involve all 27 domestic legal orders.

However, a selection requires justification. Considering the importance of comparative law for European society, but also the difficulties it involves, I find it convincing that the justificatory requirements are modest. Many grounds are accepted as justifying selective choices, not least that of limited language proficiency and limited time resources (see the selection made in III. 3. below).

At the same time, there is one strict rule. It is unacceptable to select only what confirms the desired result and to deliberately avoid contradictory findings. Antonio Scalia put it in what is arguably the most famous statement on the comparative method: 'To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.'[67] European scholars must, to the extent they are capable of doing so, search for typical patterns as well as divergences.[68]

There is also an expectation that, in most cases, research should go beyond abstract rules and doctrines. Indeed, most academics discuss, with different emphases, historic trajectories, social functions, and the legal, but also the cultural, economic, political, and social context.[69] I under-

66 The CJEU publishes some of its comparative research, see CJEU, *Research Note. Application of the Cilfit Case-Law by National Courts or Tribunals against whose Decisions there is No Judicial Remedy under National Law*, (2019) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit_synthese_en.pdf>, last accessed 15 February 2023. On the CJEU's comparative approach, Koen Lenaerts, 'Discovering the Law of the EU: The European Court of Justice and the Comparative Law Method' in: Siniša Rodin and Tamara Perišin (eds), *The Transformation or Reconstitution of Europe. The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (London: Bloomsbury 2018), 61-87. On the ECtHR's comparative approach, Mónika Ambrus, 'Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law', Erasmus Law Review 2 (2009), 353-371.

67 USSC, *Roper v. Simmons,* 543 U.S. 551, 627 (2005) (Scalia, J, dissenting). For criticism of the CJEU along these lines, see Michaël Bardin, 'Depuis l'arrêt Algera, retour sur une utilisation "discrète" du droit comparé par la Cour de justice de l'Union européenne' in: Tierry Di Manno (ed.), *Le recours au droit comparé par le juge* (Brussels: Bruylant 2014), 97-108 (97 ff., esp. 101).

68 Attila Vincze, 'Europäisierung des nationalen Verwaltungsrechts. Eine rechtsvergleichende Annäherung', HJIL 77 (2017), 235-267 (246 ff.).

69 On this need, see Jan Muszyński, 'Comparative Legal Argument in the Polish Discussion on Changes in the Judiciary', JöR 68 (2020), 705-720.

stand my approach (see III.) along those lines as 'contextualised functionalism'.[70] This concept, though, does not entail any precise protocol for successful research. The *function* of any law, i. e. its contribution to the viability of society, is not a given, but needs to be construed for the purpose of the research undertaken. This understanding of function is much broader than originally when it meant how the law solves a specific conflict.

Hence, the concept of function only shows the necessity to develop a meaningful research question. The same is true for the context: there is no fixed set of criteria what to consider. To present a successful study, all depends on a well-argued answer to a good research question. In that respect, comparative research shows little difference to other scholarly endeavours.

There are many good uses of comparative arguments. After all, comparison is a standard method of human insight and normative argumentation.[71] Comparative law may even play a role similar to that of experimentation in other disciplines.[72] As in general comparative law, three uses of comparison in public-law research appear dominant: to confirm a statement, to develop a broader conceptual framework, but also to highlight a contrast.[73] Indeed, European comparative analysis can show European institutions if an envisioned act or decision is incompatible with a domestic constitutional order, and hence might lead to deep controversies.

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70 See Kischel (n. 2), 87 ff.; Ralf Michaels, 'The Functional Method of Comparative Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford: Oxford University Press 2019), 345-389. With a stronger focus on contextualization Günter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law', Harv. Int'l L. J. 26 (1985), 411-456; Vicki C. Jackson, 'Comparative Constitutional Law: Methodologies' in: Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012), 54-74.

71 Matthias. Ruffert, 'The Transformation of Administrative Law as a Transnational Methodological Project' in: Matthias Ruffert (ed.), *The Transformation of Administrative Law in Europe* (Munich: Sellier 2007), 3-7 (5).

72 Martin Shapiro, *Courts. A Comparative and Political Analysis* (Chicago: Chicago University Press 1981), viii.

73 Mattias Wendel, 'Richterliche Rechtsvergleichung als Dialogform: Die Integrationsrechtsprechung nationaler Verfassungsgerichte in gemeineuropäischer Perspektive', Der Staat 52 (2013), 339-370 (344 ff.); Tania Groppi and Marie-Claire Ponthoreau, 'The Use of Foreign Precedents by Constitutional Judges. A Limited Practice, an Uncertain Future' in: Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (London: Bloomsbury 2013), 411-432 (424 ff.); Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', AJIL 102 (2008), 241-274 (241 ff.).

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There are also objectionable uses. The most important one is suggesting commonality where it does not exist, as did the CJEU's *Mangold* judgment on age discrimination[74] or the German Federal Constitutional Court's *PSPP* judgment when it claimed to be representative of the European mainstream.[75] Particularly crass is the Hungarian Constitutional Court in the way it uses comparative law to support authoritarian tendencies.[76]

As a means of legal argumentation, European comparative law involves assessing the externalities of domestic decisions, i. e. their impact on other legal orders. Given the interdependence of legal orders within European society, a legislative, administrative, or judicial decision may well have significant repercussions or consequences outside the legal order in which it was taken. To consider such externalities is part of the common responsibility for European society (III. 4.).

The consideration of consequences is today accepted as part of legal reasoning, albeit usually only within the framework of the national legal order.[77] In European society, this common responsibility implies that this framework extends to all united legal orders. Thus, a national court must consider whether a possible interpretation could lead to the insolvency of the Greek state or encourage authoritarian tendencies in other Member States. Blanking out such consequences fails European responsibility and amounts to what one might call epistemic nationalism.[78] Looking beyond one's national borders is essential to ensuring reasonable outcomes in European society.

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74 CJEU, *Mangold*, case no. C-144/04, EU:C:2005:709, paras 74 ff.; see Basedow (n. 58), 275; Ulrich Preis, 'Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht. Der Fall "Mangold" und die Folgen', NZA 23 (2006), 401-456 (401, 406).

75 BVerfGE 154, 17, *Public Sector Purchase Programme – PSPP,* paras 124 ff.; Diana-Urania Galetta, 'Karlsruhe über alles? The Reasoning on the Principle of Proportionality in the Judgment of 5 May 2020 of the German BVerfG and Its Consequences', Rivista Italiana di Diritto Pubblico Comunitario 14 (2020), 166-178.

76 Beáta Bakó, 'The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, *Ultra Vires*- and Fundamental Rights Review in Hungary', HJIL 78 (2018), 863-902.

77 Gertrude Lübbe-Wolff, *Rechtsfolgen und Realfolgen. Welche Rolle können Folgenerwägungen in der juristischen Regel- und Begriffsbildung spielen?* (Freiburg [u.a.]: Alber 1981), 156 f.; Andreas Voßkuhle, 'Neue Verwaltungsrechtswissenschaft' in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts, Bd. 1* (Munich: C. H. Beck 2006), § 1, paras 32 ff.

78 See Michael Zürn, 'Politik in der postnationalen Konstellation. Über das Elend des methodologischen Nationalismus' in: Christine Landfried (ed.), *Politik in einer entgrenzten Welt. 21. wissenschaftlicher Kongreß der Deutschen Vereinigung für Politische Wissenschaft* (Cologne: Verlag Wissenschaft und Politik 2001); Anne Peters, 'Die Zukunft der Völkerrechtswissenschaft. Wider den epistemischen Nationalismus', HJIL 67 (2007), 721-776.

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For all these reasons, comparative reasoning is part of European law. But what is its normative reach? Can the comparative method yield 'the best' answer to a legal question? I cannot see how that might work. Indeed, comparative public law has always known that almost no legal prescription is just a best technical solution, but somehow is also always political.[79] For that reason, comparative public law usually presents not the best solution, but rather thoughts for understanding, reflection, critique, and construction.[80] Such usage today comes with Zweigert's term of 'evaluative comparison'.[81] The constructions that result from such comparisons are what the EU Treaties call 'common' or 'generally recognised principles' or 'traditions common to the Member States'.[82] While neither these (nor other) concepts answer all epistemic questions, they do provide a viable frame, as the flourishing of the field shows.

5. European Public Law, Old and New

Finally, a historical comparison helps theorise the special nature of European comparative public law. There is the old European public law and the new European public law informed by Article 2 TEU. Both have a strong comparative law component, but differ greatly in many other respects. The old European comparative public law emerged after the Peace of Westphalia of 1648 put an end to the idea of Christian political unity.[83] Joachim Hagemeier's *Juris Publici Europaei* is probably the first European comparativist

79 Rudolf Bernhardt, 'Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht', HJIL 24 (1964), 431-452 (432 f.).

80 Philipp Dann, 'Thoughts on a Methodology of European Constitutional Law', GLJ 6 (2005), 1453-1473 (esp. 1427 ff.); Eberhard Schmidt-Aßmann, 'Zum Standort der Rechtsvergleichung im Verwaltungsrecht', HJIL 78 (2018), 807-862 (esp. 836 ff., 850 ff.).

81 Zweigert (n. 41), 610 f.

82 See Article 6 para. 3 TEU, Article 340 para. 2 TFEU, Article 83 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version), OJ 2009 L 78/1; Sabino Cassese, 'The "Constitutional Traditions Common to the Member States" of the European Union', Riv. Trimestr. Dir. Pubbl. 67 (2017), 939-948; see also Peter M. Huber, 'Die gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten – Identifizierung und Konkretisierung', EuR 57 (2022), 145-276.

83 Derek Croxton, *Westphalia. The Last Christian Peace* (New York: Palgrave Macmillan 2013). The following section is based on Armin von Bogdandy and Stephan Hinghofer-Szalkay, 'European Public Law – Lessons from the Concept's Past' in: Armin von Bogdandy, Peter M. Huber and Sabino Cassese (eds), *The Max Planck Handbooks in European Public Law, Volume I: The Administrative State* (Oxford: Oxford University Press 2017), 30-56.

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monograph to explore what that meant.[84] It consists of eight volumes, published between 1677 and 1680. They contain reports on Denmark, Norway and Sweden, France, England, Scotland and Ireland, Belgium and the Netherlands, Hungary and Bohemia as well as Poland, the Principality of Moscow, Italy, and, last but not least, the Holy Roman Empire of the German Nation.[85] The work provided an extensive overview of public laws in Europe. European comparative public law began as a chronicler of sovereign states.

Later, European public law gained a deeply conservative meaning. After the French Revolution, Charles Maurice de Talleyrand-Périgord, one of the deftest statesmen of his time, used the concept of a *droit public européen*, with an even restorative note. After the Holy Alliance had defeated the French revolutionary transformation of Europe, Talleyrand advocated monarchical legitimacy as the guiding principle of a *droit public européen.*[86] Talleyrand argued that the *droit public européen* protected monarchical sovereignty just as the domestic *droit public* protected private property.

After the Second World War, the public-law scholar Ernst Rudolf Huber elaborated this legitimistic notion. His ground-breaking *Deutsche Verfassungsgeschichte seit 1789* (*German Constitutional Law After 1789*) assigned the *Jus Publicum Europaeum* a function for both domestic *and* international law under the *Ancien Régime*. In Huber's view, the *Jus*

84 The title reads *Juris Publici Europaei*, and not *Jus Publicum Europaeum,* because it is the genitive to *Epistola*, Joachim Hagemeier, *Juris Publici Europaei de Trium Regnorum Septentrionalium Daniae, Norvvegiae & Sveciae Statu, Epistola Prima* (Frankfurt a. M.: Beyer 1677); Joachim Hagemeier, *Juris Publici Europaei de Statu Galliae, Epistola II* (Frankfurt a. M.: Beyer 1678); Joachim Hagemeier, *Juris Publici Europaei de Statu Angliae, Scotiae Et Hiberniae, Epistola III* (Frankfurt a. M.: Beyer 1678); Joachim Hagemeier, *Juris Publici Europaei de Statu Imperii Germanici, Epistola IV* (Frankfurt a. M.: Beyer 1678); Joachim Hagemeier, *Juris Publici Europaei de Statu Provinciarum Belgicarum, Epistola V* (Frankfurt a. M.: Beyer 1679); Joachim Hagemeier, *Juris Publici Europaei de Statu Italiae, Epistola VI* (Frankfurt a. M.: Beyer 1679); Joachim Hagemeier, *Juris Publici Europaei de Statu Regnorum Hungariae et Bohemiae, Epistola VII* (Frankfurt a. M.: Beyer 1680); Joachim Hagemeier, *Juris Publici Europaei de Statu Regni Poloniae et Imperii Moscovitici, Epistola VIII* (Frankfurt a. M.: Beyer 1680).

85 On the methodology used, see Heinz Mohnhaupt, '"Europa" und "ius publicum" im 17. und 18. Jahrhundert' in: Christoph Bergfeld et al. (eds), *Aspekte europäischer Rechtsgeschichte. Festgabe für Helmut Coing zum 70. Geburtstag* (Frankfurt a. M.: Klostermann 1982) 207-232 (esp. 219-224); for a reconstruction, Heinz Mohnhaupt, *Rechtsvergleichung als Erkenntnisquelle. Historische Perspektiven vom Spätmittelalter bis ins 19. Jahrhundert* (Frankfurt a. M.: Klostermann 2022).

86 Paul Louis Couchoud and Jean Paul Couchoud (eds), *Mémoires de Talleyrand. Tome II* (Paris: Plon 1957), 436 ff.; Wilhelm G. Grewe, *The Epochs of International Law* (Berlin, New York: de Gruyter 2000), 430 f.; Duff Cooper, *Talleyrand* (Leipzig: Insel Verlag 1955), 232 f.

Publicum Europaeum of that time consisted of the law of interstate relations as well as of 'inviolable' elements of a common European constitutional law.[87] He considered the European monarchies' intervention in revolutionary France justified, for the revolutionary overthrow and execution of Louis XVI had violated the European constitutional principle of monarchical legitimacy.

Of all the books on the European public law, none is as famous as Schmitt's *Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, published in 1950.[88] Schmitt's concept, like Talleyrand's and Huber's, encompasses international law as well as the constitutional orders of the European states.[89] Schmitt doubles down on Talleyrand and Huber as he uses it to justify the German war of aggression.[90] In summary, the normative thrust of comparison within the old European public law was almost the complete opposite to that of the new one that is informed by Article 2 TEU.

In 1954, Paul Guggenheim, a Swiss scholar of international law, articulated the fallacies of Schmitt's concept and heralded the new European public law.[91] 'Concerning its substantive content', he denounced the *Jus Publicum Europaeum* as 'an ideological interpretation of numerous rules of general international law'. At the same time, he projected that the European Coal and Steel Community of 1952 could lead to a true *Jus Publicum Europaeum* that stands between universal international law and the domestic legal systems of Europe. Guggenheim's concluding sentence is prophetic. 'It would be no small irony in world history if the sovereign state […] were to undergo a structural transformation due to the blossoming of the Jus publicum europaeum.'[92] This is what occurred (II. 1.), providing for the special character of European comparative public law, as shown by the development of constitutional adjudication.

87 Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789. Bd. 1. Reform und Restauration. 1789 bis 1830* (Stuttgart: Kohlhammer 1957), 16 ff.

88 Jochen Hoock, 'Jus Publicum Europaeum. Zur Praxis des europäischen Völkerrechts im 17. und 18. Jahrhundert', Staat 50 (2011), 422-435.

89 Carl Schmitt, *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969*, (Berlin: Duncker & Humblot 1995), 592 ff.

90 Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Bd. 1. Reichspublizistik und Policeywissenschaft 1600-1800* (Munich: C. H. Beck 2012), 204.

91 Paul Guggenheim, 'Das Jus publicum europaeum und Europa', JöR 3 (1954), 1.

92 Guggenheim (n. 91), 14.

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III. A Test with Constitutional Adjudication

1. To be an Apex among Apices

How useful is this theorisation of European comparative public law? As a test case, I apply it to domestic apex courts. Applying contextualised functionalism, I start by suggesting that apex courts exercise various functions, i. e. they contribute in various ways to the viability of society. They decide in a concrete dispute, in a definitive manner, what the law is; via deciding such disputes, they also stabilise normative expectations throughout society; they control and thereby legitimate authority; and, finally, they establish precedents, i. e. they engage in law-making.[93]

To be sure, other distinctions are possible. One could distinguish whether a certain function is legally posited, whether it lies within the horizon of the judges' consciousness, or how direct the connection is between a judicial decision and its impact on society. Moreover, Niklas Luhmann considers only one function for every social system, due to his theoretical set-up. But such theoretical purity is hard to maintain. Indeed, Luhmann finds himself compelled to introduce a number of other 'contributions' of court decisions to keep his theory plausible.[94] Not being a theoretical purist, I think a multifunctional approach works fine.

The point of departure of this research is that apex courts are transforming in European society. In the process of ever closer union, domestic courts have become part of a 'union of courts'.[95] It is self-evident that a union of apex courts transforms these courts: as an apex is the highest peak and thereby implies exclusivity, this core characteristic is affected by the multiplication of equally-ranking apices. The overall research question then is to gather insights from various European legal orders that help grasp, manage, and orient that transformation in light of ever closer union, properly understood (I.). This is an open research question. Whether it is nevertheless meaningful is for the reader to judge after having read the next 20 pages.

93 On the functions of apex courts, Peter M. Huber, 'Constitutional Courts and Politics in the European Legal Space' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume IV: Constitutional Adjudication: Common Themes and Challenges* (Oxford: Oxford University Press 2023), 547-589; Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press 2014), 21, 101 ff.

94 Niklas Luhmann, *Law As a Social System* (Oxford: Oxford University Press 2008), 167-172.

95 CJEU. Opinion 1/09 (n. 22), para. 80; Rosas (n. 22), 105; see also Andreas Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts', Eu Const. L. Rev. 6 (2010), 175-198.

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Under a functional approach, to study that transformation one should look at how the union impacts the general functions performed by apex courts.[96] On the function of deciding a concrete dispute, and, as an apex court, *ultimately* deciding a concrete conflict, the situation is now that there is no such finality any more: somehow, any decision can be raised before another court. Concerning the stabilisation of normative expectations, the decision of a domestic court can affect expectations throughout European society, as the *Bundesverfassungsgericht's PSPP*-judgment showed when disapplying a CJEU decision.[97] That brings us to the function of controlling and thereby legitimising authority: most apex courts claim the authority to control CJEU and ECtHR decisions. Thereby, they can support the legitimacy of European decisions (via adding their own), but they can also create conflicts, as the *PSPP*-judgment shows. Last, but not least, the precedents of apex courts participate in establishing the meaning of EU law, in particular the meaning of the values of Article 2 TEU, which can also lead to conflicts. All the functions I posited in the opening of the present Section can thus be maintained to have been profoundly impacted by the emergence of the union of apex courts I hereby study.

To grasp comparatively the transformation, I start, informed by historical institutionalism, by comparing how constitutional adjudication has unfolded in the various legal orders. The presentation proofs the overall take of 'united in diversity': there is a basic common development, but there are also multiple modernities (III. 2.). Moreover, there are huge differences when it comes to the authority of apex courts to impact European society that sits uneasily with the principle of equality of Member States (Article 4 para. 2 TEU).[98] The next step focusses on how three courts have construed their domestic authority on which their European authority is built (III. 3.). This also provides insights for the reproach against European courts that they are acting *ultra vires*. Last, I compare how conflicts are handled (III. 4.).

96 See Christoph Grabenwarter, 'Zusammenfassung der Ergebnisse der vorangegangenen Sitzungen für den XVI. Kongress der Konferenz der Europäischen Verfassungsgerichte' in: Verfassungsgerichtshof der Republik Österreich (ed.), *Die Kooperation der Verfassungsgerichte in Europa. Aktuelle Rahmenbedingungen und Perspektiven* (Vienna: Verlag Österreich 2014), 174.

97 Martin Wolf, 'German Court Decides to Take Back Control with ECB Ruling', Financial Times (13 May 2020), 17, <https://www.ft.com/content/37825304-9428-11ea-af4b-499244625ac4>, last accessed 8 December 2022; Noel Dorr, 'Why Is a German Court Undermining the European Union?', The Irish Times (28 May 2020), <https://www.irishtimes.com/opinion/why-is-a-german-court-undermining-the-european-union-1.4263978>, last accessed 8 December 2022; Julien Dubarry, 'Prendre la Constitution au sérieux. Regard franco-allemand sur l'enchevêtrement des discours juridique et politique au prisme de la proportionnalité', D. S. Jur. 27 (2020), 1525-1533.

98 Antoine Vauchez, 'Vicarious Hegemony. The German Crisis of European Law', Verfassungsblog (6 October 2020) <https://verfassungsblog.de/vicarious-hegemony/>, last accessed 15 February 2023.

2. Common Developments and Multiple Modernities

Any institution transforms along its path. To some extent, the apex courts have attained their current role along similar paths.[99] None of them had an important role on constitutional issues until well into the twentieth century.[100] Judicial review of legislation against standards such as those entrenched in Art. 2 TEU was at best an *optional* component of democratic constitutions. The most important interwar book of comparative public law considered it rather a democratic imperative to immunise legislation, i. e. parliamentary statutes, against judicial review.[101] The Conference of European Constitutional Courts was founded in 1972 with only four members – the German Federal Constitutional Court and the Austrian, Italian, and Yugoslavian Constitutional Courts.[102]

Then, a grand transformation began.[103] Today, the Conference of European Constitutional Courts has forty members, many of which decide important controversies and shape society. This transformation has proved popular: in rankings of public confidence, constitutional courts generally perform very well and far ahead of political actors.[104] Everywhere, courts have assumed the function of entrenching, but also of developing constitu-

99 Pedro Cruz Villalón, 'The Evolution of Constitutional Adjudication in Europe', in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume IV: Constitutional Adjudication: Common Themes and Challenges* (Oxford: Oxford University Press 2023), 1-50; Carl Schmitt, *Der Hüter der Verfassung* (1932) (5th edn, Berlin: Duncker & Humblot 2016), partially translated in: Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press 2015).

100 See Sabino Cassese, 'The Administrative State in Europe' in: Armin von Bogdandy, Peter M. Huber and Sabino Cassese (eds), *The Max Planck Handbooks in European Public Law, Volume I: The Administrative State* (Oxford: Oxford University Press 2017), 57-97 (60 ff.); Michel Fromont, 'A Typology of Administrative Law in Europe' Sabino Cassese, 'The Administrative State in Europe' in: Armin von Bogdandy, Peter M. Huber and Sabino Cassese (eds), *The Max Planck Handbooks in European Public Law, Volume I: The Administrative State* (Oxford: Oxford University Press 2017), 579-599 (585 ff.).

101 Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis. L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Paris: LGDJ 1921).

102 See <www.confeuconstco.org>, last accessed 8 December 2022.

103 This is a global phenomenon: see Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in: David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development – A Critical Appraisal* (Cambridge: Cambridge University Press 2006), 19-73 (63).

104 Christine Landfried, 'Constitutional Review in the European Legal Space: A Political Science Perspective', in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume IV: Constitutional Adjudication: Common Themes and Challenges* (Oxford: Oxford University Press 2023), 591-612.

tional law that feeds the traditions on which Article 2 TEU is premised. However, there are also countermoves, most importantly by the Hungarian and Polish constitutional courts.

If apex courts have become important everywhere, the ways they exercise their functions are anything but uniform. The many institutions of constitutional adjudication in European society exhibit manifold differences, and it requires contextualisation to understand them. Their diversity explains why I study the phenomenon of *constitutional adjudication* rather than simply constitutional courts. Only nineteen EU Member States have a specific constitutional court, if we consider the *Conseil constitutionnel* as such,[105] but eight EU Member States, namely Denmark, Estonia, Finland, Greece, Ireland, the Netherlands, Sweden, and Cyprus, do not.[106] The diversity of constitutional adjudication validates the theorem of multiple modernities[107] even for the small group of countries that form European society. The idea of one modernity exemplarily realised in one society is obsolete. The many paths of European constitutional adjudication do not follow any one model, especially not the so-called European (i. e. Kelsenian) model of constitutional adjudication.[108]

The diversity in constitutional adjudication has many reasons. One is that the relevant institutions were established at different times in different contexts and then developed accordingly, as historical institutionalism explains with the concepts of critical junctures and path dependency.[109] The spectrum

105 Olivier Jouanjan, 'Constitutional Justice in France' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 223-278 (235-237).

106 On the reasons, Kaarlo Tuori, 'Constitutional Review in Finland' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 183-221 (204, 207-209, 219); Leonard Besselink, 'Constitutional Adjudication in the Netherlands' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 565-618 (578 ff.).

107 Shmuel N. Eisenstadt, 'Multiple Modernities', Daedalus 129 (2000), 1-29.

108 On this model, Victor Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective* (New Haven, CT: Yale University Press 2009), 111 ff.; Luca Mezzetti, 'Sistemi e modelli di giustizia costituzionale' in: Luca Mezzetti (ed.), *Sistemi e modelli di giustizia costituzionale* (Padua: CEDAM 2009), 1, 5 ff.

109 Giovanni Capoccia, 'Critical Junctures' in: Orfeo Fioretos, Tulia G. Falleti and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (2016), 89-106; Nils Grosche and Eva Ellen Wagner, 'Einführung in das Tagungsthema. Pfadabhängigkeit hoheitlicher Ordnungsmodelle' in: Mainzer Assistententagung Öffentliches Recht e. V. (ed.), *Pfadabhängigkeit hoheitlicher Ordnungsmodelle: 56. Assistententagung Öffentliches Recht* (2016), 11-26.

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ranges from the Dutch *Hoge Raad*, established after the Napoleonic wars by the Constitution of 1815, to the Austrian Constitutional Court of 1920, to the post-socialist constitutional courts of the Central and Eastern European Member States of the 1990s.[110]

We may identify three contexts to which national constitutional adjudication primarily owes its existence. In some states, in particular in Austria, Cyprus, and Belgium, but also in Switzerland, it reflected a federal settlement. In many other states, experiences with authoritarianism and the concern to protect democracy led to the creation of a constitutional court, for instance in Italy, Germany, Portugal, Spain, and many post-socialist states. In a third group, such as France, the Netherlands, or the Nordic states, constitutional adjudication owes a lot to the general strengthening of individual rights from the 1970s onwards, a strengthening institutionally embedded in the ECtHR.

The courts' powers differ accordingly.[111] In some legal orders, judicial review of legislation is limited to the disapplication of a law in the individual

110 Jochen A. Frowein and Thilo Marauhn (eds), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa* (Berlin, Heidelberg: Springer 1998); Otto Luchterhandt, Christian Starck and Albrecht Weber, *Verfassungsgerichtsbarkeit in Mittel- und Osteuropa* (Baden-Baden: Nomos 2007); Constance Grewe, 'Constitutional Jurisdiction in Ex-Yugoslavia in the Perspective of the European Legal Space', in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume IV: Constitutional Adjudication: Common Themes and Challenges* (Oxford: Oxford University Press 2023), 51-96.

111 Cruz Villalón (n. 99); in detail on the individual states (in alphabetical order by author), Maria Lúcia Amaral and Ravi Afonso Pereira, 'The Portuguese Constitutional Court' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 673-718; Christian Behrendt, 'The Belgian Constitutional Court' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 71-118; Besselink (n. 106); Giovanni Biaggini, 'Constitutional Adjudication in Switzerland' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 779-840; Raffaele Bifulco and Davide Paris, 'The Italian Constitutional Court' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 447-504; Anuscheh Farahat, 'The German Federal Constitutional Court' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 279-356; Christoph Grabenwarter, 'The Austrian Constitutional Court' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 19-70; Jouanjan (n. 105); Jo Eric Kushal Murkens, 'Verfassungsgerichtsbarkeit im Vereinigten Königreich' in: Armin von Bogdandy,

case. In others, the courts have the power, akin to a 'negative legislator', to invalidate the statute under review. Some courts have the additional power to pass substitute legislation. The protection of individual rights can take the shape of mere interlocutory proceedings, in which the concerned individual plays almost no role (such as in Italy or before the CJEU), or that of separate proceedings instituted by the concerned person (such as the constitutional complaint in Germany and Poland or the individual complaint before the ECtHR). Even greater diversity reigns with respect to proceedings for disputes between political bodies.

Given this spectrum, we may ask whether any particular court embodies a model for all. Proposals include the *Conseil constitutionnel*[112] as well as the German Constitutional Court, given the power the latter enjoys.[113] A model, however, is something that can be reproduced, which means that the Karlsruhe Court cannot serve as such. The German Court's role originated in a unique combination of circumstances: the lost war, the experience with totalitarianism, the German trust in authority, clever judicial politics, and many decades of stable government majorities.[114] Constitutional courts that followed the model of Karlsruhe encountered enormous difficulties. Thus, we find real world proof of the German Constitutional Court's little use as a role model.[115]

All things considered, conceptions of a 'European model' remain unpersuasive.[116] Diversity is deeply built into the ever closer union. To address it, comparative knowledge is key.

Peter M. Huber and Christoph Grabenwarter (eds), *Handbuch Ius Publicum Europaeum, Bd. VI, Verfassungsgerichtsbarkeit in Europa: Institutionen* (Heidelberg, C.F. Müller 2016), 795-852; Juan Luis Requejo Pagés, 'The Spanish Constitutional Tribunal' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 719-778; László Sólyom, 'The Constitutional Court of Hungary' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 357-446; Piotr Tuleja, 'The Polish Constitutional Tribunal' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 619-672; Tuori (n. 106).

112 Élisabeth Zoller, *Introduction au droit public* (2nd edn, Paris: Dalloz 2013), esp. 197 ff.

113 Samuel Issacharoff, *Fragile Democracies. Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press 2015), 138 ff.

114 Christoph Schönberger, 'Karlsruhe: Notes on a Court' in: Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger (eds), *The German Federal Constitutional Court: The Court Without Limits* (Oxford: Oxford University Press 2020), 1-31 (7 ff.)

115 On the crises in Spain and Hungary, Requejo Pagés (n. 111), and Sólyom (n. 111).

116 Andreas Voßkuhle, 'Die Zukunft der Verfassungsgerichtsbarkeit in Deutschland und Europa', EuGRZ 47 (2020), 165-171.

3. On Judicial Authority[117]

I now narrow down on one aspect of that diversity: the differences in authority. To exercise their functions, courts need authority. Authority is particularly critical for constitutional adjudication that goes against other institutions of authority – parliaments, governments or other courts. The German *Bundesverfassungsgericht*, the Italian *Corte costituzionale*, and the French *Conseil constitutionnel* will serve as examples.

This selection can be justified by numbers (these are the constitutional courts of the three most populous Member States) and by impact (these courts had the biggest influence on the creation and jurisprudence of constitutional courts established later, in Portugal, Spain, or former socialist states). Moreover, the German and the Italian court symbolise the potential judicial contribution to a society's democratic transformation.[118] As this was the great theme of European constitutionalism in the second half of the twentieth century, the two post-authoritarian courts gained much visibility. France, on the other hand, has the most influential tradition of public law defined by democratic continuity.

The path of these courts, as the path of the CJEU and the ECtHR,[119] was unforeseen. Neither the German nor the French or the Italian constitutional framers wanted to endow these three courts with the power they have today. In Italy, the establishment of the constitutional court was controversial until the very end. In Germany, the establishment was not disputed (as the Allies required it), but the framers certainly did not envision today's powerful institution either. In the case of the *Conseil constitutionnel*, it is even clearer that the framers of the Constitution of the Fifth Republic did not envision a law-making institution. Indeed, they called this body a Council rather than a Court because they did not want a constitutional court such as the ones in Austria, Germany, or Italy.[120]

The *Conseil constitutionnel* was not conceived as the institution of a post-authoritarian society. Instead, the framers of 1958 intended for the court to

117 This section is based on Armin von Bogdandy and Davide Paris, 'Power is Perfected in Weakness. On the Authority of the Italian Constitutional Court' in: Vittoria Barsotti, Paolo Carozza, Marta Cartabia and Andrea Simoncini (eds), *Dialogues on Italian Constitutional Justice. A Comparative Perspective* (London: Routledge 2021), 263-280.

118 Cruz Villalón (n. 99).

119 Antoine Vauchez, 'The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of EU Polity', 16 ELJ (2010), 1-28; M. Madsen, 'The Protracted Institutionalization of the Strasbourg Court. From Legal Diplomacy to Integrationist Jurisprudence' in: J. Christoffersen and M.R. Madsen (eds), *The European Court of Human Rights between Law and Politics* (2011), 43.

120 Jouanjan (n. 105), 235.

protect the separation of powers, above all by protecting the executive power against legislative encroachments. This was a reaction to the parliamentary centralism of the Third and Fourth Republics that the Constitution of the Fifth Republic was meant to overcome. For that reason, the *Conseil*'s *raison d'être* in 1958 was not to develop fundamental rights or a democratic society.[121] Accordingly, the subsequent transformation of the *Conseil constitutionnel* into a court that also protects fundamental rights was considered nothing less than a 'constitutional miracle'.[122]

It is almost as miraculous how the *Bundesverfassungsgericht* and the *Corte* extended their powers, establishing themselves as engines of democratic society. The fundamental judgments of all three courts are remembered today as transformative steps towards social democratisation:[123] the German *Lüth* judgment, the Italian judgment *1/1956*,[124] and the French *Liberté d'association* decision.[125] Their common denominator is that they all tremendously expanded the scope of constitutional provisions, and thus of judicial powers. The *Lüth* judgment includes what is perhaps the most important and most frequently cited sentence of the *Bundesverfassungsgericht*, with the Court holding that 'the Basic Law […] has also established an objective system of values in its section on fundamental rights' and that this system of fundamental values must 'apply to all areas of law as a fundamental constitutional decision'.[126] Consequently, the Court can ultimately adjudicate controversies in all areas of society. The *Corte*'s judgment *1/1956* ascribed a legal character to fundamental rights, thereby contradicting the supreme court, the *Corte di Cassazione*, which had held that fundamental rights have a purely programmatic function.[127] In doing so, the *Corte* too extended its reach tremendously.

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121 Dominique Rousseau, Pierre-Yves Gahdoun and Julien Bonnet, *Droit du contentieux constitutionnel* (12th edn, Paris: LGDJ 2020), 29 ff.

122 Jouanjan (n. 105), 235.

123 Of course, there are also other voices, see Otto Depenheuer, 'Grenzenlos gefährlich. Selbstermächtigung des Bundesverfassungsgerichts' in: Christian Hillgruber (ed.), *Gouvernement des juges. Fluch oder Segen* (Paderborn: Ferdinand Schöningh 2014), 79-118.

124 Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (Oxford: Oxford University Press 2016), 30.

125 Conseil constitutionnel, *Law completing the provisions of Articles 5 and 7 of the Law of 1 July 1901 on association agreements*, decision no. 71-44 DC of 16 July 1971; George D. Haimbaugh, Jr., 'Was it France's Marbury v. Madison?', Ohio St. L. J. 35 (1974), 910-926.

126 BVerfGE, 7, 198, *Lüth*, judgment of 15. January 1958 – 1 BvR 400/51, 205; on this, Matthias Jestaedt, 'The Karlsruhe Phenomenon: What Makes the Court What It Is' in: Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger (eds), *The German Federal Constitutional Court: The Court Without Limits* (Oxford: Oxford University Press 2020), 32-69 (48 ff.) (translation by the author)

127 Bifulco and Paris (n. 111), 454.

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The *Conseil constitutionnel*, in its 1971 decision *Liberté d'association*, took an even greater step in expanding its jurisdiction to individual rights. That is because the Constitution of the Fifth Republic of 1958 is almost devoid of fundamental rights. Only its preamble hints at the protection of rights by proclaiming the 'attachment' of the French people to the 'Rights of Man' as defined by the Declaration of 1789 and as 'confirmed and complemented by the Preamble to the Constitution of 1946'.[128] This minimalism was obviously insufficient thirteen years later, for the Rights Revolution had begun in the meantime.[129] Therefore, the *Conseil* simply postulated that the rights mentioned in the preamble were legally binding. The legal argument was weak, given that preambles do not generally establish binding law, but that did not diminish the transformation of an institution intended to protect the executive power into an – initially embryonic – fundamental rights court.

Why did these three courts engage in such transformations? This question relates to broader debates concerning the exercise of judicial discretion. Hardly any legal scholar will claim that legal texts, legal doctrine, or interpretive theories guide courts' decision-making.[130] Consequently, the courts' true reasons are the object of much speculation. Some claim to have isolated a chief motivating factor. Ran Hirschl argues that judges act like 'any other economic actor: as self-interested individuals'.[131] Accordingly, the judges' concern for their power is sometimes perceived as motivating some constitutional courts to resist transnational courts' case law, such as the Second Senate of the *Bundesverfassungsgericht* in its *PSPP* judgment.[132] However, this theory's explanatory power is limited, as it is also used to explain the antithetical orientation of the *Bundesverfassungsgericht*'s First Senate's 'Right to be Forgotten I and II' decisions.[133]

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128 In detail, Olivier Jouanjan, 'Frankreich' in: A. von Bogdandy, P. Cruz Villalón and P. M. Huber (eds), *Handbuch Ius Publicum Europaeum, Bd. I, Grundlagen und Grundzüge staatlichen Verfassungsrechts* (2007), 87-150.

129 Charles R. Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago, IL: University of Chicago Press 1998); Mitchell de S.-O.-l'E. Lasser, *Judicial Transformations. The Rights Revolution in the Courts of Europe* (Oxford: Oxford University Press 2009).

130 Kelsen (n. 19), 236 ff.; Ulfried Neumann, 'Theorie der juristischen Argumentation' in: Winfried Brugger, Ulfrid Neumann und Stephan Kirste (eds), *Rechtsphilosophie im 21. Jahrhundert* (Frankfurt a. M.: Suhrkamp 2008), 233-260 (241).

131 Ran Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press 2014), 168.

132 Wolf (n. 97), 17; Dorr (n. 97); Dubarry (n. 97).

133 BVerfGE 152, 152, *Right to be forgotten I*, order of 6 November 2019 – 1 BvR 16/13 and BVerfGE 152, 216, *Right to be forgotten II*, order of 6 November 2019 – 1 BvR 276/17, para. 60; on this, Mattias Wendel, 'Das Bundesverfassungsgericht als Garant der Unionsgrundrechte', JZ 75 (2020), 157-168.

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Many more possible reasons come to mind: ideologies and world views, cultural patterns, character, the constraints of collective decision-making, but also the call for justice, established protocols of legal argumentation, the established meaning of the law, the ethos of fidelity to the law and, not least, the idea to participate in the development of a democratic society. All these factors seem relevant to me and are deeply interwoven, making it impossible to isolate individual factors and thereby explain judicial decision-making. The best we can aim for is understanding, rather than explanation.

While all three courts have become powerful, they play fundamentally different roles within their national legal order. The *Bundesverfassungsgericht* accomplished what no other constitutional court has yet achieved: it established itself as the apex court of the German legal system. Through its *Lüth* judgment, it supplanted the Federal Supreme Court (the *Bundesgerichtshof*) which, as successor to the *Reichsgericht*, considered itself the highest German court. The judgment, which overturned a decision by the *Bundesgerichtshof*, made clear that the *Bundesverfassungsgericht* does not cooperate with the specialised courts but rather corrects them.[134] Accordingly, the *Bundesverfassungsgericht* sets very high standards for the admissibility of concrete judicial review. Under the Italian constitution, by contrast, concrete judicial review represents almost the only way for the Italian Constitutional Court to interpret and apply rights.[135]

Thus, the *Bundesverfassungsgericht*, unlike the *Corte,* has the power to make the final decision as the apex of the judicial system. Since almost any controversy can be brought before a court in Germany (Article 19 para. 4 of the Basic Law), the constitutional complaint is first and foremost a legal remedy against court judgments. Not least for this reason, the *Bundesverfassungsgericht* represents an exception rather than the rule: very few other legal orders allow for a constitutional complaint against judgments.[136] In the vast majority of cases, the *Bundesverfassungsgericht* reviews whether another German court has violated the individual rights enshrined in the Constitution.[137] While it overturns only a tiny percentage of the other courts' decisions,[138] this does not detract from its august role.

134 BVerfG *Lüth* (n. 126).

135 Jörg Luther, *Die italienische Verfassungsgerichtsbarkeit* (Baden-Baden: Nomos 1990), 82 ff.

136 Markus Vašek, 'Constitutional Jurisdiction and Protection of Fundamental Rights in Europe', in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume IV: Constitutional Adjudication: Common Themes and Challenges* (Oxford: Oxford University Press 2023), 325-381.

137 See Bundesverfassungsgericht, *Annual Statistics 2020* <https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/Gesamtstatistik%202020.pdf?__blob=publicationFile&v=2>, 23, last accessed 8 December 2022.

138 See Bundesverfassungsgericht, *Annual Statistics 2020* (n. 137), 24.

Furthermore, the two courts have different addressees and audiences in mind. The Italian Constitutional Court, similar to the CJEU, mainly addresses the other courts on which it depends, whereas the German Constitutional Court, much like the ECtHR, primarily addresses the citizenry. The proverbial expression of 'going to Karlsruhe'[139] articulates the citizens' expectation of finding justice before the *Bundesverfassungsgericht* at the end of a long judicial process.

The *Corte* never gained such a role vis-à-vis the other courts. In its Judgment *1/1956*, it initially scored a win against the *Cassazione.* In this case, which concerned the freedom of expression, it declared a law unconstitutional that the *Cassazione* had previously considered constitutional. In doing so, the *Corte* sided with the lower court that had referred the case, rebelling against the *Cassazione*'s interpretation and, worse, its authority.

Ten years after the Constitutional Court's decision, the so-called first 'war of the Courts' forced the *Corte* to relinquish a lot of ground. The dispute revolved around its attempt to impose its interpretation of a law on the *Cassazione*, which would have served to constitutionalise the legal order, as exemplified by the *Lüth* judgment of the *Bundesverfassungsgericht*.

Yet the *Corte*'s attempt failed, revealing an important structural element of Italian constitutional adjudication: the *Corte* can only bring its authority to bear in conjunction with another court. Hardly conceivable from a German point of view, it is a constitutional court without a constitutional complaint or any other form of direct access for citizens.[140] Instead, the *Corte*'s most important power, that of concrete judicial review, depends on other courts' willingness to refer to it questions of statutory constitutionality. Unlike the *Bundesverfassungsgericht*, the *Corte* does not impose individual rights on recalcitrant courts; instead, it protects rights by acting together with them. Cooperation, not correction, is its tenet.

The *Corte* digested its defeat with the new doctrine of *diritto vivente.*[141] According to this doctrine, the *Corte* no longer inquires whether the *Cassazione* could have developed a better – that is, a constitutional – interpretation of the law. In doing so, it defuses the conflict between the two courts. The *Corte* considers the *Cassazione*'s interpretation to be mandated by the law in question and limits itself to reviewing statutes for constitutionality following

139 Uwe Wesel, *Der Gang nach Karlsruhe. Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik* (München: Blessing 2004).

140 From a comparative perspective this is also an exception: most legal order provide for some access, Vašek (n. 136).

141 Corte costituzionale, sentenza n. 11/1965 and sentenza n. 52/1965 as well as sentenza n. 127/1966 and sentenza n. 49/1970; Bifulco and Paris (n. 111), 478.

the *Cassazione*'s interpretation. Thus, the *Corte's* normative authority is much more limited than that of the *Bundesverfassungsgericht*. After all, imposing a certain understanding of a statute by means of an 'interpretation that conforms with the constitution' is an important tool of judicial law-making.[142]

This weakness prompted the *Corte* to closely cooperate with the other courts. It developed an 'interjudicial relationality' that has become paradigmatic of Italian constitutional adjudication.[143] Thus, the concept of judicial dialogue, which in Germany is used to describe the interaction of the *Bundesverfassungsgericht* with the European courts, grasps the relationship of the Italian Constitutional Court with all other courts.

The *Conseil constitutionnel* found it even more difficult than the *Corte* to establish an authoritative role beside the highest civil and criminal court, the *Cour de Cassation,* and the highest administrative court, the *Conseil d'État.* For many decades, it simply was not a court that protected citizens. This remained true even after the 1971 constitutional revolution, which brought rights protection into its remit. The constitutional reform of 1974 expanded standing rights, but this only benefitted the parliamentary opposition (*saisine parlementaire*). What remained unchanged was that the *Conseil constitutionnel* could only review a statute before it entered into force, and only at the request of political institutions. Litigation involving citizens had to wait for the constitutional reform of 2008 to find its way to the *Conseil constitutionnel*. But the new proceeding, a preliminary ruling procedure (*question prioritaire de constitutionnalité)*, is even more circumscribed than Italian concrete review, for only the *Cour de Cassation* and the *Conseil d'État* can initiate it. Accordingly, the *Conseil constitutionnel* can do little to alter their powerful position.[144] Unlike the *Corte* in Italy or the CJEU, the Constitutional Council thus cannot become the ally of rebellious lower courts.[145] Nevertheless, concrete judicial review is beginning to play a role in the French legal system. Ten years after its introduction, the *Conseil*

142 Anuscheh Farahat, 'Constitutional Jurisdiction and the Separation of Powers in the European Legal Space: A Comparative Analysis', in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume IV: Constitutional Adjudication: Common Themes and Challenges* (Oxford: Oxford University Press 2023), 255-323.

143 Barsotti, Carozza, Cartabia and Simoncini (n. 124), 236.

144 Laurence Gay, 'Le double filtrage des QPC: une spécificité française en question? Modalités et incidences de la sélection des questions de constitutionnalité en France, Allemagne, Italie et Espagne' in: Laurence Gay (ed.), *La question prioritaire de constitutionnalité. Approche de droit comparé* (Brussels: Bruylant 2014), 51-90 (53, 72 ff.).

145 Thierry Santolini, 'La question prioritaire de constitutionnalité au regard du droit comparé', Rev. Fr. Dr. Const. 93 (2013), 83-105 (94).

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constitutionnel noted that 80 percent of its decisions result from these proceedings.[146]

The three constitutional courts also wield different forms of authority over political institutions. The tremendous authority that the *Bundesverfassungsgericht* quickly claimed is summed up by a famous phrase attributed to Konrad Adenauer: 'That is not how we thought it would be.' (*Dat ham wir uns so nich vorjestellt.*)[147] These words go to the heart of how the *Bundesverfassungsgericht* has evolved: it has built its authority by confronting political power, establishing itself as a visible counterweight to the government majority.

The German Constitutional Court's founding decade is remembered as a decade of epic victories. One only needs to recall its 'status struggle', in which it overcame its dependence on the Ministry of Justice, still pervaded by a National Socialist presence. Through that struggle, it established itself as one of the five constitutional institutions alongside the Federal President, the *Bundesrat*, the *Bundestag*, and the federal government.[148] In the First Broadcasting Judgment (the so-called *ZDF* Judgment), the *Bundesverfassungsgericht*, responding to a complaint by SPD-led *Länder*, prevented the establishment of a pro-government television channel,[149] an important project of the federal government led by the Christian Democratic Union.

Things went differently in Italy in this respect, too. There is no public memory of anything akin to Adenauer's remark. Considering how controversial the *Corte* was in the Constituent Assembly, it is hardly surprising that it approached and continues approaching its work far more cautiously than the German Court. Its landmark decision *1/1956* concerned not the democratic legislature but a statute from Fascist times that restricted the freedom of expression. While the executive branch of democratic Italy continued to use this and similar repressive statutes, it did not actually wish to defend them. By declaring the statute unconstitutional, the Constitutional Court attested to its democratic anti-fascism. In its review of such statutes, the *Corte* discovered a field in which it could develop its case law and authority

146 Laurent Fabius, 'QPC 2020 – Les 10 ans de la question citoyenne', Les cahiers du Conseil constiutionel Titre VII (Octobre 2020), <https://www.conseil-constitutionnel.fr/publications/titre-vii/avant-propos-du-president-laurent-fabius>, last accessed 8 December 2022.

147 Quoted from Schönberger (n. 114), 10. The German quote is from Christoph Schönberger, 'Anmerkungen zu Karlsruhe' in: Matthias Jestaedt et al. (eds), *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Frankfurt a. M.: Suhrkamp 2011), 9-76 (26).

148 In detail, Wesel (n. 139) 54-82; Christian Walter, 'Art. 93 GG' in: Theodor Maunz and Günter Dürig (eds), *Grundgesetz Kommentar I* (Munich: C. H. Beck 2018), paras 93 ff.

149 BVerfGE 12, 205, *Rundfunk*, judgment of 25 March 2014 – 1 BvF 1/11.

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while avoiding major conflicts with the political sphere.[150] The self-confident Karlsruhe Court, which did not need to proceed with such caution, left such statutes to the ordinary courts.[151] The *Conseil constitutionnel* acts even more restrained when reviewing legislation in substantive terms.[152] However, in the spirit of its original role as guardian of the separation of powers, its scrutiny of the legislature's compliance with parliamentary procedure is stricter than that of the other two courts.[153]

The abortion issue illustrates how differently the three courts relate to the legislature. All three courts addressed this issue back in 1975, and thus at a time when individual-rights protection was gaining strength in many societies. In its long, innovative, and doctrinally elaborate first decision on abortion rights, the *Bundesverfassungsgericht* rejected the full decriminalisation of abortion, a key legislative project of the social-liberal coalition. Here, a powerful court confronted a powerful government (with its parliamentary majority). It established when human life begins and how it must be protected.[154]

In the same year, the *Corte* was confronted with the question of whether the general criminalisation of abortion without exceptions violates the constitution.[155] Parliamentary attempts at liberalisation had failed because of the Christian Democrats' resistance. In this context, a criminal court asked the *Corte* whether punishing a woman for terminating her pregnancy was constitutional if the pregnancy endangered her health. The *Corte*'s very brief decision refrained from determining when life begins and deciding on the nature of unborn life. Its terse decision states that unborn life is constitutionally protected in principle but that a criminal court cannot punish a woman for an abortion if her health was in danger.

The *Conseil constitutionnel* also faced the issue in 1975. The context resembled the German one, for decriminalising abortion constituted an important project of Valéry Giscard d'Estaing's liberal presidency and majority. Opposing MPs brought it before the *Conseil constitutionnel* by means of a *saisine parlementaire.* When compared with the German and Italian solutions, the *Conseil* pursued a third avenue. Its brief decision clarified that it

150 Elena Malfatti, Saulle Panizza and Roberto Romboli, *Giustizia costituzionale* (6th edn, Torino: Giappichelli 2018), 357.

151 BVerfGE 2, 124, *Normenkontrolle II*, order of 21. Dezember 1997 – 2 BvL 6/95.

152 Georges Bergougnous, 'Le Conseil constitutionnel et le législateur', Les Nouveaux Cahiers du Conseil constitutionnel 38 (2013), 5-21 (18).

153 Julie Benetti, 'La procédure parlementaire en question dans les saisines parlementaires', Les Nouveaux Cahiers du Conseil constitutionnel 49 (2015), 88-92.

154 BVerfGE 39, 1, *Schwangerschaftsabbruch I*, judgment of 27. Oktober 1998 – 1 BvR 2306/96.

155 Corte costituzionale, sentenza n. 27/1975.

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does not question such decisions of the parliamentary majority.[156] It also developed the formula it would henceforth use in dealing with such cases. According to this formula, the Constitution 'does not confer on the Constitutional Council a general or particular discretion identical with that of Parliament, but simply empowers it to rule on the constitutionality of statutes referred to it'. In other words, the *Conseil* avoided the matter altogether.

Important differences between the three courts also become apparent in their style of reasoning. The *Bundesverfassungsgericht* often dedicates a separate section to constitutional interpretation, the famous 'C.I.' section,[157] which is neatly separated from the subsequent application of the interpretation to the concrete case. This separation helps the Court develop extensive interpretations that transcend the case in question. Indeed, most commentators focus on the C. I. section's peculiar mix of sermon, political theory, and elaborate doctrine. To ensure that nobody overlooks the directives developed in that part, the Court prefixes them to the decision in so-called *Leitsätze*, which often read like statutory provisions.

The Italian Constitutional Court employs a far more minimalist style of reasoning. The *Corte* does not formulate general directives resembling those of the *Bundesverfassungsgericht*. Moreover, it employs the so-called absorption technique. Thus, the lower courts often include multiple possible grounds for unconstitutionality of a statute they refer to the *Corte*. If the latter holds that one of these grounds is sufficient to render the law unconstitutional, it declares the other grounds 'absorbed' without reviewing them.[158] The *Corte* is usually adamant in avoiding pronouncements that are not strictly necessary. The *Bundesverfassungsgericht*, by contrast, often indulges in *obiter dicta,* namely, in general statements that are not required to decide the case but are meant to have great impact nevertheless.[159] This might surprise a reader from a common-law country, where *dicta* do not form part of a precedent. German lawyers and courts do not make this distinction, thereby enormously expanding the *Bundesverfassungsgericht's* law-making

156 Conseil constitutionnel, *Law on Abortion I*, decision No. 74-54 DC of 15 January 1975; the following quote is from § 1 of the decision, in the English version on the website of the Conseil constitutionnel, <https://www.conseil-constitutionnel.fr/en/decision/1975/7454DC.htm>, last accessed 8 December 2022.

157 Oliver Lepsius, 'The Standard-Setting Power', in: Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger (eds), *The German Federal Constitutional Court: The Court Without Limits* (Oxford: Oxford University Press 2020), 70-130.

158 Andrea Bonomi, *L'assorbimento dei vizi nel giudizio di costituzionalità in via incidentale* (Napoli: Jovene 2013).

159 For a recent example: BVerfG, *State Liability for Foreign Deployments of the Bundeswehr*, decision of 18 November 2020 – 2 BvR 477/17: the statements on liability are obiter, but they stand at the heart of the Court's reasoning.

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powers. Because of its minimalist approach, the *Corte* exercises much less of a directive function vis-à-vis the legislature and society.

This is even more true of the *Conseil constitutionnel*, whose particularly apodictic and cryptic style of reasoning has traditionally been hostile to generalisation.[160] However, things are changing. In 2016, the *Conseil* abandoned its practice of formulating its decision as a single sentence.[161] Its reasoning, however, remains very brief. The *Conseil* provides more orientation, though indirectly, as its Secretary General usually publishes a commentary that serves the function of the *Bundesverfassungsgericht*'s C. I.[162]

The *Bundesverfassungsgericht* on the one hand and the *Corte* and the *Conseil* on the other hand embody two different forms of logic – *maximalist* or *minimalist* – that determine how a constitutional court shapes a democratic society's structures. The terms 'maximalist' and 'minimalist' are not contradictory but comparative, for they describe a difference of degree, not of kind. Further, they are meant analytically rather than evaluatively. Maximalist does not mean activist or *ultra vires*, and minimalist does not mean lethargic or captured.

Both orientations are propagated by renowned scholars.[163] The *Bundesverfassungsgericht* is extolled as the heart of the Republic.[164] The *Corte* is considered one of the most stable institutions in Italy besides the president,[165] and the *Conseil constitutionnel* is even praised as a new incarnation of the European model of constitutional adjudication.[166] This helps understand why neither French nor Italian mainstream scholars advocate introducing a constitutional complaint that many German academics regard as the procedural core of democratic constitutionalism.

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160 Arthur Dyèvre, 'The French Constitutional Council' in: András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge: Cambridge University Press 2017), 323-355.

161 Conseil constitutionnel, *Société civile Groupement foncier rural Namin et Co*, decision no. 2016-540 QPC of 10 May 2016, and Conseil constitutionnel, *Mme Ève G.*, decision no. 2016-539 QPC; Nicole Belloubet, 'La motivation des décisions du Conseil constitutionnel: justifier et réformer', Les Nouveaux Cahiers du Conseil constitutionnel 55-56 (2017), 7-21.

162 Ruth Katharina Weber, *Der Begründungsstil von Conseil constitutionnel und Bundesverfassungsgericht. Eine vergleichende Analyse der Spruchpraxis* (Tübingen: Mohr Siebeck 2019), 120-127.

163 On the one hand, Cass R. Sunstein, *One Case at a Time. Judicial Minimalism on the Supreme Court* (Cambridge, Mass: Harvard University Press 1999), 3-72, 259-263; on the other hand, Mattias Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', GLJ 7 (2006), 341-369.

164 See Michael Stolleis (ed.), *Herzkammern der Republik. Die Deutschen und das Bundesverfassungsgericht* (Munich: C. H. Beck 2011).

165 Cruz Villalón (n. 99).

166 Zoller (n. 112).

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The transformation of all three courts can be traced back to farsighted judges, but also to a general understanding that democratic societies do better with constitutional adjudication. This also holds true for European society. Indeed, it depends on judicial law-making, as well as on judicial cooperation.

4. The European Role of National Courts[167]

The rise of constitutional adjudication is not specific to Europe. It is a global development that occurred, above all, in the two decades around the turn of the millennium.[168] Most states now feature some form of constitutional adjudication, exercised either by an apex court or by a specific constitutional court.[169] The judicial guarantee and development of constitutional legality has been a central component of the democratic rule of law since the fall of the Iron Curtain in 1989.[170]

Constitutional jurisdiction in European society is thus part of a global phenomenon. But at the same time, it is special. One distinctive feature is, as stated, that European constitutional adjudication is not governed by a single apex court (as in most societies) but is instead exercised by many institutions: the CJEU, the ECtHR, the Member States' apex courts, and, frequently, lower courts entrusted with this task by European law. European society's diversity is reflected in the diversity of its institutions of constitutional adjudication.

The European embedding of national courts affects their doctrines, practices, outlooks, authority, and image.[171] Five main levers have effectuated that embeddedness: the duty under EU law to provide for judicial review, the constitutional role of EU law and the ECHR, the duty to refer cases to the CJEU, the jurisdiction of the ECtHR, and the multi-level cooperation of

167 The following section draws on Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter, 'Constitutional Adjudication in the European Legal Space' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions* (Oxford: Oxford University Press 2020), 1-17.

168 Doreen Lustig and Joseph H. H. Weiler, 'Judicial Review in the Contemporary World. Retrospective and Prospective', I.CON 16 (2018), 315-372; Lucio Pegoraro, *Giustizia costituzionale comparata. Dai modelli ai sistemi* (2nd edn, Torino: Giappichelli 2015); Michel Fromont, *Justice constitutionnelle comparée* (Paris: Dalloz 2013).

169 Cassese (n. 6).

170 Ackerman (n. 6).

171 Aida Torres Pérez, 'The Challenges for Constitutional Courts as Guardians of Fundamental Rights in the European Union' in: Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Portland: Intersentia 2013), 49-78 (53).

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courts that responds to their common responsibility for European law and society, which I now explore.

The legal foundation for the European responsibility of national judges are contained in Article 4 para. 3 TEU, the mandate of the Member State courts under European law, and the 'Europe clauses' of the Member State constitutions.[172] It also follows from the rule of law (principle): often, a decision by the Luxembourg or Strasbourg Court requires a further decision by a national court in order to be realised within the domestic society, given that the CJEU and ECtHR cannot void national decisions.[173] Common responsibility also results from a court's responsibility for its own legal order since the latter is closely interwoven with the other legal orders.

The constitutional courts are of particular interest in this regard because the CJEU and ECtHR's case law has affected their role more than that of all other courts. While the powers and importance of most Member State courts has increased as a result of their Europeanisation, the monopoly of the constitutional courts is under threat. Scholars of European law have put a lot of effort into researching the resulting conflict.[174] Ideal-typically, the constitutional courts have two options: to resist[175] or to cooperate.[176]

Many courts have accepted and even supported the CJEU and ECtHR's transformative case law, not least by recognising, in principle, their precedential effect. Specifically with regard to the CJEU, many constitutional courts moderate their review and sanction violations of the duty to refer cases to the CJEU. The apotheosis of this support is when a constitutional

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172 Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht. Verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich* (Tübingen: Mohr Siebeck 2011); Burchardt (n. 24), 199 ff.

173 There is an exception for Central Banks. CJEU, *Rimšēvičs*, joined cases C-202/18 and C-238/18, EU:C:2019:139, paras 69 ff.; Alicia Hinarejos Parga, 'The Court of Justice Annuls a National Measure Directly to Protect ECB Independence: *Rimšēvičs*', CML Rev 56 (2019), 1649-1660.

174 Monica Claes and Bruno de Witte, 'The Roles of Constitutional Courts in the European Legal Space', in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume IV: Constitutional Adjudication: Common Themes and Challenges* (Oxford: Oxford University Press 2023), 495-526.

175 Paradigmatically, Jan Komárek, 'Why National Constitutional Courts Should not Embrace EU Fundamental Rights' in: Sybe A. de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument. Five Years Old and Growing* (Oxford; Portland, Oregon: Hart 2015), 75-92.

176 Paradigmatically, Davide Paris, 'Constitutional Courts as European Union Courts. The Current and Potential Use of EU Law as a Yardstick for Constitutional Review', Maastricht J. Eur. & Comp. L. 24 (2017), 792-821; Francisco Balaguer Callejón et al., 'Encuesta sobre el TJUE como actor de constitucionalidad', Teoría y Realidad Constitucional 39 (2017), 13-82.

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court itself refers a critical case to the CJEU and abides by the latter's decision.[177]

At the same time, some constitutional courts have positioned themselves as review bodies vis-à-vis the ECtHR and the CJEU, usually by invoking the democratic principle. The dispute about the scope of EU law's primacy is well known. The CJEU's doctrine assumes Union law's unconditional primacy over all constitutional law of the Member States.[178] While the Member State constitutional courts recognise primacy in principle, some impose provisos that enable them to check the CJEU.[179]

Consequently, conflicts are bound to occur and must be managed to keep European society viable. It helps that the interaction between the various courts is very flexible,[180] and so are the relevant doctrines (*controlimiti*, *ultra vires*, etc.).[181] Moreover, there is consensus that Union law should remain unapplied only as a means of last resort. A constitutional court has to justify such a move by pointing to a grave threat to constitutional principles; moreover, it should first give the CJEU the opportunity to address and manage the conflict.[182]

Voicing dissent, in turn, comes in different ways. Ideal-typically, we can distinguish between a maximalist style and a minimalist one, as, once again, respectively exemplified by the German Constitutional Court and the Italian Constitutional Court. When the German Constitutional Court perceives a conflict between EU and German constitutional law, it tends to instruct the European Court of Justice about the limits of EU primacy in pithy terms. The reaction of the Karlsruhe Court to the broad interpretation of the Charter's scope in *Åkerberg Fransson* provides a telling example.[183] Two months after the CJEU's judgment, the *Bundesverfassungsgericht* stated – and did so, moreover, in an *obiter dictum,* that is, without compelling reasons

177 Monica Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure', GLJ 16 (2015), 1331-1342.

178 Koen Lenaerts, José A. Gutiérrez Fons and Stanislas Adam, 'Exploring the Autonomy of the European Legal Order', HJIL 81 (2021), 47-87.

179 On the state of the discussion, Stephan Schill and Christoph Krenn, 'Art. 4 EUV. Prinzipien der föderativen Grundstruktur' in: Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (Munich: C. H. Beck 2020), paras 14-38.

180 Claes and de Witte (n. 174); Juan Luis Requejo Pagés, 'The Decline of the Traditional Model of European Constitutional Jurisdiction', in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Volume IV: Constitutional Adjudication: Common Themes and Challenges* (Oxford: Oxford University Press 2023), 613-649.

181 CJEU, *Gauweiler et al.*, opinion of AG Cruz Villalón, case no. C-62/14, EU:C:2015:7, para. 59.

182 In detail, von Bogdandy, Huber and Grabenwarter (n. 167).

183 CJEU, *Åkerberg Fransson*, case no. C-617/10, EU:C:2013:105.

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to do so – that the *Åkerberg Fransson* decision 'must not be read in a way that would view it as an apparent ultra vires act […]. Thus, the decision must not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR.'[184] As a rule, the German Constitutional Court leaves little room for interpretation, as is the case here: the CJEU must interpret the precedent of *Åkerberg Fransson* narrowly if it wishes to avoid serious conflict.[185] Its formulation in the *OMT* case is similarly categorical.[186] The German Constitutional Court assumes common responsibility by clearly articulating its position.

In *Taricco,* the Italian Constitutional Court chose virtually the opposite approach. The case concerned the punishment of tax fraud to the detriment of the EU budget. Since the Italian judiciary often works slowly, such offences frequently become statute-barred. The ensuing impunity harms European financial interests considerably. Therefore, the CJEU held that an Italian criminal court had to disapply the statute of limitations in order not to impede the effectiveness of Union law.[187] Said court then asked the *Corte* whether to comply with this CJEU judgment. The *Corte*, in turn, again referred the question to the CJEU, pointing out that sentencing the defendant would violate the constitutional prohibition of retroactivity.

The order for reference 24/2017 to the European Court of Justice undoubtedly contained a threat. The *Corte* made it clear that it would likely use its strongest weapon, the *controlimiti* doctrine, if the CJEU were to uphold its *Taricco* judgment. Unlike the *Bundesverfassungsgericht*, however, it did not outline the decision it expected the CJEU to make. Rather, in a minimalistic move, it limited itself to declaring a conflict between a CJEU judgment and one of the Italian Constitution's highest principles. And unlike the *Bundesverfassungsgericht*, it also did not elaborate on the principle's scope in the order for reference, leaving open what it would ultimately consider acceptable. Thus, it did not shy away from a conflict that would affect its

184 BVerfGE 133, 277, *Counter-Terrorism Database* (translation by the author), judgment of 24 April 2013 – 1 BvR 1215/07.

185 Daniel Thym, 'Die Reichweite der EU-Grundrechte-Charta. Zu viel Grundrechtsschutz?', NVwZ 33 (2013), 889-895; Filippo Fontanelli, '*Hic Sunt Nationes*. The Elusive Limits of the EU Charter and the German Constitutional Watchdog. Court of Justice of the European Union: Judgment of 26 February 2013, Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*', Eu Const. L. Rev. 9 (2013), 315-334 (327 ff.).

186 BVerfGE 134, 366, *OMT Decision*, judgment of 21 June 2016 – 2 BvR 2728/13.

187 CJEU, *Taricco*, case no. C-105/14, EU:C:2015:555, paras 35-44.

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constitutional authoritativeness significantly. However, it also kept practically all its options open.

Both the German and the Italian approach allow for conflicts to be managed constructively.[188] The CJEU has adjusted its standards pursuant to the preliminary reference of the Italian Constitutional Court.[189] The same applies to the CJEU's *Åkerberg-Fransson* doctrine, which has taken into account the German Court's criticism.[190] However, I hold that the relational Italian style better suits the courts' common responsibility because it is more dialogic.

The courts' common responsibility brings considerable costs for legal certainty and the length of judicial proceedings.[191] But they seem an acceptable price to pay. No one should overlook the civilizational gain that inheres in the way the pluralistic European society manages, cabins, and often resolves its conflicts by judicial means, thereby processing its own unfolding (II. 2.). This civilizational achievement shows that most judges have a shared conception of their functions, rely on common principles, and are aware of their common responsibility in a legal setting composed of multiple and diverse legal orders.[192] To all this, comparing, i. e. European comparative public law, is key.

IV. A Fitting Mindset for European Society

The comparative setting of European law has mainstreamed comparative thinking of all sorts among European public-law scholars. A new mindset is in the making that mirrors the development of European society as diverse, yet characterised by common principles. This mindset is another facet of ever closer union.

Nowadays, scholars who only work on *their* national law without considering anything *outside* seem almost anachronistic.[193] This loosens scholars'

188 von Bogdandy and Paris (n. 117).

189 CJEU, *M. A. S. and M.B.*, case no. C-42/17, EU:C:2017:936.

190 See CJEU, *Siragusa*, case no. C-206-13, EU:C:2014:126; CJEU, *Torralbo Marcos*, case no. C-265/13, EU:C:2014:187; CJEU, *Julian Hernández*, case no. C-198/13, EU:C:2014:2055.

191 Dana Burchardt, 'Kehrtwende in der Grundrechts- und Vorrangrechtsprechung des EuGH? Anmerkung zum Urteil des EuGH vom 5.12.2017 in der Rechtssache M. A. S. und M. B. (C-42/17, "Taricco II")', EuR 53 (2018), 248-263; Anneli Albi, 'An Essay on How the Discourse on Sovereignty and on the Cooperativeness of National Courts Has Diverted Attention From the Erosion of Classical Constitutional Rights in the EU' in: Monica Claes, Maartje De Visser, Patricia Popelier and Catherine Van De Heyning. (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Portland: Intersentia 2012), 41-70.

192 See M. Cartabia, 'Courts' Relations', I.CON18 (2020), 3.

193 Thomas Ackermann, 'Eine »ungeheure Jurisprudenz«? Die Europarechtswissenschaft und die Europäisierung des Rechts', JöR 68 (2020), 471-487.

ties to the legal order in which they, as individuals, were primarily socialized, and thus on their topics, doctrines, methods, theories, and cultures of attention. The European setting also affects academic organization, the media, career paths, academic loyalties, structures of equality, how to gain (and lose) one's reputation, and academic authority.

Politics stand behind this mainstreaming. Research is by now a fully-fledged EU policy field under Article 179 para. 1 TFEU.[194] One outcome is the European Research Council (ERC)[195] and its associated executive agency, the ERCEA.[196] Their grants have established a European reputational hierarchy, thus Europeanising a driving force for academic work.[197] Even the Polish government redesigned its incentives so that Polish legal scholars would speak to a European audience.[198] This was a remarkable act – all the more so because a national-conservative government was Europeanising Polish scholarship.[199]

Many further factors operate in favour of overcoming the focus on just one legal order. Since many up-and-coming scholars seek high European visibility by publishing in international journals that feature anonymous peer review from various legal cultures, they need to adapt. Moreover, quite a few researchers have more than one career path in mind. Today, there are new options abroad, particularly those offered by Dutch, English, Irish, Norwegian, Scottish, and Swiss faculties. Given their multinational composition, comparative thinking is built into their fabric. It is striking that many of the

194 Álvaro De Elera, 'The European Research Area. On the Way Towards a European Scientific Community?', ELJ 12 (2006), 559-574.

195 Commission Decision 2013/C 373/09 of 12 December 2013 establishing the European Research Council, OJ 2013 C 373/23.

196 Commission Implementing Decision 2013/779/EU of 17 December 2013 establishing the European Research Council Executive Agency and repealing Decision 2008/37/EC, OJ 2013 L 346/58.

197 On the role of reputation, Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (Frankfurt a. M.: Suhrkamp 1990), 245-251; Helmut Goerlich, 'Die Rolle von Reputation in der Rechtswissenschaft' in: Eric Hilgendorf and Helmuth Schulze-Fielitz (eds), *Selbstreflexion der Rechtswissenschaft* (Tübingen: Mohr Siebeck 2021), 207-240.

198 I. e. in English and in the major transnational journals. See the Polish Ministry of Science and Higher Education (Ministerstwo Nauki i Szkolnictwa Wyższego), available at <https://www.gov.pl/web/nauka/nowe-rozszerzone-wykazy-czasopism-naukowych-i-recenzowanych-materialow-z-konferencji-miedzynarodowych-oraz-wydawnictw-monografii-naukowych>, last visited 11 July 2022.

199 On the role of public-law scholarship for Polish identity Irena Lipowicz, 'Polen' in: Armin von Bogdandy, Pedro Cruz Villalón and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum, Bd. II, Offene Staatlichkeit – Wissenschaft vom Verfassungsrecht* (Heidelberg: C. F. Müller 2008), 663-696, paras 10 ff.; Andrzej Wasilewski, 'Polen' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum, Bd. IV, Verwaltungsrecht in Europa: Wissenschaft* (Heidelberg C. F. Müller 2011), 229-262 , para. 21.

voices we hear throughout Europe are those of migrant workers speaking from such institutions. This group of migrant workers plays a vital role in the European scholarly community.

There is much room for further development of that community. Many legal scholars still articulate their self-understanding primarily in terms of the national community in which their professional future unfolds. A European academic community is not easy to develop, given the plurality of languages, the complexity of the research and publication landscape, and the cultural diversity that legal research often reflects. But if a comparative mindset, multilingualism, expertise in European cooperation, and a European publication profile open doors to attractive positions, many scholars will make the effort.[200]

Such developments are perhaps easier to detect outside Germany. In 2012, I presented my ideas on European legal scholarship in Leiden at the *Staatsrechtconferentie,* the annual conference of the *Staatsrechtkring*, the Dutch Association of Constitutional Law.[201] Unlike the Association of German Professors of Public Law, the Dutch Association admits scholars who, in the German system, are called – strangely enough – *Nachwuchs*, offspring. The latter categorically opposed my assertion that national self-understandings continue to dominate academic identities. For many, the fact they belonged to the Dutch or Belgian, or even Flemish, community constituted only one of several identities. While such latter self-understanding remained important, it was not paramount anymore, being embedded in the wider European as well as international context. I saw those *Nachwuchs* as self-confident citizens of European society, and they showed a sophisticated comparative mindset.

200 For proposals, see Gernot Sydow, 'Die Europarechtswissenschaft europäisieren? Überlegungen zur Strukturentwicklung der juristischen Fakultäten und zur Lehre des Europarechts', JöR 68 (2020), 545-559; Christophe Jamin, *La cuisine du droit. L'École de Droit de Sciences Po: une expérimentation française* (Paris: LGDJ 2012), 171 ff.

201 The conference proceedings are published in: Michal Diamant, Michiel Leonard van Emmerik, Jan-Peter Loof and Wim J. M. Voermans (eds), *The Powers that Be. Op zoek naar nieuwe checks and balances in de verhouding tussen wetgever, bestuur, rechter en media in de veellagige rechtsorde* (Nijmegen: Wolf Legal Publishers 2013).

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