August 1, 2013

Theory of constitutional comparison

sebastian muller-franken, prof. dr

Available at: https://works.bepress.com/sebastian_muller-franken/1/
Theory of constitutional comparison*

Sebastian Müller-Franken**

I. Basics

1. Term and object

A theory of constitutional comparison does not compare constitutions by making statements about the term and function of constitutions or by analyzing and regulating single constitutional determinations and regulation complexes. Instead, it rises above the practical handling of this academic field and asks on a theoretical level for the character, object and method of constitutional comparison itself.

Constitutional comparison correlates two or more independent constitutional orders. Subject matter is the constitution as legal basic system of states, not as regards content concepts of a „constitutional governance“, which are not bound to the category of state (“constitutionalism”). As a legally comparative subject it works out the similarities and differences of constitutions, analyzes interactions and makes use of perceptions about one constitutional order for the understanding of another. A main interest lies within the different

---


** Professor for Public Law at the Philipps University of Marburg.

1 To the necessary independance of the legal systems, which are analyzed by constitutional comparison: Ulrich Häfelin, Das soziologische Element in der rechtsvergleichenden Methode, in: Recueil de travaux suisses présentés au VIIIe Congrès international de droit comparé, 1970, p. 87, 88.

2 Mark Tushnet, Comparative Constitutional Law: Cases and Materials, in: Reimann/Zimmermann (eds), The Oxford Handbook of Comparative Law, 2006, p. 1225, 1230-1233; a counter concept which transcends the state and gets its bearings as regards content elements of the comparison from the very beginning (acceptation of constitutional principles, basic and human rights, judicial control of public authority etc.): Norman Dorsen/Michel Rosenfeld/András Sajó/Susanne Baer, Comparative Constitutionalism, 2003,p. 1 ff., 10-16, 47-66 and passim. The commonly used translation of the term constitutionalism with „Verfassungsstaatlichkeit“, see e.g. Rainer Wahl, Konstitutionalisierung – Leitbegriff oder Allerweltsbegriff?, in: Festschrift für Winfried Brohm zum 70. Geburtstag, 2002, p. 191 with further evidence at fn. 1, does not meet the content, how its displays at hand. The term Verfassungsstaatlichkeit already implicates the reference to the so described type of wielding of power to the category of the state and is therefore inappropriate to include also an interdependency which is autonomous from the state, just as its described by the term „constitutionalism“. The content of this term is, as proposed here, better met by the transcendent category of „verfassten Regierens“.

3 To the elements of constitutional comparison: Ernst Rabel, Rechtsvergleichung und internationale Rechtsprechung, RabelsZ 1 (1927), 5, 7. The last mentioned aspect of constitutional comparison, the feeding of understandings to one constitution into the understanding of another one, shows, that there can’t be a „comparison“ in the true sense of the word. However, we also speak of constitutional
aspects of legal reality of constitutions. Not yet a contemplation of constitutional norms provides an insight into the content, function and effect of constitutions, but only a comprehensive substantive approach. Therefore, we have to take into consideration the use of constitutional norms by the state bodies, the actual circumstances of power and furthermore the social and economic background of the development of a constitution (genetical approach), as well as its social impact (operational approach). Already the term of the subject shows, that the examination includes a legally factual dimension. Compared to the term „constitutional comparative law“, which only comprises positive law, the term „constitutional comparison“ is consciously open to reality by leaving out the word „law“. Thus, constitutional comparison is not only operated by actors of constitutional law, but also by representatives of political philosophy and comparative political science. Constitutional comparison ranges above constitutions, which are correlated by the comparison, and resorts to a meta-level. In the categories of system theory, constitutional comparison exceeds the limits


7 Cp. Karl-Peter Sommermann, Funktionen und Methoden der Grundrechtsvergleichung, in: Merten/Papier (eds), HGR, vol. bd. I, 2004, § 16, margin number 5. In this context Sommermann speaks about „material“ instead of „real“ constitution and uses therewith a term, which does not describe the actual situation of power after the current terminology, but describes unlike the formal constitution the content of the fundamental rules of communities; to the terminology Matthias Jestaedt, Die Verfassung hinter der Verfassung, 2009, p. 47-49 (see supra sub III.1., p. 10 f). However, there is no difference in the cause.


of the system.\textsuperscript{10} By stepping out of the role as a participant and becoming an observer,\textsuperscript{11} the comparator is comparable to constitutional theoretician and sociologists of law, who also observe the law not from the inside, but from the outside.\textsuperscript{12} The comparator has to detach himself from the terms of his own legal system, because they obstruct the view to the parallelism of the duties, which have to be fulfilled by the compared constitutions. But an exhaustive solution is just an ideal in terms of a heuristic idea which can not be reached, but only be striven for. The development of a metalanguage, which paraphrases the rules of life problems with own terms,\textsuperscript{13} may not help. Indeed, the general theory of the state offers neutral terms, with which we can work. However, this possibility only exists, if terms and the problems which lay behind them, can be find in every compared legal system. A total neutralisation of one’s own perspective is primarily not possible, because the process of understanding is inevitable affected by one’s own preconception.\textsuperscript{14} Therefore, the comparator has to preserve his consciousness about the relativity of his own point of view.\textsuperscript{15}

2. Perspectives of comparison

Objects of constitutional comparison can be constitutions of independant states (international comparison) as well as federal systems within a federal state (intranational comparison); certainly in the latter case, some normative characteristics, which depart from the international comparison, partially ensue because the constitutions belong to the same legal system.\textsuperscript{16,17} The intranational comparison can refer to the constitutions of several federal states (horizontal comparison) even though to the comparison of federal constitutions with the constitution of the state (vertical constitution). In contrast, the comparison of norms within the


\textsuperscript{11} To the differentiation of a participant and an observer perspective: Matthias Jestaedt, Das mag in der Theorie richtig sein …, 2006, p. 17 f.

\textsuperscript{12} To constitutional theory: Jestaedt (supra note 7), p. 17-20, 24-29 (supra sub I.3., II.1.b., p. 2-4, 5 f.); to the sociology of law: Niklas Luhmann, Das Recht der Gesellschaft, 1993, p. 16 f.

\textsuperscript{13} That way so Christian Starck, Rechtsvergleichung im öffentlichen Recht, JZ 1997, 1021, 1027.


\textsuperscript{15} Gadamer (supra note 14), p. 274.

\textsuperscript{16} Cp. for the Basic Law article 28 paragraph 1 sentence 1. To distinguish the „external“ from the „internal“ comparison, the former is called the „actual“ comparative law, Konrad Zweigert, Artikel Rechtsvergleichung, in: Strupp/Schlochauer (eds), Wörterbuch des Völkerrechts, vol. III, 2nd edition, 1962, p. 79, 80.

\textsuperscript{17} Bernd Wieser, Vergleichendes Verfassungsrecht, 2005, p. 18 with further evidence.
same constitution is not part of constitutional comparison. At this juncture, it is rather about a systematic interpretation of norms, as it’s also practiced in constitutional law in accordance to the general methodology. With regard to the temporal scope of validity of the compared constitutions, the comparison can correspond to the ruling law (synchronal comparison) as well as intertemporal to the past law, which is no longer valid (diachronic comparison). The intention of constitutional comparison can be, to gain knowledge of each analyzed constitution (symmetric comparison) or to define the content of just one constitution (asymmetric comparison). By having a look at the extent of the access, we distinguish between phenomenons, which are collectively attached to a constitution, just as the theory of rules, thematic structure or classification in the categories of constitutional doctrine (macrocomparison) and an approach, which deals with single elements of the compared legal orders (microcomparison); but as a matter of fact, the microcomparison can not get by with the macrocomparison, so that the differentiation between these two perspectives becomes less important. Eventually, object of the comparison can be dogmatic questions, the interpretation of single constitutional terms, actual incidents, as well as theoretical themes, like questions of the function, style and decisive understanding of constitutions (substantive, instrumental, programmatically, open etc.). The comparison of constitutions with international agreements or organisational statutes of supranational organisations does not deal with the legal system of states, which explains that we terminological can not talk about vertical constitutional comparison in this context. Nevertheless, inter- and supranational law is important for constitutional comparison, because it interacts with the national law. For this reason the comparison of national constitutions with inter- and supranational law can be put into the category of vertical constitutional comparison.

18 Helmut Strebel, Vergleichung und vergleichende Methode im öffentlichen Recht, ZaöRV 24 (1964), 405, 406.
19 Sommermann (supra note 7), § 16, margin number 2.
23 BVerfGE 39, 1, 73 f., 81, 93.
24 BVerfGE 32, 54, 70; cp. to this the analyze by Jörg Manfred Mössner, Rechtsvergleichung und Verfassungsrechtsprechung, AöR 99 (1974), 193, 228-241.
25 BVerfGE 7, 377, 415 f.
3. Historical Background

Constitutional comparison has a long tradition. Already the political science at ancient times was interested in a comparative evaluation of the constitutions of the different hellenistic city states. In Western Europe the study of foreign constitutions started with the enlightenment. In the first instance, just a few heads in France and Germany concentrated on the similarities and differences of constitutions in a comparative way. But as soon as the idea of a written constitution came up at the end of the 18th century, the inquisitiveness about different principles of states increased. In fact, the revolutionary constitutional movements in Europe and North America at this time did not develop their constitutional concepts separately, but in a process of mutual comparison and transfer. At the time of the German Confederation, between the Congress of Vienna and the foundation of the Reich, the German faculties of political science had to cope with a particularly constitutionally situation: the lack of nation-state unification needed to be remedied by developing a general german constitutional law. The common german constitutional law was not about an applicable constitutional law of the time, but rather a work of art, which was composed by the still applicable old law of the Reich, the new federal law as well as the cross sum of the constitutional law of the single states. In the time of the empire the general theory of the state worked out its forms of government by consulting historical and contemporary comparative examples. The activity...
with foreign law changed in the 19th century, the „age of comparison“ (Nietzsche), its character from an investigation of foreign law with a comparison of external and internal law to an academic constitutional comparison.

But the history of constitutional comparison is not free from failures. Due to the autonomy of private law in the single states on the one hand and the constitutionalization of government within a national framework on the other hand, the comparison of public law in general and constitutional law in particular experienced a cesura at the beginning of the 19th century. Unlike the pacification of legal disputes between privates, the handling of transnational legal questions between states does not depend on a comparison of the solutions of the different national constitutions, but comprises a normative order since the modern age in public international law and found a home in the corresponding academic field. But finally, the Europeanization and the phenomenon of „globalization“, caused by the collapse of the Soviet Union and, as a consequence, multifaceted openings of the national constitutional spaces, led to an entanglement and interdependence of national statehood, which increasingly aroused interest in constitutional law and constitutional comparison. However, constitutional comparison did not get beyond an additional science at universities.

II. Functions of constitutional comparison

1. Predetermination by pre-governmental, international and supranational law or independance of constitutions as preliminary question?

The size of province, which is attributed to constitutional comparison, is connected to the question, how far the single constitutional law can be seen as predertermined by pre-governmental, international and supranational law. Representatives, who see the national
constitutional law mainly as a concretion of pre-governmental, international and supranational requirements and ideas act on the assumption of a larger scope of function of constitutional comparison than exponents, who put emphasis on the independance of every national constitution. In the first case, the extraction of normative contents of a constitution would only be possible, if initially the pre-, co- and superordinate norms would be comparative sifted, prepared and the gained knowledge supplied into the national constitutional law. If one put emphasis on the independance of national constitutions instead, constitutional comparison would only have the task to determine the differences and, as far as possible under this assumption, similarities between the compared constitutions.

However, such a categorical confrontation does not meet the present situation of western constitutional states. Faced with the choice, if constitutional law has to be understood as a concretion of pre-governmental, international and supranational law or as an independant national settling, one has to follow the second alternative: also in the present, the relationship between the states regarding their constitutions is formed by their souveranity in terms of an outward independance. Thereafter, international law does not have its original cause in itself, but depends on an order from the national law, which validates the norm. The same counts for the law of the European Union. Whose priority over the law of the member states does not go back to a common basic norm, which encloses the European legal system and the law of the member states and establishes a graduation of norms in an identical system, but goes back to an own application cause, which steps besides the application cause of the constitution of the respective state. The law of the European Union is not self-supporting.


40 To the primacy of the Community law: EuGHE 1964, 1251/1269 – Costa/Enel; to the idea of independence of the European Community: Hans Peter Ipsen, Europäisches Gemeinschaftsrecht, 1972, p. 61 f.

41 See BVerfGE 89, 155, 190; Josef Isensee, Vorrang des Europarechts und deutsche Verfassungsvorbehalte – offener Dissens, in: Festschrift für Klaus Stern, 1997, p. 1239, 1261-1265; Peter M. Huber, Der Staatenverbund der Europäischen Union, in: Ipsen/Rengeling et al (eds), Verfassungsrecht im Wandel, 1995, p. 349, 350-352, 360; different view Häberle (supra note 4), § 7, margin number 4: "... all forms of appearance of „Herrenideologien“ in the sense of states as the masters of the treaties‘ are an ideological ballast".

but its validity depens on an order of validity from the national law.\textsuperscript{43} For this reason, starting-point of constitutional comparison can only be the coexistence of coordinated national constitutional orders, not the idea of a network or scope of pre-governmental, international and transnational constitutional texts.\textsuperscript{44}

However, this comprehension does not mean, that constitutional comparison only performs a limited function.\textsuperscript{45} Instead, constitutional comparison does have to cope with a lot of tasks. The reason for this purpose lies within the fact, that states opened up themselves, interconnected (with each other) and blended into an unity, to ensure safety and prosperity to their citizens in times of globalization. Thus, a large part of European states joined forces in the European Union, a confederation of states, as well as did even more in the European Conventions on Human Rights to protect a minimum standard of human rights in their legal order. To understand the bonds of the states, which come along with these unions, we need constitutional comparative investigations.\textsuperscript{46} This view goes hand in hand with the idea of the independance of constitutions, as we can see that agreements under international law are an expression of state sovereignty.\textsuperscript{47}

\textbf{2. Overview}


\textsuperscript{44} To the legal theoretical untenability of the term „multilevel constitutionalism“: Matthias Jestaedt, Der Europäische Verfassungsverbund – Verfassungstheoretischer Charme und rechtstheoretische Insuffizienz einer Unschärferelation, in: Gedächtnisschrift für Wolfgang Blomeyer, 2004, p. 637, 641-674.

\textsuperscript{45} As like this for the comparison of the fundamental rights Sommerrnan (supra note 7), § 16, margin numbers 22-25.


Constitutional comparison can adduce multifaceted yields, which can not be listed conclusive because of the dynamic in the development of states and society.\textsuperscript{48} Like comparative law in general, constitutional comparison in particular pursues different purposes. Therefore, we can distinguish between purposes which are not targeted directly on the application of constitutions on the one hand and application-oriented ones on the other hand. But the classification of one purpose into one category can’t be strict. Generally, we strive for perceptions to achieve applicatory goals and vice versa the application gives us an insight which goes beyond the practical application.\textsuperscript{49}

3. Perceptions without any purposes

Constitutional comparison can be practiced without any purpose.\textsuperscript{50} To get to know and understand the „provision of solutions“\textsuperscript{51} in different communities on the field of constitution law is first of all an educational experience.\textsuperscript{52} The work with foreign legal orders opens up the national perspective of the beholder\textsuperscript{53} and creates a distance to ones own legal system.\textsuperscript{54} During this process the comparator alienates himself from his familiar legal order and gets a different access to his well-known law. The constitutions of the different states become a foil on which the outlines of ones own constitution emerge in a new light.\textsuperscript{55} The contrast effect to the foreign law as well as the embedment of the constitution in its particular sociocultural context and legal terms give the comparator the possibility to understand the substance of his own constitution better (asymmetric comparison).\textsuperscript{56}

\textsuperscript{48} To this supervision see already Walter Erbe, Der Gegenstand der Rechtsvergleichung, RabelsZ 14 (1942), 196.
\textsuperscript{49} Bernhardt (supra note 5), ZaöRV 24 (1964), 431, 434 f.
\textsuperscript{50} Höffelin (supra note 1), p. 87, 91; Herbert Krüger, Stand und Selbstverständnis der Verfassungsvergleichung heute, VRÜ 5 (1972), 5, 26; Wieser (supra note 17), p. 29-31.
\textsuperscript{51} This phrase is imputed to Ernst Zielmann by Ernst Rabel (supra note 6), RheinZ 13 (1924), 279, 287, and since then by many others.
\textsuperscript{53} Wieser (supra note 17), S. 17.
\textsuperscript{55} Sommermann (supra note 7), § 16, margin number Rz. 69; this insight isn’t new: Johann Wolfgang v. Goethe: „Who knows no foreign languages, know nothing of his own“, in: Maximen und Reflexionen, No. 1015, in place cited after the special edition to the 250th birthday of Goethe at 28.8.1999 from the C.H. Beck Verlag, 1998, p. 508.
\textsuperscript{56} Joseph H. Kaiser, Vergleichung im öffentlichen Recht, ZaöRV 24 (1964), 391, 404; Haller (supra note 26), p. 311, 312.
At the same time, constitutional comparison tends to understand foreign constitutions by working out similarities and differences between the diverse constitutional orders or single elements of the constitutions and institutional arrangements (symmetric comparison). In this context it is of high interest, to see whether constitutional rules have been proven in practical application. Thus, a lot of states are based on comparable principles and therefore have to cope with similar problems. For instance, a federal state is interested in seeing how a state with a comparable system has solved a problem concerning his federal structure. The intrigued state can detect in which environment and for which reasons the appropriate model has fulfilled its task.

4. Creating constitutional theory

In practical terms, constitutional comparison takes advantage of constitutional theory. The function of constitutional theory is to compensate the narrow view of constitutional dogmatics, which is caused by its task, and to ask for the sense and eligibilty of positive constitutional law. For that purpose, constitutional theory differs between various terms of constitution, which are correlated. Constitutional theory is, among other things, about a comparison of the positive legal constitution with the ideal type of certain constitutional models as well as about whose critique on the standard of an ideal constitution. Meanwhile, the changing of perspectives between a normative-real, positive legal one towards the ideal type of a certain constitution on the one hand as well as to the normative-ideal constitution on the other hand can only partly be afforded by constitutional theory itself. To create the standards of its comparison as well as its critiques, to cope with the complexity of its subject „constitution“, constitutional theory also depends on knowledge of other neighborly academic disciplines. At this point of constitutional theoretical reflection social science, constitutional

---

57 Sommermann (supra note 7), § 16, margin number 26.
58 Wieser (supra note 17), p. 33.
59 See Haller (supra note 26), 311, 321.
60 The classification of the benefit of constitutional comparison to constitutional theory under the category of practical purposes is not a contradictio in adjecto; to the practical importance of legal theory in general and constitutional theory in particular: Jestaedt (supra note 11), p. 13 f. and passim; id. (supra note 7), p. 40-96 (supra sub II.3.-IV.2., p. 9-22); in general: Pierre Legrand: „good practice requires good theory“, in: How to compare now, Legal Studies 16 (1996), 232, 239.
61 Jestaedt (supra note 7), p. 40-44 (supra sub II.3., p. 9 f.).
64 Jestaedt (supra note 7), p. 51 f. (supra sub III.2., p. 12).
comparison and other constitutional academicians assert themselves. Their understandings convey a more comprehensive view of general structural principles and single structural elements of ideal types of certain constitutions as could be extracted solely from theoretical considerations. For example, the ideal type of a constitutional-democratic constitution gains contour and distinctiveness not yet by constitutional theoretical arguments, but only by separating its characteristics from the comparison of „lived“ constitutions, which can be considered as appropriate to this type. Without constitutional comparison, constitutional theory would be confined to a conflict about words, which would deductively and speculatively remain without any correlation to reality of constitutional ideal types.

But also the construction of a positivitätstranszendierenden ideal constitution does not develop alone by constitutional theoretical „philosophy of constitutional law“. Thus, constitutional theory depends on illustrative material of constitutional concepts and solutions from which an ideal constitution can be formed; the configuration and preparation of this material is provided by constitutional comparison. A constitutional arrangement can, on the other hand, only be regarded as the desirable ideal of a constitution, if its norms are not only valid in positive law, but can also assert themselves in legal reality. According to the categories of Roscoe Pounds, to perform the leap from a „constitution in the books“ to a „constitution in action“, only on the foundation of a sufficient knowledge, we can impute the capability to rise from an applicable to a lived constitution.

Conveyed by constitutional comparison, which contains both, normatives and realities of constitution, constitutional theory provides an insight into the social and economic background of the origin of a constitution as well as its social effect. According to questions

---

65 Martin Morlok, Was heißt und zu welchem Zweck studiert man Verfassungstheorie? 1988, p. 31-33; Wieser (supra note 17), p. 45.
66 To this function of comparative law in general: Léontin-Jean Constantinesco, Rechtsvergleichung, vol. II: Die rechtsvergleichende Methode, 1972, p. 337.
67 To this function of constitutional theory: Jestaedt (supra note 7), p. 51 (supra sub III.2., p. 12).
70 Wieser (supra note 17), p. 20, 45. The related term “constitutional reality”, which has often been used in this context, is mutable in its sense and is therefore tried to be avoided. It means in addition to the actual situation of power in the sense of “real constitution”, as here, see e.g. Ludwig Adamovich, Artikel Verfassung, in: Klose/Mantl et al (eds), Katholisches Soziallexikon, 1980, Sp. 3184, also the strenuous interpretation of the constitution through the state bodies, as Dieter Grimm, Artikel Verfassung, in: Staatslexikon der Görres-Gesellschaft, vol. V, 7th edition, 1989, Sp. 633, 637, as well as the section of
which exceed the practical application of constitutional law, constitutional comparison ties in
with the knowledge of sociology of law, which explores the impact between law and society.\textsuperscript{71} Constitutional comparison differs from the sociology of law by primary dealing with the legal
norm itself and secondary with the social background, which provides only an illustrative
function. The sociology of law instead deals with the ontologically cohesions of law and society.\textsuperscript{72}

The relation between constitutional comparison and constitutional theory can be described as
the first one provides assistance and retrievalservice to the second one.\textsuperscript{73} But the relationship
of these two disciplines can not be limited to an unilateral taking the one from the other.
While constitutional comparison takes the perspective of an observer to the investigated
constitutions and detaches itself from its terms of systematic\textsuperscript{74} to describe its object of
investigation, constitutional comparison in return requires constitutional theory as a
descendant of the general political science, which, as far as available and possible, provides
neutral categories and terms.\textsuperscript{75} The proportion of these two subjects can be best described as
division of work.

5. Constitutional politics

Constitutional theory is not limited to a critique of the positive legal constituion, but
furthermore strives for a change of the status quo.\textsuperscript{76} In its function as an acadmic ,,policy of
constitutional law“, constitutional theory again benefits from constitutional comparison in
many respects. Thus, constitutional comparison provides an orientation in the process
constitution drafting. In addition constitutional theory obtains arguments for the reform
political discussion. However, constitutional comparison doesn’t initiate an unification of
constitutions, but sets a limit to such attempts.

\textsuperscript{71} \textit{Friedrich M"ullers, Juristische Methodik, 7th edition, 1997, margin numbers 232, 482.}
\textsuperscript{72} \textit{Heldrich (supra note 6), RabelsZ 34 (1970), 427, 429 f.; see also H"afelin (supra note 1), p. 87, 96-104.}
\textsuperscript{73} \textit{H"afelin (supra note 1), p. 87, 96 f.; Wieser (supra note 17), p. 28.}
\textsuperscript{74} \textit{Wieser (supra note 17), p. 30.}
\textsuperscript{75} \textit{See also supra sub I.1.}
\textsuperscript{76} \textit{See also Jestaedt (supra note 7), p. 15-17 (supra sub I.2., p. 2), to the question whether the general
political science found next to the constitutional theory a further descendant with the theory of the
states.}
\textit{Jestaedt (supra note 7), p. 51 f. (supra sub III.2., p. 12).}
a) Orientation at the drafting of a new constitution

The drafting of a new constitution does not occur as a spontaneous act in terms of a „juristic big bang“. In political reality, constitutions rather originate in dependance on former constitutions as well as, „the less the people are bound to the usage“, on comparison with constitutions of other states. That way, not only the draftings of constitutions in the 20th century before and after the second world war as well as in the recent past in the reform states of the former Eastern Bloc after the implosion of the Soviet Union, but already the revolutionary constitutional movements in the 18th and 19th century in reference to constitutional ideas, which were developed in other states, were designed and implemented. In the process of constitution drafting constitutional comparison provides an orientation about control theories and differences, which make it easier to create an „effective“ constitution.

b) Arguments in the reform political discussion

Though, constitutional comparison does not only play a role for the drafting of a new constitution. Moreover, constitutional discourses about the reform of an applicable constitution also get their ideas and arguments to a large extent from a consideration of the constitution of other states. Constitutional comparison opens ones view to a palette of already proven solutions and offers thought-provoking impulses for a better understanding of the existing constitution. That way, the comparison of constitutions offers suggestions how to solve constitutional problems with the solutions of other constitutions or rather helps, that the problems not even arise. But the transfer of a foreign solution to another constitutional arrangement is only possible, if the compared constitutions do not only possess the same structure, but also, at least in the essential points, arise from the same social, economical,

---

78 Friedrich Nietzsche (supra note 33), p. 36.
79 To the constitutional comparison roots of constitutions from the 18th and 19th century see sub. I.3; to the constitution-drafting process at the end of the 20th century in Eastern Europe: Boguslaw Banaszak, Die Bedeutung der rechtsvergleichenden Forschung für das Verfassungsrecht, in: Essays in Honour of Professor Antal Ádám on the Occasion of his 75th Birthday, 2005, p. 23, 29-31; collectively Häberle (supra note 4), § 7, margin numbers 1-20 and passim.
80 Sommermann (supra note 7), § 16, margin number 45.
81 Haller (supra note 26), p. 311, 312.
82 Sommermann (supra note 7), § 16, margin number 47.
cultural and historical context.\textsuperscript{83} Constitutional comparison would fail its function, if it would like to access to an answer of a legal system, in which it is imbedded and in which it has proven to be efficient, and exert this answer into a different legal system without worrying whether this adoption from other traditions makes sense or works in a foreign regime; just like the postmodern concept of „bricolage“\textsuperscript{84,85} For example, if we would like to implement plebiscites into the Basic Law, we might refer to the Switzerland and their experiences with this governmental instrument.\textsuperscript{86} But we also have to take into consideration, that plebiscites have a long tradition in Switzerland and have to fulfill the function of a political opposition in Switzerland because of the constant practice of a „consociational democracy“ in the Swiss political system. Besides, the citizens of Switzerland, socially and culturally, do not provide their state with the financial power for the purpose of the highest possible transfer payments, but rather fund him thriftily.\textsuperscript{87} All these historical, political and social conditions differ from the corresponding situation in Germany.\textsuperscript{88}

c) Not: harmonization of law

In contrast, the unification of law does not play a role in the field of constitutional comparison. Herein, constitutional comparison differs from the comparison in the realm of subconstitutional law, which accentuates the legal harmonization by supranational organizations as well as the formulation of a union law („lois uniformes“) as main goals.\textsuperscript{89} The reason for this lies within the characteristic of the object of constitutional comparison compared to the one of comparison in the field of subconstitutional law:

\textsuperscript{83} Bernhardt (supra note 5), ZaöRV 24 (1964), 431, 437.

\textsuperscript{84} Development of the term Bricolage as the taking and handling of the straight given in anthropology: Claude Lévi-Strauss, The Savage Mind (1962), 2nd edition, 1968, p. 16 f.


\textsuperscript{86} Andreas Glaser, Nachhaltige Entwicklung und Demokratie, 2005, p. 341-352, 380-386.


\textsuperscript{88} Instructive essay from a Swiss point of view: Thomas Härlimann, Herr Steinbrück, Sie haben Mundgeruch, FAZ No. 71 from v. 25.3.2009, p. 33.

constitutional comparison does not only refer to a section assumed within the framework of the legal system, but, because of the priority of the constitution, moreover refers to the basics of law and furthermore to the „ground“ on which these basics rest in turn;\textsuperscript{90}

the constitution deals with the inception, shaping and limiting of governmental power as well as the relationship between state and individuals; though the inner system of the state is less determined by an immanant objective necessity than it is the case of abandonments in the sphere of subconstitutional law; the first and foremost determining factor for constitutions is the political will to create dynamic forces;\textsuperscript{91}

constitutional law is the product of national sovereignty,\textsuperscript{92} which is characterized by the idea of a nation, the unity of the public. Because of this, constitutions are more affected by factors, which are linked to the nation as their subject of legitimation, than all the other normative systems of rules: historical developments and experiences, social and economical conditions, political convictions and beliefs, culturel and religious heritage; the composition of constitutional law comprises not only rational, objective-general traits but also subjective-specific ones, which are not predetermined by sanity.

Constitutional comparison, which not only has to accentuate and investigate the similarities, but also the differences of constitutions, as a matter of principles, questions the effort to standardize. Bureaucratic notions of legal harmonization are bothered by established national autonomy.\textsuperscript{93} In the field of law, constitutional comparison takes the role of a framework of

\textsuperscript{90} Rainer Wahl, Verfassungsvergleichung als Kulturvergleichung, in: Festschrift für Helmut Quaritsch zum 70. Geburtstag, 2000, p. 163; already Bernhardt (supra note 5), ZaöRV 24 (1964), 431, 432; id. to the following.

\textsuperscript{91} Haller (supra note 26), p. 311.

\textsuperscript{92} Stolleis (supra note 34), p. 27.

\textsuperscript{93} Thomas Würtenberger, Grundgesetz und Verfassungstradition, in: Essays in Honour of Georgios I. Kassimatis, 2004, p. 323, 325 f.; Häberle (supra note 4), § 7, margin number 26; Hafelin (supra note 1), p. 87, 103. Pasquale Stanislao Mancini emphasizes, that one task of jurisprudence is, to identify and to save the national singularities, the „originalità nazionale“, see e.g. id. in his also legal comparison orientated Enciclopedia Giuridica Italiana, vol. I, Mailand, 1884, p. 3-4 (preface; in the original without pagination). Mancini was the great opponent of Emerio Amaris, founder of the modern comparative law, see: Erik Jayme, Rechtsvergleichung und Fortschrittsidee, in: Schwind (ed.), Österreichs Stellung heute in Europarecht, IPR und Rechtsvergleichung, Österreichische Akademie der Wissenschaften, Philosophisch-Historische Klasse, Sitzungsberichte, 526. vol., 1989, p. 175, 177 f.
references, in which the postmodern theory of legal comparison can find illustrative material: the normativity of modernity, which strives for a joint world law, confronts on the realm of constitutional comparison with the idea of acceptance of the plurality of lifestyles.94

6. Application of constitutional law (extraction of constitutional law)

Besides, constitutional comparison can render benefits for the application of constitutional law (extraction of constitutional law).

Thus, constitutional comparison asserts itself as an „academic feeder“ of constitutional theory, to resume the trail, not only with a view to future-oriented topics de constitutione ferenda, but also according to current questions de constitutione lata. If we divide the application of law (extraction of law) in a foreign-programmed section of legal cognition and a self-programmed section of law-making,95 constitutional comparison can, in both stages of the process, be applied in its function as a „feeder“ for constitutional theory: the knowledge needed for the preconception of constitutions is affected by the authoritative constitutional theory. Because firstly constitutional comparison inures to the benefit of the cognition of one’s own law, constitutional comprehensions pour into constitutional theory. The same applies for the extraction of law. In this connection constitutional comparison matters for the metapositive suprastructure of the constitution, because also the overall picture of the constitution accrues not only from constitutional theoretical deliberations, but also needs a constitutional comparative view.96 Indeed, cognitions of constitutional comparison do not hold a normative binding force in the nexus of constitutional theoretical preconception as well as academic policy of constitutional law, but merely have the character of a material Regelhaftigkeitshypothese respectively of a legal political leading function; however, even with this meaning, they unfold a real effect, which shouldn´t be underestimated.97

Furthermore, constitutional comparison plays a role at the application of law independant from any involvement into the frame of constitutional theory. Because constitutions which do not follow the concept of an open constitution, but understand themselves as a legal binding

---

95 Jestaedt (supra note 7), p. 89 f. (supra sub IV.2., p. 20 f.).
96 See supra sub. II.4.
97 Jestaedt (supra note 7), S. 93 (supra sub IV.2.b., p. 22).
standard of governmental acts,\textsuperscript{98} can not choose arguments of constitutional interpretation freely, they need to constitute the opening towards a comparative perspective.\textsuperscript{99} The reasoning with constitutional law, constitutional adjudication and literature of foreign states has to prove its identity as an „obligation“ to the constitution, as it applies to every point of interpretation. To open up their contents, constitution as well as its rules of interpretation have to allow the consultation of constitutional comparative aspects.\textsuperscript{100} This is essential regardless of the importance of constitutional comparative arguments for the interpretation. Because of the wideness and indefiniteness of constitutional norms, they are even less accessible to a positive interpretation than norms from other fields of law. Therefore, also a legally comparative argument, which shall not be required explicitly for the solution, but can be adduced confirmatively, might, at the end, tip the scales for a certain interpretation.\textsuperscript{101} The problem with this effect of reasons in the process of the extraction of constitutional law is disregarded, when we, in a relativizing intention, say, that constitutional comparative arguments are not obligatory, but only an aid for a better understanding of ones own law.\textsuperscript{102} If one does not manage to detect such an authorization in ones own law and if therefore carries constitutional comparative arguments only as general reasonable contemplations or simple cosmopolitan emphasis into the process of constitutional interpretation, one would miss the idiosyncratic of jurisdiction\textsuperscript{103}: the one, who applies the law, ranges beyond „statute and law“.

It’s most obvious, if the constitution itself demands a comparative procedure for its application. In addition to the explicit order to the courts, to work legally comparative,\textsuperscript{104} a constitution might also use terms, whose contents are not autonomous, but can only be made

\textsuperscript{100} Tushnet (supra note 85), Yale Law Journal 108 (1999), 1225, 1231.
accessible by comparing them with legal-cultural standards of other states. Thus, the prohibition of the VIII. Amendment of the Bill of Rights of the United States of America, to impose „cruel and unusual punishments“, is created to be made accessible through a comparison of the normative legal system as well as the practical enforcement of criminal law in other states.\textsuperscript{105} Furthermore, whole systems of norms, whose content is determined by constitutional comparison, can be made obligatory through a reference to a constitution, so that the comparison, which is required in that context, becomes indirect significant for the other one. One example for this is the European Convention on Human Rights. Whose contracting states have committed themselves to adhere to the guarantees of the convention at the implementation of their own fundamental rights. If a comparison of European fundamental rights is needed to determine their content, this comparison will also assert itself by implementing the national fundamental rights.\textsuperscript{106}

If a constitution does not command constitutional comparartional considerations in particular through the application of appropriate terms or in general through the reference of norms, which can be opened up by a comparison, a comparative procedure can still prove itself as an acceptable aspect of the application of constitutions through general methodical rules.\textsuperscript{107} Authoritative for this is the theory of constitutional comparartive interpretation: if one is of the opinion, that the target of interpretation is the detection of the objectified will of the constitution, comparative arguments can be established under the aspect of teleological interpretation. A constitution is supposed to establish, form and limit governmental power. Therefore the „functioning“, which means the practical effectiveness of one state, is an integral element of its system.\textsuperscript{108} Consequently, constitutions have to be interpreted in a manner, which enables and gives them practical effectiveness.\textsuperscript{109} If one way of interpretation has been proven in an assimilable state, the idea of teleological construction suggests to adopt this alternative. Such an argumentation with a foreign constitution does not declare the will of another nation as authoritative and therefore does not change the legitimatory basis of ones

\textsuperscript{105} See Tushnet (supra note 85), Yale Law Journal 108 (1999), 1225, 1233; in the Basic Law, the term „general rules“ of public international law of article 25 accords an analogical request, to determine its contents through constitutional comparison, see: Bernhardt (supra note 5), ZaöRV 24 (1964), 431, 445.
\textsuperscript{106} Jochen Abr. Frowein, Zur Lage der deutschen Staatsrechtslehre nach fünfzig Jahren Grundgesetz, DÖV 1999, 806, 809.
\textsuperscript{107} Jackson (supra note 102), Harvard Law Review 119 (2005), 109, 123.
\textsuperscript{109} Isensee (supra note 108), § 15, margin number 196; id., Verfassungsrecht als „politisches Recht“, in: id./Kirchhof (eds), HStR, vol. VII, 1992, § 162, margin numbers 30, 83 with further evidence.
Because it’s the own people who, as a constituent power, want an efficient constitution themself and thereby legitimate the use of foreign law.

If one instead see the target of interpretation in the determination of the subjective will of the constituent power, legal comparative arguments would only be acceptable by exhibiting the will of the constituent power concerning that matter. It takes a historical-genetical evidence to show that the constituent power wants to orient its legal system to principles and institutions of another constitution. In that case, the contents of the constitution, which served as a

---


111 See Fritz Münch, Einführung in die Verfassungsvergleichung, ZaoRV 33 (1973), 126, 127 f.; Kurt Heller, Rechtsvergleichung und Verfassungsrecht, in: Festschrift Fritz Schwind zum 80. Geburtstag, 1993, p. 147, 152; Heinrich Triepel emphasizes the „democratic underground“, which was laid by different states and on which the new German legal system is based, as a basis of constitutional comparison in his often cited article, VVDSrl 3 (1927), p. 50.
model, can be significant for the interpretation of the constitution, which got inspired by the first one.\textsuperscript{112}

All in all, constitutional comparison does not become a „fifth method of interpretation“,\textsuperscript{113} but it is necessary and, as shown, also possible, to implement arguments from foreign law under the accepted rules of constitutional interpretation into the application of law. Depending on the point of reference, the framework of teleological or the one of historical-genetical construction comes into consideration.

However, legal comparative arguments are also subject to restrictions. First of all, the problem of constitutional comparison, as with every other legal comparison, is how to choose a state to compare with.\textsuperscript{114} If we prove a certain result of interpretation with one constitution, we may often find a contrary position by consulting another constitution. Since it is hardly possible, nor sensible to integrate all constitutions of the world into every legal comparison, but instead to work with just a few constitutions, the selection of the used constitutions may already have an impact on the desired result. Because of the potential relevance of every argument, this problem can not be solved by giving comparative arguments only a confirmatory, controlling role, but not – apart from the cases, in which a normative constitutional interpretation is directed – one which is decisive for the result of the interpretation.\textsuperscript{115} Another possibility may rather, to disclose the selection criteria and to make oneself aware of the structural weakness of comparative legal arguments.

One also has to take into consideration, that constitutions, in addition to their often verifiable orientation on foreign constitutional and political ideas, always form standards and coin institutions, which, as shown, are based on own historical experiences, cultural impressions

\begin{footnotes}

The terms „mother-constitution“ and „daughter-constitution“, which are often used in this context, implicate a genetic historical family relationship in the sense of an in-line absorption. With a few exceptions, constitutions are generally composed of different elements (such as domestic traditions, foreign role models and independent innovations), so that these terms are a misleading simplification of the contexts. Wieser (supra note 17), p. 108.

\item[113] However, like this Peter Hieberle, Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat, JZ 1989, 913, 917; in favour of the interpretation of the basic rights Fritz Ossenbühl, Grundsätze der Grundrechtsinterpretation, in: Merten/Papier (supra note 4), § 15, margin number 31 f.


\item[115] See supra in the text with note 101.
\end{footnotes}
and national myths.\footnote{Bernhardt (supra note 5), ZaöRV 24 (1964), 431, 443; Jan Kropholler, Comparative Law, Function and Methods, in: Bernhard (supra note 77), p. 702, 704. Also the much criticized categorical rejection of legal comparative arguments at constitutional interpretation is based on this context, Hans Nawiasky, Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung, VVDSfRL 3 (1927), p. 25, 26.} Besides, every constitution is a compromise, in which different beliefs are summarized and balanced.\footnote{See Alexander Hollerbach, Ideologie und Verfassung, in: Maihofer (ed.), Ideologie und Recht, 1969, p. 37, 54-56; Andreas Voßkuhle, Verfassungsstil und Verfassungsfunktion, AoR 119 (1994), 35, 38-43.} There will always be indigenous ideas of law, which originally accrue from the deep layers of the collective consciousness of a nation or from reciprocal accommodation of its members, and which can not be leveled by comparative considerations.\footnote{BVerfGE 39, 1, 66-68, to the coining of the Basic Law by the experiences of the National Socialism. In the case \textit{District of Columbia v. Heller}, 554 U.S. 570 (2008), the U.S. Supreme Court completely abandoned legal comparative considerations regarding the question, how the right of private guns is regulated in the law of other civilized nations of the Western civilization. The proceeding was about an U.S. American myth, whose destruction by comparative law has not even been considered by a divergent vote; see: Cass R. Sunstein, Second Amendment Minimalism: Heller as Griswold, Harvard Law Review 122 (2008), 246, 271. To the Basic Law, for example the law regulating the separation of church and state (constitutional church law) is an original construction, which would also subduct itself from a legal comparative leveling; to the indigenous character of the German constitutional church law: Josef Isensee, Die Zukunftsfähigkeit des deutschen Staatskirchenrechts, in: Festschrift für Joseph Listl zum 70. Geburtstag, 1999, p. 66, 70-75.} But this does not mean, that „the academic limits […] have to coincide with the political ones“;\footnote{Change with critical intention to jurisprudence in general: Rudolf v. Jhering, Vom Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, vol. I, 5th edition, 1891, p. 15.} in fact comparison is also reasonable and necessary under this assumption. However, this means, that it is always required to investigate the cultural context of constitutional norms and their conditions of application, because differences might result therefrom. A general presumption, whereby a variety of interpretation of ones own law at newly emerged issues has to be rejected, if this interpretation is obviously highly controversial at different constitutional systems,\footnote{In favor of such a role: Schulze-Fieltz (supra note 5), p. 355, 375 f., also under reference to the doctrine „singularia non sunt extendenda“, p. 370; already to the inappropriateness (also) of this idea Hans Nawiasky, Allgemeine Rechtslehre, 2nd edition, 1948, p. 135 f.; Karl Engisch, Einführung in die Rechtswissenschaft, 9., edition obtained by Würtenberger and Otto, 1997, p. 129-132, 194 f.} lacks a basis in comparative constitutional law. Even new emerged constitutional questions might be answered on the basis of established beliefs.\footnote{Sample: Josef Isensee, Die alten Grundrechte und die biotechnische Revolution, in: Festschrift für Alexander Hollerbach zum 70. Geburtstag, 2001, p. 243, 250-264.}  

7. Determination and development of general principles of law

Finally, constitutional comparison has to serve as a source of knowledge to international and supranational law.\footnote{To further goals (supra note 17), p. 31 f.} Thus, constitutional comparison is an aid to detect the general principles
of law of civilized nations in terms of article 38 paragraph 1 lit. c of the Statute of the International Court of Justice.\textsuperscript{123} Accordingly, the European Court of Justice has gained the general principles of law, which the legal systems of the member states have in common, through comparative work.\textsuperscript{124} Article 6 paragraph 3 EU, which was inserted by the Maastricht Treaty and whereby the European Union respects the fundamental rights, as guaranteed in the ECHR and as they result from the common constitutional traditions of the member states as general principles of Community law, stipulates this jurisprudence and since then demands to determine the contents of the fundamental rights of the EU through a widespread comparison in written law.\textsuperscript{125}

III. Subject of constitutional comparison

1. Multiplicity of constitutions

So far, according to common language usage, we referred to „constitution“ as point of reference of constitutional comparison. Constitution, however, is a multivalent term, so that its use has to be substantiated. The result of the different functions, which constitutional comparison has to satisfy, is, that constitutional comparison can not find its object in only one term of constitution. In fact, we need a different term in each case, depending on the task of comparison.

2. Reference point of constitutional comparison

If constitutional comparison is supposed to give an insight into ones own as well as foreign constitutions for the purpose of pure knowledge or the formation of constitutional theories, we have, depending on the interest of knowledge, to distinguish between three terms of constitution:

If the comparison wants to find out, in which constitutional status the state shall be, it refers to the constitution in a normative sense. In order to explore the contents of the desired condition,

\begin{itemize}
  \item Zweigert (supra note 16), p. 79; closer Bernhardt (supra note 5), ZaöRV 24 (1964), 431, 446–448.
  \item Wüntenberger (supra note 93), p. 323 f.; to the history of this norm: Christian Walter, Geschichte und Entwicklung der Europäischen Grundrechte und Grundfreiheiten, in: Ehlers (supra note 46), § 1, margin numbers 20-33.
\end{itemize}
which means the legal substance, on which a constitution is based, the constitution becomes subject of constitutional comparison in a substantive sense.\textsuperscript{126} But comparison would not do justice to its aim, to gain knowledge about one’s own and foreign law, if it would remain on the level of the normative. If constitutional comparison, instead, also wants to provide a view of the actual function of the examined constitutions, the term constitution needs to be understood as real constitution as an expression of the positive balance of power within a state.

The purpose of the comparison might also lie within the provision of arguments for the reform political discussion and the provision of an orientation to the policy of constitutions for the process of drafting a constitution by pointing out experiences from abroad. In this case the same applies: the desired political order of other states (normative constitution), its organization with regard to the contents (substantive constitution) and its implementation at the power struggle of governmental reality (material constitution) is of interest for constitutional politics. If the comparison shall also determine one’s own position regarding constitutional political reform attempts, the positive constitution in terms of an „overall decision about type and form of political unity“ (Carl Schmitt), which upstreams the normative constitution, appears.\textsuperscript{127} The positive constitution, as well as essential matters of substantive constitution, is not at the disposal of desires for harmonization of constitutional law, which are fueled by constitutional comparative considerations.

With regard to the constitutional comparison, which is done within the scope of the application of law, we have to distinguish in the same way: if a constitution, by its terms or through a reference to comparative norms, asks for opening up its contents through constitutional comparison, or if it endorses constitutional comparative deliberations in the context of teleological or historical-genetical interpretation, the comparator can ask himself, how the terms are understood in different constitutional orders as regards content (substantive and normative constitutions) and how they are understood in real (material constitutions). As to the emphasis of constitutional comparative arguments, like at constitutional policy in relation to the immovable positions towards efforts of harmonization, the positive constitution

\textsuperscript{126} To the term substantive constitution see \textit{Jestaedt} (supra note 7), p. 47 (supra sub III.1., p. 10 f.); diverse the usage in Austria, where the term generally denominates the sum of „Normerzeugungsregeln“, cp. Robert Walter/Heinz Mayer/Gabriele Kucsko-Stadlmayer, Bundesverfassungsrecht, 10th edition, 2007, margin number 4; András Jakab, Die Dogmatik des österreichischen öffentlichen Rechts aus deutschem Blickwinkel – Ex contrario fiat lux, Der Staat 46 (2007), 268, 269 (also to irregularities).

is added to the substantive constitution for the determination of the indigenous matter of an constitution, which can not be leveled through constitutional comparison.

If constitutional comparison aims to assess the existence of general legal principles in different states, we have to make distinctions as well: the comparison can find out, which norms are applicable in the examined states (normative constitution), whereupon they are focused with regard to the content (substantive constitution) and whether they are respected in legal reality (material constitution).

The normative and in parts the substantive constitution is easily identifiable at external attributes and therefore emerges at the formal constitution, which means the constitutional text. It gives the comparator an idea on how the normative intended political order can be constructed in a community. However, the constitutional charter is not a separate object of comparison, even not, if only the structures or the linguistic styles of certain constitutions are compared as such.

Because there is no pure form, the form always implicates the contents. Therefore, terms at different constitutions generally have a various meaning, which results from their social and cultural context and which can not be opened up solely through an examination of the constitutional charter. Therefore we are not even allowed to infer from textual consonances of constitutions to a similar understanding of formal questions, „to compare legal paragraphs“ (Rabel), is now common property, is not sufficient at any case.

IV. Methods of constitutional comparison

1. In general

128 This understanding is relating to the history of ideas common property, cp. Johann Wolfgang v. Goethe: „the content brings the form; form is never without content“, Paralipomena zu Faust, 2. Teil v. 11.4.1800, in place cited after the edition from the Insel-Verlag p. 529; also Heinrich v. Treitschke: „...mere forms do not exist“, Die Gesellschaftswissenschaft, Halle a.d. Saale 1927, in place cited after Neudruck Darmstadt 1980, p. 62.

129 Sommermann (supra note 10), DÖV 1999, 1017, 1022; sample: Uwe Kischel, Vorsicht, Rechtsvergleichung!; ZVglRWiss 104 (2005), 10, 11 f.

130 Hartmut Krüger (supra note 21), p. 1393, 1403.

Constitutional comparison claims to be qualified as an academic fundamental discipline of constitutional law. Thus, its procedure requires a method, which means a planned, certain rules followed research approach to gather knowledge. However, a methodical procedure does not call for a rigid corset. The method of a constitutional comparative investigation moreover has to, like every method, act on whose concrete goals. If one, for example, wants to make a statement about whether unwritten constitutional ideas were received first in our own or a foreign constitutional text, one can describe and show such interactions with the method of „Textstufenanalyse“. When it comes to compare constitutions in terms of dealing with a particular objective problem, we possess, for this method of „functional constitutional comparison“, certain basic rules from the general comparative law, with which such an approach can be put in order. These rules are flexible enough, so that one does not need a surrender of constitutional comparison to an aleatory-situational approach under renouncement of any regular statement, as it is variously demanded, to do justice to the diversity of situations.

2. Particularities of constitutional comparison

Indeed, an imitation of constitutional comparison to the rules of the functional method only comes into consideration with modifications, since these rules have been developed mainly by private comparative law. Comparative civil law primarily copes with transnational financial or personal issues, where it mainly comes to finding a reasonable reconciliation of interests between the involved persons. As shown, constitutional comparative law has a different purpose. It refers to the organization of state power as well as the relationship between the state and individuals. Therefore, the object of constitutional comparison is not determined by

---

133 Bernhardt (supra note 5), ZaöRV 24 (1964), 431, 432; Kay Hailbronner, Ziele und Methoden völkerrechtlich relevanter Rechtsvergleichung, ZaöRV 36 (1976), 190, 193; Strebel (supra note 18), ZaöRV 24 (1964), 405, 406.
135 Sommermann (supra note 7), § 16, margin number 52.
136 Trend: Konrad Zweigert/Hein Kötz, Einführung in die Rechtsvergleichung, 3rd edition, 1996, p. 32; likewise Axel Tschentscher, Dialektische Rechtsvergleichung – Zur Methode der Komparatistik im öffentlichen Recht, JZ 2007, 807, 810-816, whose methodological approach puts mainly the judgmental element of constitutional comparison in the foreground; to the question of judgments at constitutional comparison see infra sub V.
137 See Wieser (supra note 17), p. 27-29, 38-43; though still noncritical Kaiser (supra note 56), ZaöRV 24 (1964), 391, 402, favours a dependance of public law on civil law.
an immanent objective necessity, but by the political will of the fundamental forces.\textsuperscript{138} Hereby constitutional comparison gets more ridden with prerequisites and more extensive than comparative law based on an excerpt from the subconstitutional law and rises above whose problems.\textsuperscript{139} The rules and institutions, which are the subject of comparison, are to a greater extent influenced by national particularities, by historical developments, social forces, political beliefs and cultural heritage than any other normative regulations. Thus, constitutional comparison depends on findings from the sociology of law and legal history to a higher extent than comparisons on the field of subconstitutional law.\textsuperscript{140} For example, the constitutional struggles of constitutionalism in Germany are closely associated with the political history of France, that both can only seen against this background.\textsuperscript{141} Consequently, the varied elements of comparative law are differently weighted and provided with further aspects at constitutional comparison.\textsuperscript{142}

Furthermore, the doctrine of „legal families“, which was developed by private comparative law, can not play the same decisive role at constitutional comparison.\textsuperscript{143} The idea of legal families contains that certain typical legal structures, which can be found in a variety of jurisdictions, are classified in a few big groups and by doing this, the law can be arranged, penetrated more sharply and thus, a „legal world map“ can be created. Although this idea corresponds to an intellectual basic need, which can be find in every science, even at constitutional comparison, in one or another way, we do not have a common foundation of development which might be associated with substantive similarities of the constitutions, as it can be assumed with Romance, German, Anglo-American, Arab or any other legal family at private law.\textsuperscript{144} At private law, the Roman legal family is based on the common idea of the \textit{Code civil} (1804), the German legal family has its origin in the historical legal school (Savigny) and the Anglo-American legal family can be traced back to the tradition of

\textsuperscript{138} Bernhardt (supra note 5), ZaöRV 24 (1964), 431, 432.
\textsuperscript{139} Wahl (supra note 90), p. 163; already Bernhardt (supra note 5), ZaöRV 24 (1964), 431, 432.
\textsuperscript{142} Sommermann (supra note 7), § 16, margin number 64.
\textsuperscript{143} See Zweigert/Kötz (supra note 136), p. 64.
Despite divergent trends, these points of references provide the foundation, to establish substantive similarities between the jurisdictions. Constitutional law is lacking such common ground. Thus, Great Britain only knows substantive constitutional law, whereas the United States of America follow the idea of a written constitution. This example shows, that already the „Anglo-American legal family“ lacks a common ground when it comes to central questions of their concept. Conversely, we can find significant similarities bewteen Germany and France as exponents of various conventional jurisdictions, because the constitutional traditions of both states are based on the ideas of the French Revolution. The practical application of the traditional legal family classification is therefore limited to the civil law, in constitutional law however, it is useless; legal families are factual relative.

Instead of using the conventional legal families, at constitutional law we might divide between democratic and undemocratic constitutions on a top level. However, the necessary further differentiation within the democratic constitutions on a deeper level is not possible in the same way. The features which are offered as categorization either do not possess a sufficient distinctiveness or are not suited to build legal families: basic constitutional choices such as constitutional legality, the separation of powers or the protection of fundamental rights are not sufficiently distinctive, since they can be find in every democratic constitution. Indeed, we could distinguish constitutions more clearly by asking for the establishment and role of constitutional jurisdiction within the constitutional system associated with similar categorizations. However, legal families, at which a comparison based on other issues than on constitutional jurisdiction can be supported by a representative of this family and disregard other associated constitutions, can not arise from these categorizations; this function of legal families, which just aspires a simplification of comparison through a representation of multiple constitutions through one constitution in a variety of legal questions, would remain unfilled.

145 Tschentscher (supra note 136), JZ 2007, 807, 810.
146 Kaiser (supra note 56), ZaöRV 24 (1964), 391, 400; Tschentscher (supra note 136), JZ 2007, 807, 810.
148 Zweigert/Kötz (supra note 136), p. 64.
149 Wieser (supra note 17), p. 110.
150 Wieser (supra note 17), p. 112-115.
151 Cp. to a corresponding model in general comparative law, which choses the jurisdictions, which need to be compared, by the type of solution for the single factual issues: Ulrich Drobnig, Methodenfrage der Rechtsvergleichung im Lichte der „Internationale Encyclopedia of comparative Law, in: Festschrift für Max Rheinstein zum 70. Geburtstag, 1969, p. 221, 225.
3. Comparison – comparative law – constitutional comparison

a) General logic of comparison

Regarding its structure, constitutional comparison belongs, like every comparative law, to the category of comparison and is therefore submitted to the general rules of this logic. Necessary for a comparison of two or more phenomenons are always two things: Besides the difference of the phenomenons (not-identity) we need a characteristic, which those phenomenons have in common (tertium comparationis). Even constitutional comparison has to search for a point of reference in a concerted tertium comparationis, which can then equally be contrasted with ones own law as well as with foreign law.

b) The tertium comparationis

According to general rules of comparison, the tie to an arbitrary consistency of the objects of comparison is possible, however would bring only a nonspecific gain of knowledge. Instead, comparison requires a targeted insight, if the tertium comparationis is involved into the concrete cognitive interest. Initial point of the already introduced functional method is the perception, that all constitutions have to give answers to nearly the same constitutional and political needs. For this reason, the tertium comparationis of constitutional comparison is the concrete factual issue, which has to be satisfied by the compared constitutions. To obtain a comparable constitutional political system, constitutional comparison has, as shown,
to detach itself from the terms of the compared legal orders, because they obscure the view to
the parallelism of the tasks; only the function, which has to perceive a constitutional
institution, is decisive.
In this connection, the comparsion has to follow the results of the legal sociological research
and include them in its considerations.\textsuperscript{160}

The decision on the comparability of two constitutions from the perspective of fulfilling the
same function is, on its part, already the result of a comparison.\textsuperscript{161} The dilemma of a previous
comparison can not be avoided, however there are ways to deal with it pragmatically in the
comparative operation\textsuperscript{162}: the comparator can either tie to already known structural similarities
respectively functional equivalence of the compared constitutions or has to work with
hypothesis of comparison; if the latter prove to be unfounded, the comparison might not be
continued and has to be stopped. However, the need for such a rupture declines from the
extent to which the comparator holds knowledge or obtains it.

c) Choice of the compared constitutions

A central problem of constitutional comparison, as of every comparative law, is the question
on which criterion the objects of comparison should be selected.\textsuperscript{163} Because of the multivalent
constitutional concept as well as the multifunctionality of constitutional comparison, the
selection of the material which needs to be compared depends on the purpose of the
comparison. However, the often in this context established theory, that only constitutions,
which have basically the same legal structure, are applicable objects of comparison,\textsuperscript{164} is not
correct in this generality. Rather, this theory only applies, if the goal of the comparison is to
clarify whether one solution, which has been proven successfully in one jurisdiction, can be
transferred to another one within the framework of constitutional politics or constitutional

\textsuperscript{160} Ulrich Drobnig, Rechtsvergleichung und Rechtssoziologie, RabelsZ 18 (1953), 295, 304-308; Konrad Zweigert, Zur Methodenlehre der Rechtsvergleichung, Studium Generale 13 (1960), 193, 197;
Rheinstein (supra note 3), p. 20 f., 28 f., 118; Tushnet (supra note 85), Yale Law Journal 108 (1999),
1225, 1228.

\textsuperscript{161} Harsh criticism for this reason: Bernhard Großfeld, Neue Rechtsvergleichung, in: Festschrift für Dieter
Henrich, 2000, S. 211, 212.

\textsuperscript{162} Sommermann (supra note 7), § 16, margin numbers 55 f.; also to the following.

\textsuperscript{163} See supra sub II 6.

\textsuperscript{164} Bernhardt (supra note 5), ZaöRV 24 (1964), 431, 437; similar priorities: Kaiser (supra note 56), ZaöRV
24 (1964), 391, 397; Mössner (supra note 24), AöR 99 (1974), 193, 214; Hartmut Krüger (supra note
Indeed, a similarity between the constitutions is required for the portability of an answer from one legal order to another one. However, a comparison of different constitutions can also be of high interest. Thus, a comparison with the antithesis of one’s own constitution enables the state to formulate its own positions more clearly or even to find its position by distinguishing itself from others. Furthermore, a comparison of different legal systems may be revealing for the question of the origin of constitutional political needs. Hence, different constitutions can be compared with each other; only the goal, for whose sake the comparison is carried out, is decisive.

4. The three-stages-model of comparison

To compare constitutions in the light of a specific constitutional political system, we first of all need knowledge about the legal solutions, which have been developed for this purpose. Furthermore, the effect of these rules must be understood. At constitutional comparison therefore, like at comparative law in general, an approach in three stages has been proven appropriate: „to determine“, „to understand“ and „to compare“. At the beginning of every comparative constitutional investigation, one has to ask what solutions the various constitutions have found for the constitutional political requirement, 

\[ \text{constantinesco} \]
which serves as the reference point of the comparison (first stage: „to determine“). Point of origin is the normative (positive legal) constitution. Meanwhile, the substantive constitution as its content does not already derive from the text of the constitution. The subconstitutional law which also regulates the object must be added, too. At states, which do not have a written constitution, the substantive constitution can only be made accessible through the subconstitutional and unwritten law, which decides on the constitutional political basic concept. Source of law within the meaning of comparative constitutional research is therefore everything, which claims to form or help to form the constitutional life.

In a further step, we have to unscramble the meaning of the compared constitutional norm (second stage: “to understand“). In this connection, we have to apply the methodological rules of constitutional interpretation, in fact, as far as it´s a question of a „foreign“ constitution from the comparators point of view, we have to use the methodological rule of the constitutional order to which the respective constitution belongs. Otherwise, there is a risk to draw a misleading picture of the foreign constitution from ones own point of view.

Thereby, we also have, in addition to the subconstitutional law, which, as well as the formal law, belongs to the substantive constitution of one state and therefore had already been incorporated at the first stage of the comparison („to determine“), to include the legal framework of a universal legal system in which the compared norms and institutions are written down. For instance, the range of the guarantee of property in a constitution can only be grasped, if one visualises its expansion in civil property law, in public building and national planning law as well as in other subconstitutional embodiments of freedom in the property sector.

To understand the role and impact of a constitution in social reality, the comparison has to gaze at the handling of the norms by the courts and other governmental bodies (state practice) as well as the actual existing situation of power. At states, where a constitution does not exist respectively is only available rudimental, or where a constitutional jurisdiction is missing.

---

173 See supra sub III.2.
175 Unlike Zweigert (supra note 161), Studium Generale 13 (1960), 193, 196, a normative demand is relevant here, the actual active participation of the constitutional life is not enough.
176 Häfelin (supra note 1), p. 87, 93 f.
177 Sommermann (supra note 7), § 16, margin number Rz. 66 („context at a narrower sense“)
178 Häfelin (supra note 1), p. 87, 94.
respectively is only equipped with low authority or is little efficient for other reasons, the actual handling of the constitutional order by the state bodies plays an important role.\footnote{179}

Besides, for the identification of the substantive content of single constitutional institutions (micro comparison), it is necessary to include the aspects, which characterize the constitution at large (macro comparison). Thus, it is of high importance for the understanding of single constitutional statements, whether a constitution has to be grasped as a semantical\footnote{180}, postmodern narrative\footnote{181} or strict judicial order.\footnote{182} If norms of a constitution shall not develop forces which control the competition of political power as well as the behaviour of the state bodies, but merely preserve the currently existing constellation of power or rather tell than bind, they possess only a semantical respectively a narrative character, so that similarities with a strict juridicial constitution can not be ascertained from the outset. In this context, constitutional comparison also has to give attention to the, the constitutional law upstreamed, positive constitution in terms of an „overall decision about the form and type of political unity“ (Carl Schmitt) of the compared constitutions. Thus, that’s where the norms of the constitutional law primary receive their meaning from.\footnote{183}

However, insights on the methodologically correct interpretation of constitutional norms, their normative surrounding within the universal legal system, their practical application by courts and other state bodies, the situation of power, the characteristics which coin the constitution as a whole, as well as the reasons behind the decisions are not sufficent to get a complete picture about their importance in governmental reality. For this purpose, a study about the influences of extra-legal factors like historical, political, economical sociological and religious ones, the climatical imprinting of a society,\footnote{184} its „state of mind“ as well as the „attunement“ of its groups is required.\footnote{185} Dealing with extra-legal reasons for the emergence

\footnote{179}{Typical sample: Great Britain; see Bernhardt (supra note 5), ZaöRV 24 (1964), 431, 434.}
\footnote{181}{To the category of the postmodern „narratives“, which means more narrative than binding norms: Erik Jayme, Narrative Normen im internationalen Privat- und Verfahrensrecht, 1993, S. 35-38.}
\footnote{182}{Baer (supra note 104), ZaöRV 64 (2004), 735, 738.}
\footnote{183}{Schmitt (supra note 127), p. 23, 25.}
\footnote{184}{Strebel (supra note 18), ZaöRV 24 (1964), 405, 409-413; Hartmut Krüger (supra note 21), p. 1393, 1399.}
\footnote{185}{Häfelin (supra note 1), p. 87, 94 f.; Herbert Krüger (supra note 50), VRÜ 5 (1972), 5, 13; Sommermann (supra note 7), § 16, Rz. 66 („Kontext i.w.S.“); cp. as well Wahl (supra note 90), p. 163, 166-176, in whose four-level conception of comparative law a comparison of comparative law is the final point of comparison after an investigation of „text and interpretation“, the „connection of the system“ as well as „the understanding of the state and the constitution“; cp. a classical sample of cultural characteristic of a nation is the mythic significance of the idea of sovereignty of people, of constitutions as well as the...
as well as the operation of the object of comparison in social reality plays a much more important role at constitutional comparison than at the comparision of subconstitutional law, because, as shown, constitutional law is coined by non-legal factors like no other field of law.

If constitutional comparison shall grant the character of a science and keep its practical relevance, it may not be limited to mere description.\textsuperscript{186} The teaching of foreign law is not yet comparative law.\textsuperscript{187} In a further step, we rather have to confront the reviewed models of solution from various angels in the actual comparison (third stage: „to compare“). Similarities and differences of design principles, institutions and rules of the compared constitutions have to be elaborated und put together in superior groups; the reasons which explain the similarities and differences have to be determined and arranged plus the relationship among the compared constitutions needs to be understand.\textsuperscript{188}

The demand, that the sum of the various parts has to be systemized in an ordered whole in a final step,\textsuperscript{189} is ridden with precondition and should therefore not be maintained. Within the requirement for a systematization of the solutions in constitutional law of various countries lies the problem, that national law as basic raw material is often not systemized itself and occasionally can´t be systemized or even may not want to be systemized. Thus, the understanding of a judicial norm for example in the USA is, unlike on the European continent, geared to facts, which means that the norm is not antecedent of the issue, but is build by the former.\textsuperscript{190} Though, the development of a system can not be a reasonable goal for science because facts do not make a system.\textsuperscript{191} Moreover, the term system has an antiindividualistic, illiberal connotation, which is a further reason for making systematization actions of the Supreme Court in the constitutional understanding of the U.S. citizens: Paul W. Kahn, Comparative Constitutionalism in an New Key, Michigan Law Review 101 (2003), 2677, 2685-2705. Mark Van Hoecke, in: id. (ed.), Epistemology and Methodology of Comparative Law, Oxford/Portland 2004, p. 165, 166 f.; Tschentscher (supra note 136), JZ 2007, 807, 809. Wieser (supra note 17), p. 24. However, one can speak of descriptive comparative law, because a foreign constitution can not be displays, without making comparative considerations at least inwardly; see Zweigert (supra note 16), p. 79. Constantinesc (supra note 66), p. 277-330; Fleiner (supra note 4), p. 255, 262 f.; Sommermann (supra note 10), DÖV 1999, 1017. Trantas (supra note 22), p. 87-91 Depiction: Oliver Lepsius, Was kann die deutsche Staatsrechtslehre von der amerikanischen Rechtswissenschaft lernen?, in: Schulze-Fielitz (ed.), Staatsrechtslehre als Wissenschaft, 2007, p. 319, 320 f., 326-330; id. also to the following.

But this does not mean, that cases have to be decided in the sense of a „reasoning from case to case“. Moreover, those who apply the law have to search for generalizable legal principles between the cases, see Claus-Wilhelm Canaris, Theorierenrezeption und Theorienstruktur, in: Festschrift für Zentaro Kitagawa, 1992, p. 59, 60 f. with further evidence.
not a desirable content of science.\(^{192}\) The forsaken order of the examined constitution can therefore only be geared to „internal“, i. e. considerations which are motivated by the matter, but can not generate a unit in the meaning of a return to supporting common rationales.\(^{193}\)

The constitutional comparative investigation ideally starts with the construction of country reports, on whose basis the comparison can occur.\(^{194}\) But such an order of antecedent abstraction and subsequent concretion is however not necessary.\(^{195}\) The foreign law can rather be examined directly from the perspective of ones own law and the criteria of comparison may then be developed dynamically in this process.\(^{196}\) However, also such an approach cannot fail to recognize the compared law as such and understand it in its contents; without this knowledge a basis is missing, to be able to compare constitutions rational.\(^{197}\)

The various stages of comparison are not strictly separated, but are in a relationship of mutual dependency and complementary, since one relates to the other.\(^{198}\) There is neither a rigid frame, which one completely has to pass through before making a constitutional comparative statement. If one would like to come up to the sociological dimensions of constitutional comparative issues, this would presuppose a legal-sociological knowledge, whose self-contained investigation would at least require a considerable effort or would even exceed the competence of the constitutional scientists.\(^{199}\) The method of comparative law would prove itself to be of little use for legal practice.\(^{200}\) The requirements on the extent of a comparative

\(^{192}\) Lepsius (supra note 193), p. 319, 327.
\(^{193}\) To the categories order and unity as elements of the term of systematic at law see Claus-Wilhelm Canaris, Systemdenken und Systembegriff in der Jurisprudenz, 1969, p. 12 f., 16, 40 ff., 156 and passim; Eberhard Schmidt-Aßmann, Das allgemeine Verwaltungsrecht als Ordnungsидеe, 2nd edition, 2006, 1/1.
\(^{195}\) Tschentscher (supra note 136), JZ 2007, 807, 815 f.; critical to this method also Oliver Lepsius, Themen einer Rechtswissenschaftstheorie, in: Jestaedt/id. (eds), Rechtswissenschaftstheorie, p. 1, 6 f.
\(^{196}\) Constantinesco (supra note 66), p. 43-49, 88 f.; see lately Tschentscher (Fußn. 136), JZ 2007, 807, 812, who talks about a „dialectical method“ of comparative law in this context.
\(^{198}\) Constantinesco (supra note 66), p. 139, 238, 278.
\(^{200}\) To the necessity of suitability of method also for the needs of legal practice Jestaedt (supra note 11), p. 9.
study therefore have to vary concerning the goal, which is pursued with the comparison.\textsuperscript{201} If, for example, a specific constitutional question has to be answered, the analysis of the decision of another constitutional court to a similar case may already give impetus to ones own discussion.\textsuperscript{202} Such an approach does not comprise the character of a strict methodical legal comparison, but the one of an advice to solutions on foreign law or on historical traditions of the constitutional state.\textsuperscript{203} Therefore, it is only authoritative, not to draw conclusions which exceed the basis of knowledge.\textsuperscript{204}

V. Appreciation

1. The requirement

It is not self-evident that the conclusions of the comparison have to undergo an evaluation,\textsuperscript{205} like it is demanded by many,\textsuperscript{206} who see this as a necessary culmination of the investigation process. „Evaluate“ may not even mean, that the investigated constitutions, institutions or rule models can be assigned to certain types and thereby classified judgemental; the required evaluation for a typification is still part of the comparison itself and necessarily has to be done by it. Furthermore, evaluations, which are necessary to obtain general rules of law from the compared legal systems, are not meant, too;\textsuperscript{207} the evaluation at this also remains within the theme of the previous comparison, since this question depends on, whether a rule, which is not respected from every country but only from a few, agrees with the basic principles of the constitutional orders of the community of states.\textsuperscript{208}

Moreover, a substantive statement about the different solutions in terms of „better“ or „worse“, which thereby goes beyond typification and the comparative formation of general

\textsuperscript{201} See Sommermann (supra note 7), § 16, margin numbers 78-80.
\textsuperscript{202} Sommermann (supra note 7), § 16, margin numbers 78-80.
\textsuperscript{203} To the „comparative law without actual comparison“ see already supra Rheinstein (supra note 3), p. 12.
\textsuperscript{204} Sommermann (supra note 7), § 16, margin numbers Rz. 65-67
\textsuperscript{207} See Mansel (supra note 89), JZ 1991, 529, 530; Sommermann (supra note 7), § 16, margin numbers 75-77.
\textsuperscript{208} Sommermann (supra note 7), § 16, margin number 76.
principles of law, is targeted. However, the problem of such a substance rating lies within the fact, that the required scale can not yet be found in one of the compared constitutions. Comparative law is a transnational science, which is supported by the idea of parity of legal orders. Hence, only a scale, which lies on a level above the investigated norms, can be considered. A dread, to valuate norms substantive at transcendental scales should not villainised as „orientalisation“ overhasty. Instead, it can be, as the demand of Kelsen on a concentration of jurisprudence to law, more seen as an expression of wise self-restraint of comparative law. Beyond the norms, it’s about questions, which are part of (legal) philosophy, ethics, but not jurisprudence. The reproach of a „colonial view“ on the law of other states, which shall be expressed in a rejection of an evaluation of their solutions, redounds upon the ones who have raised it. It was just the idea of „progress in law“ as a conventional scale of judgemental legal comparison, which enabled the countries of the „third world“ to be in an inferior position for a long time.

2. Possibility of appreciation

A rating for the constitutional comparison on the basis of equality of constitutional orders can only be considered, if a scale can be find, which is accepted by every country and in which the states can recognise their legal convictions. Such a scale can be find in an idea, which goes back to the old European state philosophy and political ethics, but is now upraised to a general principle of political ethics and every kind of constitutional order: salus publica suprema lex esto - the common welfare may be supreme law. Special or personal interests

---

209 The idea of a normative equalization of legal orders was most notably elaborated by Friedrich Carl von Savigny, System des heutigen Römischen Rechts, vol. VIII, 1849, p. 27, in the theoretical foundation of his conflict of laws; see for this purpose already supra sub II.1.

210 Like this e.g. Baer (supra note 104), ZaöRV 64 (2004), 735, 753, in reference to Dennis Davis, in: Cheadle/Davis/Haysom (eds), South African Constitutional Law: The Bill of Rights, Durban, 2002, p. 745.


212 See Arthur Kaufmann, Rechtsphilosophie, Rechtstheorie, Rechtsdogmatik, in: Hassemer/id./Neumann (eds), Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart, 7th edition, 2004, p. 1: „The philosophy of law is a branch of philosophy, not a branch of law.“


214 Jayme (supra note 93), p. 175, 187 f.; harsh criticism on evaluations also by Herbert Krüger, Zur Einführung: Überseeische Verfassungsvergleichung, Ju$ 1976, 213, 215; see also Rodolfo Sacco, Einführung in die Rechtsvergleichung, 2001, margin number 4.


216 This term goes back to Cicero, De legibus, III, 8.
of state bodies shall not be the target of governmental actions, but the whole community.\footnote{Isensee (supra note 218), § 71, margin number 36.}

The question of the public weal establishes a standard, on which the action of every state is measured.\footnote{Josef Isensee, Salus publica – suprema lex? in: Nordrhein-Westfälische Akademie der Wissenschaften, Geisteswissenschaften, Vorträge G 407, 2006, p. 10.}

The content of what the public weal demands must be precisely determined in accordance with the particular circumstances.\footnote{Isensee (supra note 218), § 71, margin number 50.} In the present context this means, that the idea of common welfare has to be broken down to the reference point of comparison: the point of reference, on which the comparison is made, is the constitutional political system, for which the constitutions have to find solutions. Therewith, the scale, on which the compared constitutions can be judged, is formulated: we have to ask, which one of the examined solutions achieves the defined social need most effectively in reality.\footnote{Erik Jayme, Emerico Amari (1810-1870) und die Begründung der Rechtsvergleichung als Wissenschaft, in: Festschrift für Karl Firsching zum 70. Geburtstag, 1985, p. 143, 155, 159 f.; to the scale of the „concrete available task” already Franz van Calker, Gesetzgebungspolitik und Rechtsvergleichung, in: Festschrift für Paul Laband, 1908, p. 99, 102; to comparative constitutional law nowadays Wieser (supra note 17), p. 20.}

The „social best“ can be found at constitutional comparison in the particular factual need, which has to be satisfied.\footnote{To the scale of the „social best“ („l’archetipo de ll’ottimo sociale”) already Emerico Amari, Critica di una scienza delle legislazioni comparate, Genua 1857, in place cited after the new edition which comes in two volumes and was inserted by Frosini 1969, vol. II, p. 207; to the relevance of Amaris see also note 93.}

But the diagnosis, that one legal solution has proved itself, is way more difficult at constitutional law than at subconstitutional law. Constitutional law is less about solving problems, which already adhere an immanent objective necessity, but more about the integration of a particular country at the organisation of its public authority; the above outlined characteristics of constitutional law in contrast to subconstitutional law also have an

\begin{itemize}
\item \footnote{Isensee (supra note 218), § 71, margin number 36.}
\item \footnote{Josef Isensee, Salus publica – suprema lex? in: Nordrhein-Westfälische Akademie der Wissenschaften, Geisteswissenschaften, Vorträge G 407, 2006, p. 10.}
\item \footnote{Isensee (supra note 218), § 71, margin number 50.}
\item \footnote{Erik Jayme, Emerico Amari (1810-1870) und die Begründung der Rechtsvergleichung als Wissenschaft, in: Festschrift für Karl Firsching zum 70. Geburtstag, 1985, p. 143, 155, 159 f.; to the scale of the „concrete available task” already Franz van Calker, Gesetzgebungspolitik und Rechtsvergleichung, in: Festschrift für Paul Laband, 1908, p. 99, 102; to comparative constitutional law nowadays Wieser (supra note 17), p. 20.}
\item \footnote{To the scale of the „social best“ („l’archetipo de ll’ottimo sociale”) already Emerico Amari, Critica di una scienza delle legislazioni comparate, Genua 1857, in place cited after the new edition which comes in two volumes and was inserted by Frosini 1969, vol. II, p. 207; to the relevance of Amaris see also note 93.}
\end{itemize}
impact at this point. The question, whether a rule and its evaluation have been proven depends on social, historical and political coinage of the particular state, so that we can usually make only relative statements.

---

222 See supra sub II.5.c.