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Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch
BVerfGH	Bundesverfassungsgerichtshof
BVerfGE	Bundesverfassungsgerichtshof, Entscheidung
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
EuGRZ	Europäische Grundrechtezeitschrift
VfSlg	Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes

I. Introduction & Thesis

Comparative constitutional law has recently seen what contemporary language aptly describes as “hype,” a whirlwind of excitement. The surge in attention given to crosscutting constitutional challenges, including citations in high court judgments, derived from foreign jurisdictions, is documented in a sumptuous collection of seminars, special-issue law journals, and books. As with many of the phenomena attributed to globalization – understood as the increase of information availability and its exchange – the perceived novelty and increase of such references does not stand even superficial scrutiny.

Assuming that such references are made with some frequency, one of the many questions arising is: “how?” Acknowledging, but for the moment not further expounding, the possibility of the thought and argument of a judgment being utilized without overt credit, this thesis seeks to focus on how overt references are made and how they are built into the case under discussion.

The phrase “elsewhere it has been held” – and variants thereof – are frequent placeholders in cases that are influenced by foreign sources. In seeking to discern the patterns that are followed when citations from “elsewhere” are utilized, there are a few pieces of the puzzle that need to be dissected to understand the manifold implications of such citation usage. In trying to lay the ground the thesis will be looking at the following elements:

For starters, the issue of foreign citations has to be positioned within the field of comparative law. As will be shown, the usage of references from other jurisdictions is but one part of the various aspects, which comparative law covers. Its origins in private law are only the start of a discipline that is also viewed as a method in both making and interpreting law.

The aforementioned recent increase in attention given to foreign citations warrants a brief explanation attempt also because such a review sheds light on the reservations of some of those who are adamant in staying out of the ‘hype’. Most prominently, some judges of the US Supreme Court are *extra*-outspoken about their caveats. An overview of these will directly lead to yet other judiciaries that take exception to the rule: Germany and Austria, the

latter with a focus on the “Modus Austriacus.” As recently published findings show very clearly, the self-described introversion, which appears to have somewhat shielded the legal community from the development of reviewing overseas’ interpretations, has also manifold historic reasons.

A seemingly self-evident and pointed question is: why? Why make reference to “elsewhere”? What is the motivation? Are there triggers? And if so: can they be ascertained? Following this – albeit brief – discussion of incentives, responses to the counter-question will also be sketched out: what are the limits of this practice? What potential “dangers” may one be importing from “elsewhere”? An eye-catcher in Europe lies in the division between civil and common law – but is that already a line that cannot be crossed? Finally, this part will also touch on an underlying challenge: the leaning towards Europe and the (dis)regard for later developments in newly emerged and emerging jurisdictions beyond the shores of the “old continent”, around the globe.

With a view to supranational jurisdiction in Europe, the European Court of Justice (ECJ) as well as the impact of the rulings by the European Court of Human Rights (ECtHR), a brief clarification is in order to draw a line between references, which are created because of structural dependencies and self-initiated usages of foreign citation.

Taking the path of foreign citations full circle necessarily includes working through the thickets of decision making: methods of how judgments are put together, canons of interpretation, and trying to define the limits of judicial discretion, will be the reviewed, accordingly.

In piecing the puzzle together, the above clarifications will be put to action in a number of – randomly – selected cases, which show how citations from “elsewhere” move about. Based on the ground laid out, the thesis will be tested: what are the patterns followed when a high court decision from “elsewhere” is taken into account, how do the thoughts and the content of a foreign judgment “travel”? And ultimately: how could a “model” utilization of foreign citations look like?

II. What is Comparative Constitutional Law?

“Lawyers without borders”¹ is at once a reference to the possibilities lawyers have – literally at their fingertips – in the early 21st century as well as succinct summary of the most recent history of comparative law.² Reputed to be a domain within private law, comparative law has long evolved as a constant in the field of public law.³ Comparative law is in very essence, the intellectual *process* of contrasting, evaluating – in other words *comparing* – the law of two different entities, usually countries.⁴ Then again, as *Samuel*⁵ pointedly states, one has to agree on the terms and underlying concepts of both “comparison” and “law” to gain a better understanding of what “comparative law” means.⁶ He rightly holds that it is easier to summarize what comparative law is *not*, adding that often the mere usage of foreign material is considered “comparative”, even if it remains unclear whether said material was obtained through comparative methods.⁷ The question of potentially “superficial”⁸ comparative law and particularly of “hidden”⁹ comparative law will reemerge later.¹⁰

The process of comparing law has roots at least as far back as antiquity¹¹ and emerges in different forms. Leaving aside the well-established comparison in the realm of private law, the aim of this chapter is to focus on comparison in public law. While at first thought it might be easy to dismiss the relevance of comparison in public law, studies of constitutional court systems and the influence of well-established constitutions on recently drafted

¹ Glenn, *Comparative Law and Legal Practice*, 989.

² Incidentally it also alludes to a highly reputed non-governmental organization providing medical services across the world, frequently in conflict and post-conflict areas, Médecines Sans Frontières.

³ See, *below*, Chapter II.

⁴ See further Zweigert/Kötz, *An Introduction to Comparative Law*, 2ff.

⁵ Samuel, *Comparative Law and the Courts*.

⁶ *Ibid*, 253.

⁷ *Ibid*, 254.

⁸ *Ibid*, 260 f.

⁹ *Ibid*, 255.

¹⁰ See, *below*, Chapter VII.

¹¹ For the history of Comparative Law see *below*.

constitutional texts come to mind. Pausing at the thought of the latter, “borrowing”, i.e., the utilization of foreign legislation for a legislative drafting process, is a frequently used form of comparative – constitutional – law. The recent demise of the Socialist system caused a surge of constitution writing and making in its wake. In seeking to explain what comparative law – and comparative constitutional law more specifically – is, it should be helpful to sketch out the process of borrowing and related forms of comparison along side the emergence of the field of comparative law. Also, the discussion over its viability as a method – or a variant thereof – comes into play.

1. Borrowing and other “Transfers” of Foreign Law(s)

In a discussion of the possible adaptation of legal cultures, *Nelken*¹² provides a critical assessment of the “begging, borrowing or stealing” as well as “diffusion or imposition [of] other people’s laws” and concludes: “none of these terms denotes what actually goes on.”¹³ On the surface, one legal system utilizes – to varying degrees – the constitutional text and related legislation of another one.¹⁴ Attempts to describe the process have yielded three main metaphors: borrowing, transplant and – most recently – migration.¹⁵ Carving out their main features, borrowing can be narrowed down to the usage of – mainly constitutional – legal text in drafting a new constitution in a foreign country. In summarizing constitutional processes from Hamilton all the way to the most recent wave of constitution writing in the former Socialist countries, *Tushnet*¹⁶ underscores the influence of foreign role-models.¹⁷ Resembling more the act of “copying”¹⁸ than “borrowing”, which on closer scrutiny of the term would actually require that permission for usage be sought,¹⁹ can also be described as

¹² Nelken, Introduction, in: *Adapting Legal Cultures*.

¹³ *Ibid.*, 17.

¹⁴ As will be shown *below* jurisprudence is most often dealt with as a distinctly separate form of comparative law.

¹⁵ Migration is the central theme of Choudhry’s “The Migration of Constitutional Ideas”.

¹⁶ See Tushnet, *Comparative Constitutional Law*, in: Reimann/Zimmermann: *Oxford Handbook of Comparative Law*, 1226 ff.

¹⁷ *Ibid.*; see also, generally, Higgins, *Problems & Process*, 98.

¹⁸ See Scheppele, *Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models*, 297.

¹⁹ *Ibid.*, 296.

“ready-made goods”²⁰. The metaphor echoes the sentiment that frequently clearly recognizable parts – one may want to say “chunks” to adapt to the ready-made metaphor – are placed in a constitution, which regulates an entirely different State, in entirely different circumstances. Naturally, there are big variations in the various factors, including the scrutiny of the borrowed text(s), the speed of the process, and the thought put into the newly crafted constitutions.

Metaphors are also invoked both to describe the process and its shortcomings. Borrowings are compared to surgical operations, such as kidney transplants.²¹ The imagery of an organ transplant is particularly apt for those borrowings that happen under extreme time pressure – recall the urgency of newly emerging states in 1989 – as well as the criticism: they regularly require adjustment to the recipient’s environment, i.e., the administration of immunerepressing drugs to adapt to an entirely different environment. The potential constraints and inherent limits of such borrowing – or transplant as it is also called in legal literature – are captured by *Benjamin*’s observation: “the word *Brot* means something different to a German than the word *pain* to a Frenchman.”²² In the context of legal transplants the “cultural, political, sociological, historical, anthropological, linguistic, psychological and economic”²³ factors are at once absent and present. As the newly crafted text starts to reflect the society it is to guide, it immediately becomes immersed, entangled, and enmeshed with the text that is “borrowed.”

Not surprisingly, borrowing of constitutional text is subject to wide criticism. At the risk of brevity, there are two main points of critique: the notion of constitutionalism that is being “borrowed” and the concept of borrowing as such. The assertion is that transplants by their process and nature are transporting a particular – liberal – form of constitutional ideas, almost all of which herald a Western-style approach to constitutionalism. Not *per se* a bad concept to utilize, there are very valid questions on the nature of the liberalism that is being conveyed.²⁴ Given the dynamic of most processes from West to – for lack of a better word –

²⁰ See Friedman, Some Comments on Cotterrell and Legal Transplants.

²¹ See Kahn-Freud, On UsEs and Misuses of Comparative Law, 5 ff.

²² Walter Benjamin quoted by Legrand, What “Legal transplants?”, 61.

²³ Legrand, 60; for other factors see, *below*.

²⁴ See Rosenfeld/Sajo, Spreading Constitutional Liberalism, on illiberalism, 145 ff.

“elsewhere”, there is a patronizing edge to the general pattern of borrowings, which border on the post-colonial.²⁵

What is more, borrowing and transplants are – rightly – criticized as “under theorized,”²⁶ only increasing the vulnerability of the process and the metaphor, respectively. In response to the “inaptness”²⁷ of the metaphor *Walker*,²⁸ *Choudhry*,²⁹ and many others have developed counter-models. The most recent appears to be “migration”, which is juxtaposed with the metaphor of borrowing:

Unlike [borrowing or transplant, migration] presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred. Rather [it] refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by the giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.³⁰

Migration thus provides tools that “borrowing” does not,³¹ and thereby allows for the various factors³² as well as the different power relations to be placed within the process as well as the emerging picture.³³ While certainly a good starting point to capture the complexities of utilizing foreign legal text, the processes and their results need to be far better understood to increase the understanding of the gains but also the risks involved in

²⁵ See, among others, Friedman.

²⁶ See Nelken, Introduction, 20.

²⁷ See Choudhry, Migration as a New Metaphor in Comparative Constitutional Law (henceforth: Metaphor), 19 ff; as well as Choudhry, Globalization in Search of Justification (henceforth: Globalization).

²⁸ See Walker, The Migration of Constitutional Ideas, 320 ff.

²⁹ See Choudhry, Metaphor as well as Globalization.

³⁰ Walker, 320; *see also* the discussion by Choudhry, Metaphor, 21.

³¹ See Scheppele, The Migration of Anti-Constitutional Ideas, 347.

³² See *above*, Legrand, 60.

³³ *Ibid*, 349. For the migration of constitutional ideas into private law, see: Moran, Inimical to Constitutional Values, 251.

accommodating foreign legislation in foundational texts. In bridging back to the central question of this paper – the patterns of foreign citations it may be helpful to refer to *Gaudreault-Desbiens*,³⁴ who describes the metaphor of migration as “undeniably subversive” because it raises questions on *what* is migrating *why* and *how*.

Given that parts of legislation seem to travel and migrate at a certain frequency, it seems natural to ask whether the interpretation of said law follows the path. Already the founding father of contemporary comparative law, *Ernst Rabel*, pressed that very question. In one of his main articles,³⁵ he highlighted the need to scrutinize the judgments that supersede, i.e., interpret, legislation. “The law without jurisprudence is like a skeleton without muscles. And the nerves are the prevailing doctrine,”³⁶ *Rabel* observed. There are, of course, many who “reject” the relevance of foreign jurisprudence – and many voices between those two polar ends. The most frequently cited rejecter is US Supreme Court Justice *Antonin Scalia*, who, in *Printz v United States* dissented: “Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.”³⁷

Despite objections, foreign citations are being used and increasingly so. In preparing the review of the underlying patterns it is important to note that the trail of borrowings of legislation, the migration of constitutional ideas and texts and foreign citations – as parts of judgments – all take vastly different paths. As will be discussed in detail below,³⁸ the reasons for using foreign citations are varied and do not appear to necessarily match the reasons that lead to the usage of constitutional and other legal texts. In view of the leading role that some constitutions and their pertinent courts of interpretation take, overlaps are

³⁴ Gaudreault-Desbiens, *Underlying Principles and the Migration of Reasoning Templates* 178.

³⁵ Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung*.

³⁶ Rabel, 4; *translation* by the author.

³⁷ *Printz v United States* 521 US 898, 921 n 11 (1997), quoted by *Saunders*, *Comparative Constitutional Law in the Courts*, 91 f.

³⁸ See, *below*, Chapter VI.

possible and in fact likely to occur. Obvious exceptions to this are courts under obligation to refer to foreign material.³⁹

2. The Institutionalization of Comparative Law

Picking up on the “contemporary” streak of comparative constitutional law, it seems both fitting and necessary to review some of the field’s history before moving in on the central questions of the discipline.

Comparisons in law can be traced to antiquity,⁴⁰ to the likes of *Aristotle*.⁴¹ Subsequent early fathers - in the absence of mothers⁴² – include *Montesquieu* and *Napoleon*, who requested the collection and translation of all of Europe’s laws at the time.⁴³ However, the early beginnings have little to do with further developments and are thus not viewed as having a linear connection thereto.⁴⁴ The ensuing rise of nationalism and conception of legal positivism, among others, countered efforts to look beyond ones own legal challenges. In response to the limiting of legal scholarship to “national jurisprudence,” *Ihering* insisted that the “universality” of the legal discipline be embraced again.⁴⁵

In the wake of new sciences, categorizing and classifying issues and things became fashionable, thus comparisons became a natural part of efforts to systematize human knowledge.⁴⁶ Particularly the changing notion of space and time fostered the expansion of perspectives,⁴⁷ stirring the necessary curiosity for exploring places beyond one’s borders.

³⁹ See on obligation to cite, *below*.

⁴⁰ Gutteridge, *Comparative Law*, 11.

⁴¹ Cf Rabel, 10.

⁴² There is no mention of women in the early literature of comparative law.

⁴³ Cf Rabel, 12.

⁴⁴ Cf Gutteridge, 11.

⁴⁵ See Peters/Schwenke, *Comparative Law Beyond Post-Modernism*, 806.

⁴⁶ Glenn, *Comparative Legal Families (henceforth Families)*, 424. See also Gutteridge, 16 on comparative law following anatomic studies in trying to understand structures and underlying functions.

⁴⁷ Cf Constantinesco, *REchtsvergleichung*, Band I, 24.

Glenn⁴⁸ points to Darwinism as leading the then contemporary understanding of social organization. The prevailing egocentrism in Europe of those times added to a perception that other cultures were deemed “primitive,”⁴⁹ making one’s own order seemingly “natural.” This understanding was shattered in some measure by the rupture in old style colonialism.⁵⁰

Contemporary comparative law was “inaugurated”⁵¹ at the International Congress of Comparative Law in Paris in 1900, which made real strides in enunciating the goals and functions of comparative law.⁵² Very much in line with the times, “uniformity” was the preeminent goal and the spirit was defined by the progress that was permeating virtually all aspects of life.⁵³ As *Zweigert* and *Kötz* summarize it: “Sure of his existence, certain of its point and convinced of its success, man was trying to break out of local confines and peaceably master the world and all that was in it.”⁵⁴

The openness of the pre-war years⁵⁵ was put to a test both during and in the immediate aftermath of World War I. The raging conflict caused the decrying of any potential interest in the enemies’ laws.⁵⁶ The 1919 Versailles Peace Treaty and related agreements created a sense of isolation or loneliness – *Einsamkeit*⁵⁷ to be more precise – because it did not incorporate the spirit of the recently demised era, forcing German lawyers to at once accept second rating and foreign legal systems as the new paradigm.⁵⁸ “We are generally more dependent on foreign countries and more frequently forced to accept the terms of foreign law,”⁵⁹ *Rabel*, one of the founding fathers of comparative law, noted somewhat bitterly. His

⁴⁸ Glenn, *Families*, 424.

⁴⁹ Cf Constantinesco I, 23 f.; see also Glenn, *Families*, 424.

⁵⁰ Cf Glenn, *Families*, 424; on the reemergence of colonialist perspectives, see *below*.

⁵¹ Kennedy, *The Methods and the Politics*, 349.

⁵² Cf Gutteridge, 5; and *Zweigert/Kötz*, 2; see also Glenn, *Families*, 423; Palmer, *From Lerolithid to Lando*, 284; Peters/Schwenke, 807; and Watt, *Globalization and Comparative Law*, 581.

⁵³ As *Zweigert/Kötz* observe, the belief in progress has since died, cf. *Zweigert/Kötz*, 3.

⁵⁴ *Zweigert/Kötz*, 2 f.

⁵⁵ Cf Watt, 592.

⁵⁶ Cf Schwenzer, *Development of Comparative Law*, 76.

⁵⁷ *Rabel*, 17.

⁵⁸ Cf Schwenzer, 78, and *Rabel*, 18, and in more detail: Constantinesco I, 191.

⁵⁹ *Rabel*, 18.

observation is part of a 1924 text entitled *Aufgabe und Notwendigkeit der Rechtsvergleichung*,⁶⁰ credited as being the “foundational text of modern comparative law.”⁶¹ He distinguishes three aspects of comparative law: systematic or dogmatic comparative law, historical comparative law, and a general part, which branches out to legal philosophy; comprising “all that is legal about legal philosophy.”⁶² Systematic comparative law is described as focusing on the comparison of actual content, asking which questions arise how and where and how they are responded to.

Not even a decade later, *Rabel’s* expulsion from his self-created academic home at the *Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht* was sought because he was “a heavy burden for the German student body” and an “obstacle for the implementation of the National Socialist spirit.”⁶³ The ensuing persecution ended the careers of many at the Institute, including *Rabel’s*. The repercussions of *Gleichschaltung* and Aryanization will be discussed in more detail.⁶⁴

The “cosmopolitan, internationalist, humanist, and socially progressive political visions,”⁶⁵ which had prevailed in Paris at the turn of the century, were at once washed away. The aftermath, *Kennedy* surmises, was a form of “academic post-traumatic stress disorder.”⁶⁶ It was an age when the “no-method method” and the “no-politics politics” of comparative law emerged.⁶⁷ The gloominess was perpetuated by the onset of the Cold War,⁶⁸ reinforcing the underlying tension of comparative law between self-ascribed neutrality and perceived

⁶⁰ The speech “for practicing lawyers” was originally published in: *Rheinische Zeitschrift für Zivil- und Prozeßrecht* 13 (1924), 279-301; reprinted in: Leser (Ed.), Ernst Rabel, *Gesammelte Aufsätze, Band III Arbeiten zur Rechtsvergleichung und zur Rechtsvereinheitlichung 1919 – 1954*, 19.

⁶¹ Rolf Ulrich Kunze, *Ernst Rabel und das Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht 1926 – 1945*, 2004 as quoted in: Schwenzer, 78.

⁶² *Ibid*, 3; *translation* by the author.

⁶³ As cited by Schwenzer, 83.

⁶⁴ See, *below*, Chapter IV.

⁶⁵ *Kennedy*, 349, see also *Watt*, 593.

⁶⁶ *Kennedy*, 353.

⁶⁷ *Ibid*; on the question of comparative law being a method, see *below*.

⁶⁸ *Kennedy*, 353, see also *Scheppele*, *Constitutional Ethnography*, 393.

proximity ideologies.⁶⁹ Half a century later, comparative lawyers converged once more in Paris. Under the auspices of the newly founded United Nations' Education Science and Culture Organization (UNESCO) a meeting was held to establish an international association for comparative law.⁷⁰ The ensuing period brought about one of the standard treatises on comparative law, *Zweigert and Kötz, Einführung in die Rechtsvergleichung*,⁷¹ which enshrined functionalism as the main “method” of the field,⁷² with critics asserting that functionalism has become the “shorthand for traditional comparative law.”⁷³

Among the factors that have influenced the most recent developments in comparative law – most of which will be featured in this paper – the emergence of constitutional courts throughout the world is an institutional factor, which has undoubtedly bolstered comparison in the realm of public law.⁷⁴ Equally, the multifold developments in relation to human rights have given comparative – public – law both a new spin and drive.⁷⁵ *Kennedy* aptly describes the latter part of the 20th Century as the era of policy and rights consciousness.⁷⁶ Parallel thereto and as part of these developments, constitutions and their discourse have shifted from merely setting rules of conflict to embracing engagement across borders. As a result, interaction – understood in a broad sense – between constitutional courts has increased.⁷⁷

Contemporary scholarship seems incomplete without curtsying to the events of September 11, 2001, which triggered the so-called war on terror. *Choudhry* highlights the dilemma of legal responses seeking to protect democratic liberal constitutions and touching on the fundamentals of the rule of law.⁷⁸ Simultaneously, economic developments and trade-related liberalization have contributed to an erosion of standards, frequently described as a “race to

⁶⁹ See among others on the issue of ideology, Watt, 595.

⁷⁰ See Schwenger, 88, *see also* Constantinesco I, 197.

⁷¹ *Zweigert/ Kötz, An Introduction to Comparative Law*; *see also* Michaels, *The Functional Method of Comparative Law*, 340.

⁷² See Michaels, 340 f.

⁷³ *Ibid*; *see further* on functionalism, *below*.

⁷⁴ See McCrudden, *A Common Law of Human Rights?*, 500.

⁷⁵ For a detailed discussion of human rights in the context of comparative law *see, below*.

⁷⁶ *Kennedy*, 413.

⁷⁷ See Kumm, *Democratic Constitutionalism encounters international law*, 292.

⁷⁸ *Choudhry, Metaphor*, 32.

the bottom.” Finally, there are new, i.e., alternative, approaches to comparative law, which utilize critical theory, feminism, literary theory, postcolonial theory, and the likes.⁷⁹

In the realm of comparative public law⁸⁰, it is interesting to note the early foundations incepted by *Carl Solomo Zachariae*, a public law professor, in 1843.⁸¹ Reflective of public law’s focus on structures and organizational aspects of public entities, comparative public law concentrates on these and related areas. The close proximity of many regulating mechanisms of public law to international public law explains the semi-permeable relationship between these two fields, which can also be discerned in comparative public law.⁸²

The institutionalization of comparative law is a stepping-stone to one of the underlying debates of the field, namely the catch question whether comparison is a method of interpretation onto itself or a variant of already existing modes and means of interpreting law.

3. The Comparative “Method”?

The *lamento chronico* in literature on comparative law is that the discipline’s theoretical work is out of step with practical developments.⁸³ There is a “yearning” for theory,⁸⁴ to explain how comparative law “works”, which methods are being applied to contrast laws from different countries and better understand the way international standards inform the

⁷⁹ See Peters/Schwenke, 801; and Frankenberg, Critical Comparisons.

⁸⁰ Cf Kaiser, *Vergleichung im öffentlichen Recht*, 391; see also Sommermann, *Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts* (henceforth *Bedeutung*), 1018

⁸¹ See generally Sommermann, *Bedeutung*. For sources on the historical developments, see also, Starck, *Rechtvergleichung im öffentlichen Recht*, 1022.

⁸² The frequent recourse of comparative public law to the interpretation clauses of the 1969 Vienna Convention on the Law of Treaties, especially its provision on interpretation, i.e. Article 31, reflects this fact.

⁸³ See among others, Choudhry, *Metaphors*, 35.

⁸⁴ See Alford, *Four Mistakes in the Debate on “Outsourcing Authority”* (henceforth *Authority*), 703, 714.

interpretation of constitutional law.⁸⁵ While some state that there is a lack of methodology, others warn against abstaining from applying comparative law because of its methodological shortcomings.⁸⁶ What will become more apparent in the course of this paper is the obvious need for a justification for engaging in comparative constitutional law, particularly in utilizing foreign citations.⁸⁷

Zweigert and Kötz, in their treatise on comparative law,⁸⁸ present a method of comparative law.⁸⁹ “The basic methodological principle of all comparative law is that of *functionality*,” they claim.⁹⁰ For starters, comparatists must free themselves of any restrictions and limitations to avoid overlooking potential sources of comparison.⁹¹ Further explanations are left to *Rabel*.⁹²

The student of the problems of law must encompass the law of the whole world, past and present, and everything that affects the law, such as geography, climate and race, developments and events shaping the course of a country’s history – war, revolution, colonization, subjugation – religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes. Ideas of every kind have their effect, for it is not just feudalism, liberalism and socialism which produce different types of law; legal institutions once adopted may have logical consequences, and not least important is the striving for a political and legal ideal. Everything in the social, economic and legal fields interacts..⁹³

⁸⁵ Ibid.

⁸⁶ See Saunders, *Comparative Constitutional Law in the Courts* (henceforth *Courts*), 125.

⁸⁷ See Saunders, *Courts*, 110.

⁸⁸ *Zweigert/Kötz*.

⁸⁹ Ibid, Chapter 3 – The Method of Comparative Law.

⁹⁰ Ibid, 34; emphasis in original.

⁹¹ Ibid, 35 f.

⁹² Ibid, 36 with an incorrect reference to *Rabel’s Aufgabe & Notwendigkeit der Rechtsvergleichung* (henceforth *Aufgabe*).

⁹³ *Rabel, Aufgabe*, 5, translation *Zweigert/Kötz*, 36.

After exhausting all potential sources, the comparatist should make herself/himself familiar with the basic materials, which provide the context of the rule under scrutiny. Then the tedious process of comparison begins: it starts by laying out the differences and similarities between the rules under comparison. Next, the solutions unearthed by the process must be disconnected from their specific context to be turned into abstract and generally applicable rules. Thereafter, a system can be put together, which, after critical reflection, may lead the comparatist to craft an entirely new solution.⁹⁴

Functionalism is criticized on various counts, including its formalism.⁹⁵ With a view to the complexity of the context of any given legal rule, the observation that the function of law is *a*, but not *the* factor seems very valid.⁹⁶ Adding to that, functionalism is criticized for postulating commonalities and concealing the desire to assimilate the other.⁹⁷ Despite the objections, authors are discerning a revival: neo-functionalism.⁹⁸ One of the latest treatises in the field of comparative constitutionalism,⁹⁹ reinforces that sense.

The comparative “method” is not only discussed with regard to a potential mode or process of comparison but also in terms of the methodology of legal interpretation. It is referred to as a potential “fifth interpretation method” by *Häberle*, who asserts that the increase of comparative methods in interpreting fundamental rights necessitates an additional mode of interpretation.¹⁰⁰ Relying on the well-established “classic” four modes of interpretation coined by *Savigny* – wording, system, history and telos – *Starck* among others maintains a “misconception”¹⁰¹ and duly assigns legal comparisons to the teleological modes of interpretation.

⁹⁴ *Zweigert/Kötz*, 40-47.

⁹⁵ See *Frankenberg*, *Stranger than Paradise*, 267; see further on functionalism, *below*.

⁹⁶ See *Palmer*, 284.

⁹⁷ See *Watt*, 594.

⁹⁸ See *Teitel*, *Comparative Constitutional Law in a Global Age*, 2573.

⁹⁹ *Dorsen/Rosenfeld/Sajó/Baer*, *Comparative Constitutionalism Cases and Materials*¹.

¹⁰⁰ See *Häberle*, *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat*, 916.

¹⁰¹ *Starck*, 924.

4. Comparative Constitutionalism

Recent attention to comparative constitutional law has brought about a range of terms to refer to the usage of foreign constitutional thought and interpretation in high court judgments. Reflective of tendencies to attribute most cross-border action to globalization, the term “judicial globalization”¹⁰² is used. There is also “constitutional cross-fertilization,” which *Slaughter* uses in her description of increased interaction between European judicial institutions and national courts.¹⁰³ Other authors have used the phrase “transnational legal communication,”¹⁰⁴ “export and import of decisions,”¹⁰⁵ “constitutional conversation,”¹⁰⁶ “constitutional migration”¹⁰⁷ or “cross-pollination”¹⁰⁸ when discussing cross-references. The word “borrowing” is clearly linked to the incorporation of constitutional regulations rather than the use of constitutional judgments.¹⁰⁹ Another frequently used term is “bricolage”, a nod to the anthropologist *Lévi-Strauss*. The bricoleur “can imagine using a set of tools and materials – his treasury – in different and heterogeneous ways; he will make do with “whatever is at hand.”¹¹⁰

Notwithstanding these – and other – terms used to describe processes of employing foreign constitutional law and jurisprudence, the clearest and therefore most relevant for the

¹⁰² Slaughter, *Judicial Globalization*, see also Davis, *United States, Germany and South Africa: Constitutional Legislation and Judicial Decisions on Abortion – Testing Judicial Globalization*, 192, and Baudenbacher, *Judicial Globalization: New Development or Old Wine in New Bottles?*.

¹⁰³ Slaughter, *Judicial Globalization*, 1116.

¹⁰⁴ Neuman, *Human Rights and Constitutional Rights*, referring to Slaughter, *Judicial Globalization*, 1103.

¹⁰⁵ Epstein/Night, *Constitutional Borrowing and Nonborrowing*, 196.

¹⁰⁶ Choudhry, *Globalization*, 892.

¹⁰⁷ *Id.*, 834; and Rosenfeld *Constitutional Migration and the Bounds of Comparative Analysis*.

¹⁰⁸ Ackermann, *Constitutional Comparativism in South Africa*, 500.

¹⁰⁹ See *above*, and Harding, *Comparative Reasoning and Judicial Review*, 409, Neuman, 1863, and Schepple *Aspirational and aversive constitutionalism*, 296. For „legal transplants“ see Fontana, *Refined Comparativism in Constitutional Law*, 541.

¹¹⁰ Schneiderman, *Exchanging Constitutions*, 407; see also Mark Tushnet, *The Possibilities of Comparative Constitutional Law*.

purposes of this paper is the term “comparative constitutionalism.” Narrowing things down to the two main parameters: the act of comparison and the focus on constitutional issues. Comparison as a process of evaluating two different (legal) texts and constitutionalism as both the form, in which power relations between the state and society are determined and interpreted.¹¹¹ Note that critics warn of assuming a shared understanding of constitutionalism, which has yet to emerge.¹¹²

Based on the above, comparative constitutionalism may then be sketched as “an active transparent, communication-oriented way to resolve constitutional problems”.¹¹³ Rather than detecting any “new constitutionalism”¹¹⁴, it seems more fitting to invoke the term “cosmopolitan constitutionalism”¹¹⁵ to reflect the air of multiple – for lack of a better term – cultural influences involved in the process.¹¹⁶

5. Interim Findings

Officially inaugurated in Paris 1900, comparative exercises have a much longer history than that, also in public law. Largely seen as the process of transferring legal rules from one system to another, there is in fact more ways in which law and its byproducts “migrate.” In fact migration is the latest of metaphors trying to describe the process as well as the complexity of comparative law, which is largely seen as an “under theorized” process, which some believe to be a method, whereas others disagree.

Equipped with a basic understanding of comparative constitutional law and comparative constitutionalism respectively, the next step toward scrutinizing patterns in foreign citations is to deconstruct the current excitement surrounding the topic. This seems necessary to narrow down the potential reasons for utilizing foreign sources, including a placement of the

¹¹¹ See for a good discussion on constitutionalism: Lev in: Dorsen et al, 12 ff.

¹¹² See Teitel, 2576.

¹¹³ Compare, Baer, *Verfassungsvergleichung und reflexive Methode*, 752 – partial *translation* by the author.

¹¹⁴ See Kersch, *The New Legal Transnationalism*, 352.

¹¹⁵ Goldsworthy, *The Challenges of Constitutional Interpretation*, in: Goldsworthy (Ed.) *Interpreting Constitutions – A Comparative Study*, 3.

¹¹⁶ See *below*, on the concept of human rights constitutionalism, Thio, *Reading Rights Rightly*.

“phenomenon” in the bigger picture of past practices and usages and its emergence therefrom.

III. The Current Excitement about Comparative Constitutional Law

Comparative constitutional law's usage has been dubbed everything between a contemporary fad and a revival. *Alford* refers to it as a “fashionable constitutional accessory”,¹¹⁷ while *Hirschl* calls it a “renaissance.”¹¹⁸ As banal and overstated a statement it is, the excitement about comparative constitutional law is due to a variety of factors, including the advances in technology, the impact of multi-lateral treaties, the increasing profile of supra-national judicial institutions, such as the ECtHR and the ECJ, the availability of overseas education in some quarters, and many more.¹¹⁹ With an immediacy that borders on inevitability, “globalization” is seen as a factor; it will be discussed as the first piece of the contemporary puzzle. Beneath that wave the recent developments in the field of human rights at various levels – national, regional and international – are the most apparent cause for cross-border citations. Touching on some of the other – more apparent – factors, the text will turn to the “skeptics” and riders of the anti-tide. Judges of the US Supreme Court are among the most outspoken. Less engaged in utilizing foreign citations and even less involved in the debate are judges from the Austrian and – with exceptions – German Constitutional Court; the reasons for their stance will be outlined in the closing part of this chapter.

1. “Globalization”

Discussing the usage of foreign citations inadvertently provokes the “globalization reflex” - an immediate mantra-like assumption that jurisprudence utilized across national borders *has* to be part of “globalization.” The question what “globalization” is, is rarely posed¹²⁰ in the context of comparative law. Rather, it is frequently used as “the” explanation for borders becoming more permeable and the steady increase in usage of comparative.¹²¹ While it

¹¹⁷ See *Alford*, In Search of a Theory for Constitutional Comparativism, 714.

¹¹⁸ See *Hirschl*, On the blurred Methodological Matrix of Comparative Constitutional Law, 39.

¹¹⁹ See *Jackson*, Narratives of Federalism, 268, and *Baer*, 754.

¹²⁰ Save a few exceptions such as *Nelken*, Comparatists and Transferability, 460; and *Teitel*, 2570.

¹²¹ See, among others, *Nelken*, Comparatists and Transferability, *Peters/Schwenke*, *Saunders*, *Courts*, *Watt*, *Obiora*, and *Choudhry*, *Metaphors*.

certainly holds true that certain borders are in fact “eroding,”¹²² *Abrahamson*¹²³ causes one to pause and reflect on the nature of the borders, which are crumbling. As she points out, there are inner – here: US American – borders breaking down.¹²⁴ Looking at the relationship of Louisiana¹²⁵ and Puerto Rico¹²⁶ in the context of the US’ federal system evokes associations of the increasing interdependence of legal systems in Europe both through the structures of the European Union (EU) and the even farther-reaching Council of Europe.¹²⁷

Leaving aside supra-national structures for the time being,¹²⁸ it seems that a major force in the permeation of legal borders are in fact corporations and the trail of private litigation that follows them semi-automatically. It is here where the fusion of capital and technology initiates a path across the world with a certain set of values in tow.¹²⁹ A combination of modernization and dollarization¹³⁰ is pushing a particular Western liberal thought beyond its shores.¹³¹ This way, globalization can be described as “neoliberal policy choices clothed in the language of economic inevitability.”¹³² Part thereof is a “triumphant legal liberalism”¹³³ that is most obvious in its economic impact. Corporations, *Nelken*¹³⁴ observes, are “crucial legal actors,” for the purposes of comparative law it is more the law firms in their tow that are of interest.¹³⁵ While commercial litigation is – for the most part – the realm of civil proceedings, the increase of “border-crossings” in that domain is a factor in paving the way

¹²² See Moran, 255.

¹²³ *Abrahamson*, All the World’s a Courtroom.

¹²⁴ See *Abrahamson*, 289.

¹²⁵ Cf *Markesinis/Fedtke*, Judicial Recourse to Foreign Law, Chapter 5, 192.

¹²⁶ See *Clark*, Development of Comparative Law in the United States, 177.

¹²⁷ See also on horizontal and vertical linkages, *Fuchs*, Verfassungsvergleichung, 185.

¹²⁸ See the discussion *below*.

¹²⁹ See *Nelken*, Introduction, 44.

¹³⁰ See *Nelken*, Introduction, 29.

¹³¹ See *Obiora*, 674.

¹³² *Watt*, 580.

¹³³ *Watt*, 597.

¹³⁴ See *Nelken*, Comparatists and Transferability, 461.

¹³⁵ See also *Frankenberg and Glenn*, Comparative Law, 980.

for a general trend. An aspect of that is also related to the increased harmonization and unification of law.¹³⁶

How do business-related legal proceedings spill into the realm of public law then – other than the obvious inter-sectionality of public regulations – to make “globalization” appear to be a trigger for foreign citations crossing borders? Part of the answer lies in the structural forces of globalization – such as increased flow of technology and information – that contribute to a general blurring of lines, those separating public and private as much as global and local as well as space and state.¹³⁷ Therein a globalization of law¹³⁸ and therewith a globalized judicial discourse¹³⁹ are discernable. The “effect of globalization needs to be conceded,” concludes *Smith* aptly.¹⁴⁰ *Spigno*, in another spin, interprets globalization as another term connoting the “circulation of judicial interpretation techniques.”¹⁴¹

While this may well be the case, there are a few distinct caveats: the legal methodology falls short in addressing the actual impact of globalization on law.¹⁴² A good part of what is now “discovered” as part of a largely technological¹⁴³ and economic force, took place before that – as will have to be detailed further.¹⁴⁴

Also of interest to the question of how and which foreign citations travel is the source of the judgment.¹⁴⁵ In that there appears to be a flow from a liberal Western pool of thought that the allegedly global solutions offer, it may be worthwhile to flag that “globalization” carries with it a narrative that is distinctly Western if not to bluntly say “white”.¹⁴⁶ Thus, the

¹³⁶ See on harmonization, unification and trans-national law, *below*.

¹³⁷ See Watt, 580, 587, 592.

¹³⁸ See Scheppele, *The Migration of Anti-Constitutional Ideas*, 350.

¹³⁹ See Hirschl, *On the blurred methodological Matrix*, 42.

¹⁴⁰ *Smith*, *Making Itself at Home*, 272.

¹⁴¹ *Spigno*, *The use of foreign precedents in constitutional adjudication: freedom of expression and hate speech in Namibian case law*, 12.

¹⁴² See Watt, 582.

¹⁴³ See also on selection, *below*.

¹⁴⁴ See on technology, *below*.

¹⁴⁵ See further on Sources more generally, *below*.

¹⁴⁶ On a possible hierarchy of jurisdictions, which could be cited, see, e.g. *Smith*, 264.

mythology that is created in the realm of law is a markedly Western concept presented as “modern law.”¹⁴⁷ Understood this way, globalization connotes the spreading of a Western style concept of modernity.¹⁴⁸ One may want to keep this in mind particularly with a view to the origins of potential sources of foreign citations. In this vein one may also want to flag that the concepts of “multiculturalism” that seems to be supported on the surface level potentially has a diametrically opposed effect: the progressive erosion of that very diversity.¹⁴⁹

In that the world is coming closer to home, the influence of public international law¹⁵⁰ can certainly be detected more frequently in the national realm. That way globalization seems to have fostered a legal culture where recourse to international law is more legitimate.¹⁵¹ Then again, there are factors such as the impact of supra-national arrangements and other – increasingly growing – regional arrangements, which are essentially international in that they are not national.¹⁵² Separate factors that cannot be dwelled on are the very recent legal responses to the threat of “terrorism” by way of increasing “security” regulations.¹⁵³ It may give reason to pause, to reflect on *Zweigert’s*¹⁵⁴ 1949 prediction that transgressing borders was a modern trend,¹⁵⁵ and that practical issues related to comparative law would decrease, as the world would become “smaller.”¹⁵⁶

2. Human Rights

Increasingly, economic liberalism has encountered the universalism of human rights,¹⁵⁷ with the People’s Republic of China as a thorny reminder of the stark limitations. Or: the

¹⁴⁷ See Watt, 597 ff.

¹⁴⁸ On globalization see, among others, Ruccio, *Postmodern Moments*.

¹⁴⁹ See for multiculturalism, Fontana, 570; on the potential erosion of diversity: Watt, 585.

¹⁵⁰ See also remarks by Justice Chaskelson of South Africa, *below*, Bentele.

¹⁵¹ See Saunders, *The Courts*, 97; see also Peters/Schwenke, 806.

¹⁵² See also Saunders, *The Courts*, 127.

¹⁵³ See also Markesinis/Fedtke, 178.

¹⁵⁴ Zweigert, *Rechtsvergleichung als universale Interpretationsmethode*.

¹⁵⁵ Zweigert, *Rechtsvergleichung*, 12.

¹⁵⁶ Zweigert, *Rechtsvergleichung*, 18.

¹⁵⁷ See Watt, 580.

globalization of fiscal and technological freedom has stumbled upon human freedom, making “globalization” also a code for rights talk.¹⁵⁸

“[There is] a “globalization of human rights, a phrase that refers to the ever-stronger consensus (now nearly worldwide) on the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as national constitutions and international treaties, and the related decisions to enlist independent judiciaries as instruments to help make that protection effective in practice.”¹⁵⁹

As *Bryde* observes there is a global, “worldwide human rights discussion” underway.¹⁶⁰ Elsewhere¹⁶¹ he describes the essential role of human rights for constitutional cross-references and the increased “need” to engage as the “ability to give judgments in a way that is recognizable as part of the international human rights project.”¹⁶²

In the aftermath of National Socialism and the end of World War II, rights-talk – the emphasis of individuals’ rights derived from being human beings – has increased steadily. The agreement of certain principles and rights at the international level – compare the conclusion of the Universal Declaration of Human Rights in 1948 – trickled down to the national level in various ways. The process from the international to the national level may have taken different formal paths but it clearly opened up various possibilities – if not necessities – to look out for the ways and means of application and implementation elsewhere. Thus, dealing with individual rights that derive from or are influenced by an international agreement or aspire to have universal character¹⁶³, human rights turned into the “chief suspects of cross-fertilization.”¹⁶⁴

¹⁵⁸ See also Koh and Nelken, Introduction, 32.

¹⁵⁹ Kirby, International Law – The Impact on National Constitutions, referring to Justice Breyer, Keynote Address, Annual Meeting, American Society of International Law, 97 American Society of International Law Proceedings 265, 266 (2003).

¹⁶⁰ Bryde, *Überseeische Verfassungsvergleichung*, 460.

¹⁶¹ Bryde, *Constitutional Law*, 15.

¹⁶² *Ibid.*

¹⁶³ See Jackson, *Narratives*, 272.

¹⁶⁴ Michelman, 263.

With a built-in common-ground, national rules a connected to international agreements, are particularly suitable for comparative law.¹⁶⁵ As Justice *Chaskalson* of South Africa rightly observes,¹⁶⁶ there is a correlation between the rate of accession to public international law obligations – international agreements that protect fundamental rights – and the tendency to utilize citations comparatively.¹⁶⁷

Not surprisingly then, the study of comparative constitutional law, is in many ways also a study of international human rights law¹⁶⁸ and in fact a lot of the judgments scrutinized by comparative constitutional law review human rights and related jurisprudence.¹⁶⁹ This applies especially to “constitutional systems whose constitutional law has been influenced by the reception of international human rights law, the interpretation of constitutional law is internationalized because the law itself is internationalized.”¹⁷⁰ In other words, there is now such a strand of law as “human rights constitutionalism.”¹⁷¹

The linkages between the international and national level can only be sketched for the purposes of this paper. Clearly, the non-binding 1948 *Universal Declaration of Human Rights* set a standard, which grew in influence. Both the 1950 *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) as well as the 1966 *Covenant on Civil and Political Rights* are related and in parts overlapping in content.¹⁷² If one would want to employ the category of “first wave human rights” – that is civil and political rights as opposed to the “second wave” of economic and cultural rights – their spread has been a factor in the tendency to engage in comparative law.¹⁷³

¹⁶⁵ See also Schwenger, 98.

¹⁶⁶ Interview with Ursula Bentele, Mining for Gold.

¹⁶⁷ Chaskalson’s case in point are the US, Footnote 38 Bentele. For a discussion of the „special case“ of the USA see *below*.

¹⁶⁸ See also Tushnet, Comparative Constitutional Law, 1233.

¹⁶⁹ See Hirschl, 43.

¹⁷⁰ Bryde, in: Fedtke/Markesinis, 300.

¹⁷¹ Thio, Reading Rights Rightly, 264.

¹⁷² See among others McCrudden, 501 as well as Bryde, in: Fedtke/Markesinis 299.

¹⁷³ See Teitel, 350.

The reinvigorating nature of the Universal Declaration and subsequent rights texts for comparative law and comparative constitutional law in particular, echoes the general sentiment of the transformative power of the post National Socialism and World War II times.¹⁷⁴ Almost equal in influence – given the emphasis on the Western-favored civil and political rights – is the impact of the Cold War. Particularly its end gave way to a new appreciation of interpretation “elsewhere” as during that phase, human rights discourse was largely reduced to a political gimmick accusing one side – usually the East – for not upholding civil and political rights and the other – usually the West – for disregarding economic and social rights, respectively.

Several authors point to the boost that comparative law experienced after the collapse of the Iron Curtain.¹⁷⁵ Indeed, most of the recent literature on comparative constitutional law and comparative constitutionalism is published after that date, referring to judgments connected to the aftermath shortly after that point in time. No doubt the end of the Apartheid system in South Africa, which gave way to a new constitution that enshrines the consultation of foreign materials, is a trigger.¹⁷⁶

It is noteworthy that only one author¹⁷⁷ makes reference to the first major human rights text following the end of Socialism: the non-binding 1993 *Vienna Declaration and Programme of Action*. In many ways it seems to embody the groundwork for the convergence of nations, which has also led to an increase in the exchange of jurisprudence on human rights related issues. Most famous for its line that “all human rights are universal, indivisible and interdependent and interrelated,”¹⁷⁸ the Declaration also embodies a renewed commitment for the *national* application of – *internationally* derived – human rights standards. Recognizing that the political tensions of the Cold War Era had seemingly minimized human rights to a fight over the moral high ground, the World Conference on Human Rights reinvigorated the need for meaningful implementation of the obligations set out in the

¹⁷⁴ See among others, Weinrib, *The Post-War Paradigm and American Exceptionalism*.

¹⁷⁵ See Koh, *The Globalization of Freedom*, 310; Kersch, *The New Legal Transnationalism*; Teitel, 2572.

¹⁷⁶ On the developments in South Africa generally, see among others: Kentridge.

¹⁷⁷ See Obiora, 668.

¹⁷⁸ OP 5, 1993 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights. On the interdependence of human rights see also McCrudden citing Nelken, 502.

various human rights treaties.¹⁷⁹ In Europe, with significant impact by the US, the establishment of the Organization for Security and Co-operation in Europe, particularly its 1975 Final Act concluded in Helsinki, have left an imprint.¹⁸⁰

Among the singular issues that likely contributed to an increase of human rights conversations across national borders other than Apartheid, the question of the legitimacy of the death penalty would certainly be a factor.¹⁸¹ A singular – or local – debate that added to an increase in utilizing comparative law was the “revitalization” of the Alien Tort Claims Act in the US and the wave of litigation that followed in the aftermath of these proceedings.¹⁸²

Developments after 1945 also changed legal structures, leading among others also to the creation of new supreme courts. Furthermore, the adoption of human rights statutes and the emergence of readily available communication technology significantly increased the “traffic” of foreign citations across national borders. The 1982 Canadian Charter of Rights and Freedoms is surely a spear-head.¹⁸³ A distinctly different case is the 1998 UK Human Rights Act. As the full title reveals – *Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights, to make further provisions with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes* – the law is focuses on the application of the regional – that is still international – human rights regime rather than establishing a genuinely British set of human rights. The *sui generis* nature of the European system will be discussed in detail in the next section.¹⁸⁴ Yet another case of human rights incorporation at the national level is the South African Constitution.¹⁸⁵ It enshrines both a comprehensive

¹⁷⁹ Compare OP 1, 1993 Vienna Declaration and Programme of Action.

¹⁸⁰ The Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292.

¹⁸¹ See among others McCrudden, 509; and Koh, Paying “Decent Respect” to World Opinion on the Death Penalty, 1108.

¹⁸² The Alien Torts Claims Act is widely discussed in literature. See Watt, 586.

¹⁸³ The scope and impact of the Canadian Charta can only be flagged here.

¹⁸⁴ See *below*.

¹⁸⁵ On the South African Court, see, e.g., Kentridge.

range of human rights and makes prerogatives on the Constitutional Court having to consult foreign interpretations, which will be discussed later.¹⁸⁶

The discussion on comparative constitutional usages revolving largely around human rights obligations begs the question: is there nothing else left in the realm of public law that could be utilized across borders? There are ample examples for other areas that lend themselves to comparison;¹⁸⁷ *Byrde* suggests environmental protection,¹⁸⁸ but the thrust of the discussion is focused on human rights. As *Choudhry*¹⁸⁹ concedes, it is a “fixation on the rights revolution,” a “rights based constitutionalism” of sorts.¹⁹⁰

Excursus: The European Court of Human Rights

Discussing the role of human rights in comparative constitutional law quickly leads to the example of the role of judgments of the ECtHR. Given the Court’s leading role in human rights jurisprudence it has become a seemingly natural *reference* point; particularly given the leading role of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as a human rights treaty that significantly influences constitutional interpretation.¹⁹¹ Both the Convention and the Court’s jurisprudence have contributed to the creation of a “veritable *ordre public* European” as *Mahoney* observes.¹⁹² Also referred to as the “common law of human rights,”¹⁹³ the ECHR exudes influence over much of the human rights discourse in many countries of the Council of Europe and beyond.

¹⁸⁶ See, *below*, Chapter VI.

¹⁸⁷ See, e.g., discussions between Austria & Germany, *below*.

¹⁸⁸ Byrde, *Überseeische Verfassungsvergleichung*, 462.

¹⁸⁹ Choudhry, *Rethinking Comparative Constitutional Law: Multinational Democracies, Constitutional Amendment, and Secession*.

¹⁹⁰ *Ibid.*

¹⁹¹ See on the influence of human rights treaties on national jurisprudence generally: Kumm, 278.

¹⁹² Mahoney, *Comparative Law*, 146.

¹⁹³ *Ibid.*, 147.

The ECtHR judgments are frequently cited outside the European realm – compare, e.g., the *Lawrence v Texas* decision of the US Supreme Court¹⁹⁴ – and the Court therefore is viewed as a self-evident player in the field of comparative constitutional law. The nature and scope of the ECHR lend themselves easily to comparative methods.¹⁹⁵ With a necessarily inconclusive wording, the text of the ECHR requires even more interpretation than legal texts naturally do.¹⁹⁶ Given the scope of the ECHR’s application – spanning across almost fifty countries – the need for comparison to achieve a common ground seems almost built into the ECHR’s system – making it “quasi-inherent.”¹⁹⁷ The ECtHR therefore takes a special place in the assessment of courts, which utilize comparative law.

There is a second reason for assigning the ECtHR a status of exception to the rule: it has a structurally distinct role. While an international court set up under an international – regional as it is frequently referred to makes it no less international – treaty, it is inter-linked with the various national systems structurally.¹⁹⁸ As part and parcel of its member states’ human rights litigation it becomes the international component in an otherwise national process. This structural dependency – “*strukturelle Koppelung*”¹⁹⁹ – provides the ground for a system-based flow of both comparative law but also international law into the national realm. While neither of these facts are an obligation – the court is not forced procedurally but rather pushed factually to utilize comparative means – its engagement of comparative law cannot be said to be on a par with the voluntary nature of the cases scrutinized as part of this paper.²⁰⁰ Voluntary engagement by a national court not entangled in a thematic or procedural web linked to an international entity is by its nature different to that of a judiciary that is at least theoretically bound into such a structural linkage. Therefore, the cases of the ECtHR and their utilization within Europe are not the focus of this paper.

¹⁹⁴ *Lawrence v Texas*, 539 US 558 (2003).

¹⁹⁵ Some authors contend „multi-constitutionalism“ or „multi-layered constitutions“ (see, e.g. Komárek, Inter-Court constitutional dialogue after the enlargement – implications of the case of University professor Köbler) in the framework of the ECHR as well as EU law, not wanting to dwell on that construct further in the realm of this paper, the construction seems slightly exaggerated given existing relations between national and international law.

¹⁹⁶ See Mahoney, 136.

¹⁹⁷ *Ibid*, 135.

¹⁹⁸ See on horizontal and vertical linkages generally, Fuchs, 185.

¹⁹⁹ Oeter, Rechtsprechungskonkurrenz, 378 ff.

²⁰⁰ Obviously different view by Canievet discussing „the recourse to comparative law in the enforcement of European rights,“ in: Markesinis/Fedtke, 317.

3. Dialogue of Judges

Another structural cause for the current upsurge in comparative constitutional law is the increase of communication between judges. Dubbed the “invisible college,”²⁰¹ judges are regularly engaged in “transnational conversations,”²⁰² which appear to be quite personal in actual fact.²⁰³ This “trans-judicial dialogue”²⁰⁴ opens new and more informal channels of communication.²⁰⁵

Naturally, the advances of technology ease both individual communication as well as the research for judgments elsewhere.²⁰⁶ The internet makes both broad ranging data-bases as well as individual courts’ web sites readily available.²⁰⁷ Annual reports reflect an ever growing impact of regional and international exchange.²⁰⁸ Added to that is a significant rise in lawyers who receive at least parts of their legal education abroad.²⁰⁹ Furthermore, the influence of law clerks educated based on textbooks that now refer to foreign judgments as a standard way of teaching.²¹⁰ What is more, there is an uptick in clerkships abroad,²¹¹ bringing judges in contact with different views, which are “fertile and innovative.”²¹²

Naturally, the linkages between academia and courts – judges who teach leave their mark on the judgments rendered.²¹³ Lastly, many judges have contributed to the academic debate

²⁰¹ Bentele, 244.

²⁰² Kahn, Comparative Constitutionalism in a New Key, 2679.

²⁰³ Compare the description of Justice Kennedy by Toobin, *The Nine*.

²⁰⁴ Ejima, Rethinking Comparative Constitutional Law: Multinational Democracies, Constitutional Amendment, and Secession, 20.

²⁰⁵ See McCrudden, 570. See also Lachmayer, *Verfassungsvergleichung*, 173 on oral transfer of knowledge.

²⁰⁶ See *below*.

²⁰⁷ The more problematic aspects of research are briefly discussed *below*.

²⁰⁸ Compare, e.g., the Annual Report of the Administrative Supreme Court in Austria.

²⁰⁹ On international education, see also *below*.

²¹⁰ See, Ejima, among others.

²¹¹ See in particular the interviews of Bentele.

²¹² Atiyah/Summers, *Form and Substance in Anglo-American Law*, 282

²¹³ See, on the impact of teaching judges, Goutal, *Characteristics of Judicial Style*, 70.

about comparative constitutionalism or the usage of foreign citations respectively over the last years.²¹⁴ There are ample examples: Bryde (Germany), Ackerman (South Africa), Barak (Israel), L'Heureux-Dubé (Canada), Ginsburg (USA), Goldstone (South Africa), Vörös (Hungary), Blackmun (United States), and many others. Noteworthy are the responses to *Markesinis'* and *Fedtke's* take on "Judicial Recourse to Foreign Law"²¹⁵ by an array of judges.²¹⁶ Among them *Barak*²¹⁷ who senses a "turning point."²¹⁸

We may have here the beginning of an intellectual revolution. In the past, we had the following phenomena: Judges did not tend to rely on comparative law; lawyers did not cite comparative law to judges; law schools did not stress comparative law; scholars did not emphasize comparative law; judges did not tend to rely on comparative law; and so on. This vicious circle is coming to its end. Judges will start to rely on comparative law; lawyers will tend to cite it to judges; law schools will start teaching comparative law; scholars will be encouraged to research in comparative law; judges will rely more and more on comparative law. And one of the important tools in breaking the vicious circle is this article of Markesinis and Fedtke. In what will follow, I am summarizing my own experience in the use of comparative law in public law. I do hope it may encourage other judges to follow in this path, both in public law and in private law.²¹⁹

4. Interim Findings

The current excitement around comparative constitutional law can be linked to the increasing discussion of human rights, also coined as "rights based constitutionalism." Consequently, constitutionalism "emerges as a set of practices in which the transnational ambitions of legal globalization flow over and modify the lived experience of specific local sites, and as a set of practices in which local sites inescapably alter what can be seen as general meanings."²²⁰

²¹⁴ See also on extrajudicial writing: Markesinis/Fedtke, 187.

²¹⁵ See book of the same title.

²¹⁶ See the collection by Markesinis/Fedtke.

²¹⁷ Barak in: Markesinis/Fedtke, 287.

²¹⁸ Opening phrase, Barak in: Markesinis/Fedtke, 287.

²¹⁹ Ibid.

²²⁰ Scheppele, *Constitutional Ethnography*, 394.

While undoubtedly a huge part of the human rights engine in Europe and beyond, the ECtHR's engagement in comparative exercises is based on structural dependencies, which limit the chance-element that is an intrinsic part of the cases sought out for this paper. The current excitement is counterweighed with those institutions and systems taking exception, they will, accordingly, be reviewed next.

IV. Exceptions to the Current Excitement

Self-evidently, there is a counter-wave to any surge, particularly one that comes clad as an almost irresistible force. The hype surrounding the usage of foreign citations is no exception. Of those taking exception two are particularly striking: the judges of the US Supreme Court because of the attention their objections have garnered and the political swirl they have created, which included a US Senate Bill prohibiting the usage of foreign citations.²²¹ The second one is the perception of comparative constitutional law generally and to a lesser degree the utilization of foreign citations by the Austrian public courts. For reasons that will be explained below, the assessment of Austrian objections will also dip into the waters of neighboring Germany.

1. The first special case: United States of America

“Exception”²²² is the *leitmotiv* of the opposition of some current judges on the US Supreme Court on potentially utilizing foreign citations. “Exception” in that a special case is made – mostly based on the US Constitution – for a quintessentially systematic inability to make references. “Exceptional” also in the fora that are addressed in the discussion, including some outside the US Supreme Court. E.g., Judges *Breyer* and *Scalia* sparred publicly at the American University,²²³ many judges have given speeches²²⁴ or made comments otherwise on a debate that has been labeled a “burning issue.”²²⁵

²²¹ On the Senate Bill, see particularly Choudhry, *Methaphors*. Another case in point is Singapore, compare on the backlash of the government there, Thiruvengadam, 8.

²²² On American exceptionalism, including a thorough discussion of the stance on utilizing foreign citations, see: Ignatieff: *American Exceptionalism and Human Rights*.

²²³ Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, College of Law, 13 January 2005, American University, Washington, D.C.

²²⁴ See, e.g. Bader Ginsburg, *“A decent Respect to the Opinions of [Human]kind”*: The Value of a Comparative Perspective in Constitutional Adjudication, *Speech*, American Society of International Law, 1 April 2005.

²²⁵ Markesinis/Fedtke, 175.

a. Moods, Fads & Fashions: Recent Cases

For starters it may be helpful to look at how the discussion has spelled out in the Court's chambers. As will be shown below, cross-references are not in any way "new" to the US Supreme Court. But it seems more appropriate to pick the debate up where it usually starts, i.e., summarizing the cases that most commentators on comparative constitutionalism scrutinize. The judgments referring to the debate openly reach just about beyond the trigger-events of 1989 – the end of Socialism. *Thompson v Oklahoma*²²⁶ focused on the enforcement of the death penalty for juveniles. In his majority opinion, Justice *Stevens* cited a range of countries, including the Soviet Union, which have abolished the death penalty entirely or prohibit the execution of juveniles.²²⁷ In response, Justice *Scalia* – joined by Chief Justice *Rehnquist* and Justice *White* – makes a swipe at the Amicus Curiae Brief by the international human rights non-governmental organization Amnesty International on which Justice *Stevens* relied. Generally criticizing the use of statistics as a decisive means to determine societal changes, *Scalia* observes that there are still almost 40 percent States in the US relying on the death penalty. "It is obviously impossible for the plurality to rely upon any evolved societal consensus discernible in legislation – or at least discernible in the legislation of this society," adding "which is assuredly all that is relevant."²²⁸ The details are covered in a footnote to this sentences, which states:

The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries, *ante* at 487 U. S. 830-831, and n. 34, is totally inappropriate as a means of establishing the fundamental beliefs of this Nation. That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, *even if that position contradicts the uniform view of the rest of the world*. We must never forget that it is a Constitution for the United States of America that we are expounding. *The practices of other nations, particularly other*

²²⁶ *Thomson v Oklahoma* 487 US 815 (1988). Markesinis/Fedtke refer to *Tropp v Dulles* (see also *below*) as a starting point, 173.

²²⁷ *Ibid*, 830-1.

²²⁸ *Ibid*, 868-9.

*democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. See Palko v. Connecticut, 302 U. S. 319, 302 U. S. 325 (1937) (Cardozo, J.). But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.*²²⁹

Similar to the Thompson case, it is not just usage of foreign citations but general reference to foreign sources that stir the debate. A year after *Thompson v Oklahoma*, the Supreme Court revisited the issue of the constitutionality of the death penalty for juveniles with a nod to the practice outside the US. In *Stanford v Kentucky*²³⁰ Justice Brennan, in a dissenting opinion, emphasized that the Court's opinion may be "informed, though not determined, by an examination of contemporary attitudes toward the punishment."²³¹ Interestingly, the reference is not just to the opinion in other countries but also "organizations" – a likely reference to the Amicus Curiae Brief by Amnesty International: "The views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society."²³²

²²⁹ Ibid; *emphasis added*.

²³⁰ *Stanford v Kentucky*, 492 US 361 (1989).

²³¹ Ibid.

²³² Ibid.

In the next case, *Printz v United States*,²³³ a Handgun Violence Protection Act, which called for the instant checking of the background of prospective purchasers of handguns, was held unconstitutional, because there was no basis for a congressional law to be directly executed by state officers. Justice *Breyer*, in tackling the question of federally imposed local action referred to experience elsewhere: “The United States is not the only nation facing this problem.”²³⁴ “At least some other countries [...] have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution.” Pointing to the federal systems in Switzerland, Germany, and the EU [sic!] Justice *Breyer* highlights the practice of constituent states rather than federal bureaucracies implementing laws and regulations.²³⁵ Referring to a EU document²³⁶ he underscores that “[those countries] do so in part because they believe that such a system interferes less, not more, with the independent authority of the “state”, member nation, or other subsidiary government, and helps safeguard individual liberty as well.”²³⁷ *Breyer* conceded that the US Constitution was being interpreted,²³⁸ “but [other countries’] experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem [...]”²³⁹ The suggestions of “comparative experience”, which Justice *Breyer* refers to,²⁴⁰ are rejected by the majority opinion, drawn up by Justice *Scalia*. The consideration of “the benefits of other countries” is discarded.²⁴¹ “We think such comparative analysis inappropriate for the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.”²⁴²

²³³ *Printz v United States*, 521 US 898 (1997).

²³⁴ *Ibid*, 977.

²³⁵ *Ibid*.

²³⁶ European Communities, European Council in Edinburgh, 11-12 December 1992, Conclusion of the Presidency 20-21 (1993), as quoted by Justice *Breyer* in *Printz v United States*, 521 US 977 (1997).

²³⁷ *Printz v United States*, 521 US 977 (1997).

²³⁸ “Of course we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own,” *Ibid*.

²³⁹ *Ibid*.

²⁴⁰ “As comparative experience suggests, there is no need to interpret the Constitution as containing an absolute principle,” *Ibid*.

²⁴¹ *Scalia* at Note 11, *ibid*.

²⁴² *Ibid*. Compare *above* for the distinction drawn between comparative law used in drafting legislation and interpreting law.

Two years later, in *Knight v Florida*,²⁴³ concerning the administration of the death penalty, Justice *Breyer* yet again ventured across the border, referring to “a growing number of courts outside the United States.”²⁴⁴ *Breyer* refers to decisions by the Privy Council,²⁴⁵ the Supreme Court of India,²⁴⁶ the Supreme Court of Zimbabwe – by way of a hyperlink (sic!)²⁴⁷ – and the Supreme Court of Canada²⁴⁸ to highlight a growing consensus against the death penalty, albeit with varying conclusions.²⁴⁹ Justice *Breyer* also refers to the ECtHR²⁵⁰ as well as the – non-binding – views of the United Nations Human Rights Committee.²⁵¹

Importantly, Justice *Breyer* noted himself that foreign authority is not binding on the US Supreme Court.²⁵² He also commented on the – political – response to the *Soering*²⁵³ decision, which concerned the extradition of a US citizen under threat of the death penalty, by the US Senate.²⁵⁴ Furthermore, he adds a string of judgments by the US Supreme Court,²⁵⁵ which cite foreign courts, who “applied standards roughly comparable to our own

²⁴³ 120 S.Ct. 459 (1999).

²⁴⁴ *Ibid*, Para 462.

²⁴⁵ *Pratt v. Attorney General of Jamaica* 29, 4 All E. R., at 783, cited at 462.

²⁴⁶ *Sher Singh v. State of Punjab*, A. I. R. 1983 S. C. 465, cited at 463.

²⁴⁷ *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, [1993] 1 Zimb. L. R. 239, 240, 269 (S) (Aug. 4, 1999), <http://www.law.wits.ac.za/salr/catholic.html>, cited at 463.

²⁴⁸ *Kindler v. Minister of Justice*, [1991] 2 S. C. R. 779, 838 (joint opinion), cited at 463.

²⁴⁹ „Not all foreign authority reaches the same conclusion,“ *Breyer* at 463.

²⁵⁰ *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser. A), pp. 439, 478, Para 111 (1989), cited at 463.

²⁵¹ Views adopted by the United Nations Human Rights Committee, 44th Session, March 30, 1992, *In re: Barrett v. Jamaica* (Nos. 270/1988 and 271/1988) §8.4.

²⁵² 120 S.Ct. 459 (1999), duly citing *Thompson v. Oklahoma*, 487 U.S. 815, 868, n. 4 (1988) (Scalia, J., dissenting). He reiterates the sentiment later, stating: “I believe their views are useful even though not binding.”

²⁵³ *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser. A), pp. 439, 478, Para 111 (1989), cited at 463.

²⁵⁴ Reservations lodged by the US Senate upon ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – not restricting or prohibiting “the United States from applying the death penalty.”

²⁵⁵ *Thompson v. Oklahoma*, at 830—831 (opinion of Stevens, J.) (considering practices of Anglo-American nations regarding executing juveniles); *Enmund v. Florida*, 458 U.S. 782, 796—797, n. 22 (1982) (noting that the doctrine of felony murder has been eliminated or

constitutional standards in roughly comparable circumstances.” *Breyer* concludes his *tour de outré-mer* insisting that “willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a “decent respect to the opinions of mankind,”²⁵⁶ aptly rounding out the tour of reference by bowing to the catch-phrase for US discussions on foreign citations.²⁵⁷

Picking things up where they were left off, Justice *Thomas* returns to the matter three years later in *Foster v Florida*,²⁵⁸ re-stating “significant skepticism,”²⁵⁹ identifying *Breyer*’s arguments as “meritless” and labeling his opinions as “musings.”²⁶⁰ Justice *Thomas* criticizes Justice *Breyer* for “only” having added one more foreign court – when in fact reinforcing the Canadian stance by adding a recent decision²⁶¹ – “while still failing to ground support for his theory.” *Thomas* further asserts that the legislature – i.e., Congress – may be interested in the choices of other nations but that the Court’s jurisprudence “should

restricted in England, India, Canada, and a “number of other Commonwealth countries”); *Coker v. Georgia*, 433 U.S. 584, 596, n. 10 (1977) (observing that only 3 of 60 nations surveyed in 1965 retained the death penalty for rape); *Trop v. Dulles*, 356 U.S. 86, 102—103 (1958) (noting that only 2 of 84 countries surveyed imposed denationalization as a penalty for desertion). See also *Washington v. Glucksberg*, 521 U.S. 702, 710, n. 8, and 718—719, n. 16 (1997) (surveying other nations’ laws regarding assisted suicide); *Culombe v. Connecticut*, 367 U.S. 568, 583—584, n. 25, and 588 (1961) (considering English practice concerning police interrogation of suspects); *Kilbourn v. Thompson*, 103 U.S. 168, 183—189 (1881) (referring to the practices of Parliament in determining whether the House of Representatives has the power to hold a witness in contempt).

²⁵⁶ *Knight v Florida*, 464.

²⁵⁷ The phrase derives from the 1779 Declaration of Independence, it is frequently invoked by US Supreme Court Justices commenting on this debate; see also „A Decent Respect to the Opinions of Mankind (Borgen, Ed.); see in particular speeches by US Supreme Court Justices Blackmun, O’Connor, and Ginsburg.

²⁵⁸ 537 U.S. 990 (2002).

²⁵⁹ Gray, Why Justice Scalia ... 1251. Gray also refers to the confirmation hearings of *JohnG. Roberts, Jr., Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 370 (2005).

²⁶⁰ *Foster v Florida*, 359.

²⁶¹ *United States v. Burns*, [2001] 1 S. C. R. 283, 353, P123, cited in *Foster v Florida*, 470.

not impose foreign moods, fads, or fashions on Americans.”²⁶² Therewith, “the battle was on.”²⁶³

A general reference to regulations elsewhere is also subject to Justice *Scalia*’s rebuttal in the case of *Atkins v Virginia*,²⁶⁴ where the execution of persons with intellectual impairments was held to be “cruel and unusual punishment,” as prohibited by the Eighth Amendment. Justice *Stevens* briefly stated: “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”²⁶⁵ Invoking the *Thompson* dissent²⁶⁶ Justice *Scalia* stated that the practices of the “world community” are “irrelevant” as their “notions of justice are (thankfully) not always those of our people.”²⁶⁷

In *Lawrence v Texas*²⁶⁸ the US Supreme Court held that the Texas statute prohibiting sex between two persons of the same sex violated the Due Process Clause. Discussing the criticism that an earlier decision of the US Supreme Court on the issue of sex between consenting adults of the same sex, namely *Bowers v Hardwick*,²⁶⁹ had drawn, Justice *Kennedy* referred to the significance of such criticism from “other sources.”²⁷⁰ “To the extent *Bowers* relied on values shared with a wider civilization, the case’s reasoning and holding have been rejected by the ECtHR [...].”²⁷¹ Justice *Kennedy* goes on to describe the circumstances of the decision of the ECtHR and cites the case, however, not the merits of the decision:

Of even more importance, almost five years before *Bowers* was decided, the ECtHR considered a case with parallels to *Bowers*

²⁶² *Foster v Florida*, 470.

²⁶³ Toobin, *The Nine*, 226.

²⁶⁴ *Atkins v Virginia*, 536 US 304 (2002).

²⁶⁵ *Ibid*, 316; the term “mentally retarded” is derogatory.

²⁶⁶ See above.

²⁶⁷ *Atkins v Virginia*, 536 US 304, at 347-8 (2002).

²⁶⁸ *Lawrence v Texas*, 539 US 558 (2003).

²⁶⁹ *Bowers v Hardwick*, 478 US 186 (1986).

²⁷⁰ *Lawrence v Texas*, 539 US 558, at 576.

²⁷¹ *Ibid*; for a discussion of “wider civilization” see *below*.

and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981) Para. 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.²⁷²

The last of the cases commonly referred to in the context of comparative constitutional references by the US Supreme Court is *Roper v Simmons*,²⁷³ focused on the question whether the execution of the death penalty on a person who, at the time of committing a crime, was a juvenile, would constitute “cruel and unusual punishment.” Referring to *Atkins v Virginia*, and – surprisingly²⁷⁴ – to a core UN human rights convention, namely the Convention on the Rights of the Child, the Court comes to the following conclusion: “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. The document sets forth, and rests upon, innovative principles original to the [American experience and] remain[s] essential to our present-day self-definition and national identity. Not the least of the reasons

²⁷² Ibid.

²⁷³ *Roper v Simmons*, 543 US 551 (2005).

²⁷⁴ As of this writing the United States and Somalia are the two only countries that have not acceded the most widely ratified UN human rights conventions, namely the Convention on the Rights of the Child.

we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.²⁷⁵

In spite of some acknowledgements, the misgivings are still the dominant theme. The reasons for the Court's objections to collective engagement in cross-referencing are manifold: There is a strictly legal side, namely the nature of the US Constitution and there is – to a lesser degree – a political side in the doubts put forward. The US Constitution is considered unique in that it is based on, *inter alia*, a different kind of federalism.²⁷⁶ The specificity is laid out briefly but succinctly by the Court in the last judgment exemplified above,²⁷⁷ *Roper v Simmons*, where the “American experience” is explained as resting on “federalism, a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity.”²⁷⁸ What is more, the Court hints at the political – as in societal-political – nature and context of the Constitution and its corresponding interpretation in continuing: “These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity.”²⁷⁹

Part of this particular identity is the “originalism” of the Constitution – the emphasis that the text of the Constitution has a fixed meaning enshrined at the time of its first writing. Therefrom flows also a mode and therewith theory of interpretation, namely original intent and original meaning, respectively. It is said that the focus of US-American constitutional debate on the “original intent of the framers” or “originalism” also leads to isolationism in

²⁷⁵ *Roper v Simmons*, 543 US 551 (2005).

²⁷⁶ See, among others, Dammann, 536.

²⁷⁷ See, *above*.

²⁷⁸ *Roper v Simmons*, 24 .

²⁷⁹ *Ibid*.

the sense that it firstly, does not contribute to an outward approach and secondly, it makes the decisions of that court far less interesting to others.²⁸⁰

Discussing Justice Scalia's stance that while "judicial dialogue outside of decision-making is fine"²⁸¹ it should not be applied in judicial reasoning itself, *Harding* links his Honor's approach back to US-American constitutional theory. "The fact that [the Court] must provide all answers naturally transforms into a belief that [the Court] indeed does provide all answers. Foreign law thus becomes unnecessary and even threatening to a belief in the authority of the Constitution."²⁸² *Smith*²⁸³ makes a seemingly psychological assessment, observing:

Justice *Scalia*'s hostility to foreign law, and the extreme, but seriously respected suggestion that the implicating of foreign law by U.S. courts erodes American sovereignty, stem from the notion that using foreign law somehow reverts the United States to a position of pre-Revolution subservience. This, in turn, plays a defining role in the popular psyche, driving a large proportion of Americans to similarly look askance at the use of foreign law.²⁸⁴

In keeping with the psychological detour: "The great fear of originalism is the tyranny of the future."²⁸⁵ Justice *Scalia*'s concern with legitimacy reaches even further than "simply" the approach through original intent. Foreign judiciary is just as unacceptable as politics in decision-making as they "implicate personal value judgments" and these undermine the legitimacy of the law."²⁸⁶ Not surprisingly, some critics go so far to label originalism as

²⁸⁰ *Harding* Comparative Reasoning and Judicial Review 28 *Yale J. Int'l L.* 409, 421; L'Heureux-Dubé, *The Importance of Dialogue*, 32 f.

²⁸¹ *Harding*, 442.

²⁸² *Ibid*, footnote omitted. She also points out that it is „legitimate to pin Justice Scalia's views [...] on the rest of the Court“.

²⁸³ *Smith*, 218.

²⁸⁴ *Smith*, 266; footnotes – with substantial references – omitted.

²⁸⁵ *Alford*, *In Search of a Theory of Comparative Constitutionalism*, 647.

²⁸⁶ *Ibid.*, 458. *Beatty* points out that „Judges like Rehnquist, Scalia, Thomas and Robert Bork, whose political philosophy is populist and conservative, are naturally inclined to look to historical sources and original understandings whereas more progressive judges like Brennan and Marshall look to underlying values and the Court's own earlier decisions that allow them to give larger and more liberal readings to the text“, *Beatty. The Forms and Limits of Constitutional Interpretation*, 99.

“irrational”²⁸⁷ or “dangerous legal fiction”.²⁸⁸ *Beatty*²⁸⁹ provides a helpful conclusion, if not to say balancing act: “Claiming originalism is less partial than rival theories is to try to salvage it with an apology rather than an argument.”²⁹⁰

Alford contends that the discussion draws a line between comparativism relying – or “embracing” – international law and “historical comparativism” seeking to understand the context from which the Constitution is born.²⁹¹ Consequently, “originalists warmly embrace constitutional comparativism, provided it elucidates a better understanding of original intent,”²⁹² which can be read as an open invitation to the use of – historical – comparative material.²⁹³ Accordingly, *Gray*²⁹⁴ suggests an “onto-teleological” approach, as showcased in *Lawrence v Texas*:²⁹⁵ Would the drafters have anticipated the various aspects of liberty as known today, they would have “been more specific.”²⁹⁶

Other aspects of the US-specific reluctance to utilize foreign citations are described as a form of provincialism,²⁹⁷ a tendency towards isolationism,²⁹⁸ “insular mentality,”²⁹⁹ a distinct individualism,³⁰⁰ and a mix of all the above.³⁰¹ *Fontana*³⁰² dubs the Court’s

²⁸⁷ See Kahn-Freund.

²⁸⁸ Ackermann, *Constitutional Comparativism*, 503.

²⁸⁹ *Beatty*, *Ultimate Rule of Law*.

²⁹⁰ *Ibid*, 11.

²⁹¹ *Alford*, *In Search of a Theory of Comparative Constitutionalism*, 654.

²⁹² *Ibid*, 649.

²⁹³ *Ibid*.

²⁹⁴ *Gray*, *Why Justice Scalia should be a Constitutional Comparativist*.

²⁹⁵ 539 U.S. 558 (2003).

²⁹⁶ *Lawrence v Texas*, 578.

²⁹⁷ *Fontana*, *Refined Comparativism in Constitutional Law*, 544; *Ackerman*, *The Rise of World Constitutionalism*, 773.

²⁹⁸ *Harding*, 421; *McCrudden*, *A Common Law of Human Rights?*, 520.

²⁹⁹ *Markesinis/Fedtke*, 192.

³⁰⁰ *Rosenfeld* *Constitutional Migration and the Bounds of Comparative Analysis*, 77.

³⁰¹ Those others would be fear, *see* *Baudenbacher*, *Judicial Globalization*, 525 *and* the lack of tradition to engage in cross-referencing, *Barak*, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 113 f. Compare also the observation by *Ackerman* on the dangers of a “tunnel vision” that frequently leads to “unimaginative thinking,” *Ackerman*, in: *Markesinis/Fedtke*, 278.

unwillingness to “listen to others’ constitutional suggestions” “provincialism,”³⁰³ while *Ackerman*³⁰⁴ detects a move “in the direction of emphatic provincialism”.³⁰⁵ The “parochialism”³⁰⁶ as well as the “internal self sufficiency”³⁰⁷ is partly blamed on notions of exceptionalism.³⁰⁸ The amplified disapproval that the introvertedness is “unacceptable”³⁰⁹ seems to be another way of trying to say that it is not entirely clear what really is “bothering” the opponents of utilizing foreign citations.³¹⁰ *McCrudden*³¹¹ cites one of the US eminent scholars in the field, *Henkin*, on isolationism:

An abiding isolationism (or unilateralism) . . . continues to appeal to many Americans, even some who readily judge others and are eager to intervene on behalf of democracy and human rights in other countries. There is a reluctance to accept, and have our courts apply, standards perceived to have been created by others, even if they were borrowed from us and reflect our own values.³¹²

Values: the underlying debate is unquestionably highly politically charged. There is little doubt that those opposing the ventures across the US border are prone to exaggeration.³¹³ The sentiment of former South African Judge *Goldstone* provides some brusque, albeit

³⁰² Fontana, 539.

³⁰³ *Ibid*, 544.

³⁰⁴ *Ackerman* *The Rise of World Constitutionalism*.

³⁰⁵ *Ibid*, 773.

³⁰⁶ Koh, *International Law as Part of Our Law*, 56.

³⁰⁷ *Markesinis/Fedtke*, 193.

³⁰⁸ See Ignatieff, *American Exceptionalism and Human Rights*, particularly the text by Michelman; see also Tushnet, *The Inevitable Globalization*, who rightly also attributes an exceptionalist stance to Australia.

³⁰⁹ *Markesinis/Fedtke*, 195.

³¹⁰ Michelman in: Ignatieff; see also *Markesinis/Fedtke*, 196.

³¹¹ *McCrudden*, *A Common Law of Human Rights?*, 520.

³¹² *Henkin*, ‘The US and International Human Rights’ in: *Justice for a Generation*, papers presented in London, England, 15-19 July 1985 at the plenary sessions of a meeting between the American Bar Association, the senate of the Inns of court and the Bar, and the Law Society of England and Wales, at 377, as cited by *McCrudden*, *A Common Law of Human Rights?*, *Id*.

³¹³ See, general sentiment in cases cited, *above*.

helpful, clarity: assuming that the US are among the most conservative democracies in the world, the most progressive member of the US Supreme Court is likely to be more conservative than the most conservative judge on the South African Supreme Court.³¹⁴ A further political dimension is raised in the potential correlation between the reluctance of the US government to ratify international human rights treaties and the seeming disinclination to cite foreign precedent.³¹⁵ Overall, a shift seems to be underway, the end of the one-way road in sight,³¹⁶ as “parents” are getting ready to learn from their children³¹⁷ and “considerations of America’s place in the a globalizing, interdependent world”³¹⁸ enter the discussion for good.

b. Well Acquainted: A History of References

Against the backdrop of the US Supreme Court judicial history, the contemporary agony both inside and outside – compare the US Senate³¹⁹ – the Court is somewhat surprising. One need not engage in in-depth research³²⁰ of the Court’s judgments to find that some form of “comparison” with courts, judicial systems and other markers abroad has taken place regularly:

As *Ehrlich*³²¹ highlights, the US Constitution took third place in the considerations of Justice *Wilson*, preceded by principles of general jurisprudence and the “*laws and practice of particular States and Kingdoms*”,³²² in the 1793 case of *Chisholm v Georgia*. Despite disagreement over the judgment – it lead to the Eleventh Amendment³²³ of the US

³¹⁴ Quoted in: Toobin, *Swing Shift – How Anthony Kennedy’s passion for foreign law could change the Supreme Court*, *The New Yorker*, September 12, 2005; as cited by Foster, 130.

³¹⁵ See Bentele; see also *below*.

³¹⁶ See Bryde, *Überseeische Verfassungsvergleichung*, 459.

³¹⁷ See Calabresi, *Wise Parents Do not Hesitate to Learn* .

³¹⁸ Borgen.

³¹⁹ See Choudhry, *Metaphor*.

³²⁰ Such research was not even attempted for the purpose of this paper.

³²¹ *Comparative Public Law and the Fundamentals of Its Study*.

³²² *Chisholm v Georgia* (U.S. 1793) 2 Dal. 419, 543.

³²³ The Eleventh Amendment reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

Constitution – its reference to foreign jurisprudence resonated for many years.³²⁴ Two esteemed justices of the Supreme Court in the 19th Century frequently reverted to Roman law, civil law as well as common law examples, respectively. *Story*, renowned for his commentary on the US Constitution, served the Court from 1811 to 1845; *Holmes* succeeded him almost a century later from 1902 to 1932 and followed a similar path.³²⁵

Fittingly, *Fontana* refers to a “latent practice” in constitutional adjudication, whereby American judges have occasionally been using constitutional findings from outside the US.³²⁶ In a “history of uses”³²⁷ he highlights the widespread nature of comparative examples and asserts, finally, that all judges serving on the US Supreme Court at the dawn of the new century have utilized comparative constitutional law in their opinions.³²⁸ In an overview spanning 200 years, *Calabresi* and *Dotson-Zimdahl*,³²⁹ track down plentiful US Supreme Court decisions utilizing foreign precedent, starting with *Rose v Himely*³³⁰ in 1808, at the start of the Republic, referring to late eighteenth century decisions of British courts as those with which the Court is “best acquainted.”³³¹ The impressive anthology covers an abundance of judgments.³³²

In the decades before the recent hullabaloo, the now famous *Miranda* case – on the police’s obligation to inform suspects of their procedural rights – refers to practices in Commonwealth countries.³³³ Also, an opinion on the religious bases of primary education was walked through the practices in the Balkans, Northern Ireland and the Middle East.³³⁴ The track record is also documented by the Justices themselves, as *Breyer* cites decisions as

³²⁴ Ehrlich cites decisions from 1832, 1874, and 1882, 623.

³²⁵ Clark, *Development of Comparative Law in the United States*, 179.

³²⁶ Fontana, 542.

³²⁷ *Ibid*, 544.

³²⁸ *Ibid*, 545.

³²⁹ Calabresi/Dotson-Zimdahl, *The Supreme Court and Foreign Sources of Law*.

³³⁰ 8 U.S. (4 Branch) 241 (1808).

³³¹ 8 U.S. (4 Branch) 241, at 270.

³³² Calabresi/Dotson-Zimdahl; for a discussion of recent decisions, see *above*.

³³³ *Miranda v Arizona*, 384 U. S. 436 (1966), see also, Alford *In Search of a Theory of Constitutional Comparativism*, 700.

³³⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), see also Annus, *Comparative Constitutional Reasoning*, 302.

far back as 1881 in a 2002 case.³³⁵ Finally, the “originalist orthodoxy”³³⁶ would lend itself to use constitutional comparativism, as *Gray*³³⁷ insists: “Why Justice *Scalia* should be a Constitutional Comparativist ... sometimes.”³³⁸

Importantly, the comparativist is not always a likeminded one, committed to the same set of constitutional values but rather also the – ideological – opponent. The role of “negative example,” which shall be explored further,³³⁹ was particularly dominant in the Cold War Era, when, e.g., the question of constraining presidential power was juxtaposed with the executive excess in fascist dictatorships.³⁴⁰ As a side note: *Kahn-Freud*³⁴¹ highlights the impact of the “gulf” between communist and non-communist decision-making on the comparability of systems,³⁴² whereas contemporary discussions point to the impact of the collapse of the iron curtain.³⁴³ The subsequent Vienna Declaration and Programme of Action has already been mentioned as embodying a shift of paradigm.³⁴⁴

2. The Second Special Case: Austria by way of Germany

Among those Courts taking exception to the almost irresistible force of excitement about the usage of foreign citations, Austria is of particular interest. For one, there is an immediacy of sorts in wanting to test a seemingly global phenomenon on ones own turf. Secondly, this very exercise in applying comparative constitutional ideas in the Austrian context sheds

³³⁵ *Kilbourn v. Thompson*, 103 U.S. 168, 183—189, *Knight v Florida*; see also *above*.

³³⁶ *Gray*, 1278.

³³⁷ *Ibid.*

³³⁸ The title of *Gray*’s article: Why Justice *Scalia* should be a Constitutional Comparativist ... Sometimes.

³³⁹ See on negative example, below.

³⁴⁰ *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579 (1952), see *Fontana*, 587; see also *Sheppele*, Aspirational and Aversive Constitutionalism, 313. On the role of totalitarianism in comparative law, see also *Grosswald*, Cultural Immersion, 77. On the impact of the Cold War generally, *Scheppele*, Constitutional Ethnography, 393.

³⁴¹ On Uses and Misuses of Comparative Law.

³⁴² *Ibid*, 11.

³⁴³ *Koh*, The Globalization of Freedom, 310.

³⁴⁴ See, *above*.

helpful light on the reasons for countering the trend. Particularly the more intricate web of structural specificity and the institutional stoicism of an established system move into focus.

Following *Wieser*'s³⁴⁵ general contention that courts can practice overt and covert reliance on foreign citations simultaneously,³⁴⁶ Austrian courts, including the Constitutional Court, have a reluctant rapport with comparative constitutional practice. While *Fuchs*³⁴⁷ rightly holds that asserting a general rejection of comparative law would be apodictic, the courts' practice is far from bravado. Although the "meaningfulness [of comparative law] has been proven through practice,"³⁴⁸ the Constitutional Court appears to avoid the utilization of foreign citations in an "almost embarrassing" fashion.³⁴⁹ While there are no traces of a full-fledged rejection of comparative practice in judgments, there is also no general practice: a skimming of almost three decades of judgments shows 38 references to the German Constitutional Court (BVerfGH)³⁵⁰ – barely more than one per annum.³⁵¹

The reasons for the "national introversion"³⁵² are manifold. In addition to the ripple effects of the recent past,³⁵³ there is something to be said about the strict focus on form over content in the Austrian approach to law. *Wiederin*³⁵⁴ has aptly labeled the combination of championing formal over substance considerations "modus austriacus,"³⁵⁵ connoting a particular indisposition for balancing reasons and substance respectively.³⁵⁶ "Part of the imperial legacy is a tendency to compensate the reluctance to weigh in on substance guarantees by emphasizing form, competence and procedure."³⁵⁷

³⁴⁵ Wieser, *Vergleichendes Verfassungsrecht*.

³⁴⁶ Wieser, 36.

³⁴⁷ Fuchs, *Verfassungsvergleichung durch den Verfassungsgerichtshof*.

³⁴⁸ Fuchs, 180.

³⁴⁹ Wieser, *Vergleichendes Verfassungsrecht*, 36.

³⁵⁰ See research paper by the author, time span 1980 to 2007.

³⁵¹ See also, Fuchs, 178.

³⁵² Fuchs, 177.

³⁵³ See *below*.

³⁵⁴ Wiederin, *Denken vom Recht her*.

³⁵⁵ Wiederin, *Denken vom Recht her*.

³⁵⁶ Wiederin, 305; with a reference to Somek's „abwägungsskeptische Verfassungskultur.“

³⁵⁷ Wiederin, 309.

The Austrian penchant for formalism over substance discussions, towed with the reference to foreign citations can be showcased through the initial debates about and subsequent incorporation of ECtHR judgments. While references to the ECtHR are generally to be seen as a case of comparative engagement *sui generis*,³⁵⁸ the Austrian discussion of comparative law in the public law realm largely revolves around the flow of cases from Strasbourg to Austria. Initially, the ECHR's application was rejected – on formal grounds: an international agreement, a reservation in line with the Federal Constitutional Act renders it not directly applicable.³⁵⁹ The adoption of the ECHR with qualified majority resolved parts of the formal debate of an otherwise substance related problem.³⁶⁰ The “unloved”³⁶¹ ECHR has since been applied, also by way of citing judgments: the case name, parts of the reasoning or direct incorporation of verbatim citations from judgments.³⁶²

One example is the 1989 decision, VfSlg. 12.103, which discusses the meaning of the term “necessary” by way of citing ECtHR judgments in the cases *Handyside v UK*, *Sunday Times v UK* and *Barthold v Germany*, among others, concluding that “the Constitutional Court concurs with the jurisprudence of the ECtHR.”³⁶³ What is striking, and somewhat telling about the attitude of the Constitutional Court toward foreign citations, is the fact that the case names are never used in full – the country is usually omitted – and the source is not the ECtHR's case number or date of judgment but rather the legal journal, which publishes the German translations of the ECtHR's judgments: EuGRZ.³⁶⁴ While such abridged references to ECtHR judgments can be found every-so-often, the thrust of utilization of Strasbourg – and likely other courts' – judgments appears to happen in covert fashion.³⁶⁵ There is a reliance on the dicta of others but it is not necessarily documented or discussed in any detail for that matter.

³⁵⁸ See Excursus, *above*.

³⁵⁹ See Art 50 Bundes-Verfassungsgesetz (Federal Constitutional Act).

³⁶⁰ Compare, Wiederin, 313.

³⁶¹ Wiederin, 313.

³⁶² See also, Wieser, *Vergleichendes Verfassungsrecht*, 36.

³⁶³ VfSlg. 12103.

³⁶⁴ EuGRZ is an acronym for Europäische Grundrechte Zeitschrift, European Fundamental Rights Journal.

³⁶⁵ See also, *below*.

Another example for the particular Austrian approach is the frequency with which the Constitutional Court seeks preliminary rulings from the European Court of Justice (ECJ): it is the peculiar blend of relying on formalism and procedures and defiance of (imperial) authority that lends itself to a more frequent request for advice.³⁶⁶ The aspect of treading comparative territory would only play a negligible role in this realm.

Adding other sources, such as references to academic writing, to the search for (c) overt references, it appears that legal reference books are cited with a comparable infrequency or reluctance, respectively.³⁶⁷ Another part in the puzzle of explanations for the disinclination is the comparatively strict separation of academia and jurisprudence: notwithstanding the fact that a number of judges enter the Constitutional Court following a high-profile career in legal academia, the legal identity of the Court and particularly its judgments is that of a clear distance between academic and jurisprudential approaches.³⁶⁸

The tendency toward “national introversion”³⁶⁹ can partly be explained through the similarities with Germany’s attitude³⁷⁰ but also the basic approach to constitutional interpretation. The Federal Constitutional Act does not provide any guidance or guidelines for that matter on interpreting the Bill.³⁷¹ *Lachmayer*,³⁷² in his assessment of the grounds of legitimation of comparative exercises and methods of usage contends very straightforwardly that the practice is within the leverage of judges’ interpretative discretion.³⁷³ *Kelsen*³⁷⁴ as the source of evidence for said choice leads back to the earlier discussion of the “modus

³⁶⁶ See Lachmayer, *Verfassungsvergleichung*, 175. On the issue of preliminary rulings and their role in comparative law, see also Schiemann in: *Markesinis/Fedtke*, 365.

³⁶⁷ Searching for the authors of well established legal treatise, the maximum hits are 20 with the author of the Federal Constitutional Act, Kelsen, scoring three; research by the author.

³⁶⁸ See Wiederin, *Denken vom Recht her*, 309.

³⁶⁹ Fuchs, 177.

³⁷⁰ See *above*, particularly „Rabel“ on „Eingesponnensein,“ compare also Frowein, *Kritische Bemerkungen* on „introversion“ (*Introvertiertheit*), 806 & 811.

³⁷¹ See Fuchs, 183; see also *below* for examples of such legal mandates.

³⁷² Lachmayer, *Verfassungsvergleichung*.

³⁷³ Lachmayer, *Verfassungsvergleichung*, 168.

³⁷⁴ Specifically, Kelsen’s Pure Theory of Law, citation by Lachmayer, 168.

austriacus,”³⁷⁵ which is not only characterized by the trumping of formalism, the influence of positivism but also the “hierarchy of norms” as laid out by *Merkl*.³⁷⁶

This triad, together with other factors sustains a disinclination for seismic shifts in the way “business” – that is rendering of constitutional judgments – is done. Consequently, a culture that is still under the spell of a now long-desolved empire is hard pressed to contemplate the possibilities offered by comparative experience in any grand fashion. The influence of the imperial past identified by *Ehrlich* nine decades ago, will be viewed as still applicable by those practicing law in those very same chambers today: “The Administrative Court and the Court of the Empire of Austria deserve some notice even although the Empire has ceased to exist.”³⁷⁷ Indeed, the Administrative Supreme Court can be traced to changes instigated by the revolution and weathered various political changes.

Steeped in history as this discussion is, it seems appropriate to briefly touch on the legacy of National Socialism and the Holocaust in particular, given their impact on law and legal institutions in Austria. The sense of irony is hard to miss in that those having escaped the horrors of the Nazi-Era are said to have carried a particular ability to engage in comparative efforts, being uniquely equipped with “polyglot qualities,”³⁷⁸ leaving in their wake a field that is more and more “turned in upon itself.”³⁷⁹ The émigrés’ impact³⁸⁰ is not just a unique disposition for the challenges of comparative exercises, including comparative constitutionalism; their experience is also said to have contributed to the increased attention to unifying elements as well as the reliance on functionalism.³⁸¹ *Grosswald Curran* convincingly characterizes the influence of comparatist scholars who escaped “Hitler’s

³⁷⁵ See *above*, *Wiederin*.

³⁷⁶ See *Wiederin*, 301.

³⁷⁷ *Ehrlich*, 636 (1921).

³⁷⁸ Steiner, “What is Comparative Literature?,” in *No Passion Spent, Essays: 1978-1995*, 148 (1996) as cited by *Grosswald Curran*, *Am J Comp Law*, 53, Footnote 30.

³⁷⁹ Steiner, *ibid*.

³⁸⁰ See *Clark*, 212 and *Grosswald Curran*, 52; see also *Markesinis/Fedtke*, 190.

³⁸¹ See *Grosswald Curran*, 66; on functionalism see *below*.

Europe³⁸² as defining for the next generation, particularly the much-relied-on work of *Zweigert and Kötz*.³⁸³

In a seemingly “academic post traumatic stress-disorder”³⁸⁴ a “politics of asserted *apolitical* sensibility”³⁸⁵ emerged, which in fact was highly political: in an atmosphere where the fallout from the racist Nuremberg regulations and its generalizations beyond “difference” to characterizing human beings as alien and “subhuman”,³⁸⁶ led to an oversimplification of differences:

“Their tendency to seek universals and obliterate differences among legal cultures in my view derives from the unstated assumption, pervasive in their legal culture since 1945, that where law recognizes and legitimizes difference, particularly as to fundamental human attributes, it will be pernicious purposes of exclusion and discrimination.”³⁸⁷

The dangerous assumption that “sameness” equates “inclusion,” whereas “difference” is linked with “exclusion,” under lied the thinking of many émigrés, trying to address the root cause of their tragic fate.³⁸⁸ Many thus reverted natural law as a way of establishing universally applicable principles. This school of thought was also a response to the German approach, which, following *Kant*, among others, had stirred away from naturalism.³⁸⁹ The experience of anti-Semitism had shaped a conviction that moved away from realism by way of reinforcing natural laws; the stance was buttressed by the subsequent experience of totalitarianism.³⁹⁰

³⁸² Grosswald Curran, 68.

³⁸³ See Grosswald Curran, 66 ff; see also Peters/Schwenke, 809, who speak of „dominating the next generation.“

³⁸⁴ Watt, 594.

³⁸⁵ Watt, 594, emphasis added.

³⁸⁶ Grosswald Curran, 68.

³⁸⁷ *Ibid*, citation ommitted.

³⁸⁸ See Grosswald Curran, 75.

³⁸⁹ *Ibid*, 77.

³⁹⁰ *Ibid*.

Certainly not wanting to diminish the impact of National Socialism, it would be too simplistic to square the causes of the German and Austrian paths, respectively, solely on the impact of those times. Importantly, the divisions and fractions within legal jurisprudence started much earlier. The debates in the aftermath of World War I would seem an appropriate entry point to flag that the causes and ripple effects of earlier events were more complex than immediately meets the eye.

Better knowledge of foreign law was a key argument in the epic debate between *Thibaut* and *von Savigny* around the non-codification of German law in the aftermath of the Napoleonic war, which reinforced resentful tendencies toward comparative efforts.³⁹¹ In that climate, “ignoring contemporary foreign law was not only a scientific choice; it also demonstrated a disapproval of liberal thought patterns and liberal scholarship in idealizing the Ancient Roman World in an ahistoric way.”³⁹² Not much later, the demise of the German monarchy caused yet more disruption and discussions over the (legal) order that should follow. The debate between positivism and anti-positivism, as it is coined, percolated in the aftermath of the German monarchy and dominated the latter part of the Weimar Republic with a string of open disputes over the course to follow.

At the height of the inter-war period, in 1923, *Isay*, an attorney in Berlin, asserted that German legal thought was encapsulating itself through “isolation”.³⁹³ While refuted for being “too harsh” an assessment, the sentiment was shared that a new sense of international cooperation was paving its way and that Germany in particular was secluding itself therefrom.³⁹⁴ The strong ties between the German and Austrian legal systems at the time, which were dominant but not confined to the private law sector, are a strong indication that the tendency to ostracize spilled over into the Austrian realm. Such disputes were soon overshadowed by more profound events, which were to leave a lasting structural mark on the field of comparative law and constitutional comparison in particular.

³⁹¹ Schwenger, 72.

³⁹² Schwenger, 73.

³⁹³ Hermann Isay, *Die Isolierung des deutschen Rechtsdenkens*, Vortrag gehalten in der Berliner Juristischen Gesellschaft, 8. Dezember 1923, cited in: Rabel, 14.

³⁹⁴ Rabel, 13 refers to “Vereinsamung.” See also the explanation by Zweigert/Kötz³, 58.

*Schwenzer*³⁹⁵ describes in gruesome yet necessary detail the impact of the “dark years,”³⁹⁶ the phrase connoting National Socialism, and how the grip of power by National Socialists initially thwarted and soon completely changed the outlook and purpose of comparative law in Nazi-ruled Germany and Austria. The sum of the pieces leading to the expulsion and denunciation of *Rabel*, founder of the first Institute of Comparative Law at the University of Munich in 1917 and the *Journal of Foreign and Comparative Law* – later commonly cited as *Rabel’s Journal*³⁹⁷ – and many others. The ideological alignment with National Socialism at the national level resulted in a pariah status at conferences, which later were interrupted due to World War II. The re-establishment of the *Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre* in 1950 ended a hiatus that spanned almost two decades.³⁹⁸ The institutional and ideological fractures were only reluctantly addressed. *Rabel’s* 1923 dictum of a cocooning-tendency (*Eingesponnensein*) spun itself into a new meaning.³⁹⁹ He furthermore sensed a tendency to isolate and therewith inbreed in German comparative law.⁴⁰⁰ *Baer*⁴⁰¹ reinforces the sentiment, assessing the post-War Era as one in which comparative law was a “marginalized” subject, largely defined by its colonialist views.⁴⁰²

3. Interim Findings

Traditions and practices can go many ways, in the case of the US Supreme Court there is more than a mere trace of inspirations derived from other courts, however, there is opposition to continuing that practice based on other traditions that have been established,

³⁹⁵ *Schwenzer*, 69.

³⁹⁶ *Schwenzer*, with explanation of the term, 87.

³⁹⁷ See *Rheinstein*, In Memory of Ernst Rabel, V *American Journal of Comparative Law* No II, 1. *Schwenzer* cites *Kunze* who quotes the justification of removing *Rabel’s* name from the journal as: „Henceforth, only the Director of the Institute shall be named on the Journal, which will make it easier for Prof. Rabel to accept the embarrassment of the disappearance of his name,“ *Schwenzer*, 84; see also *Grosswald Curran*, 69.

³⁹⁸ *Schwenzer*, 88.

³⁹⁹ *Rabel*, *Aufgabe und Notwendigkeit*, 16.

⁴⁰⁰ *Rabel*, 14.

⁴⁰¹ *Baer*.

⁴⁰² *Baer*, 753.

e.g., originalism. The Austrian Constitutional Court has neither rejected the notion of comparison entirely, nor has it fully embraced the practice. The idea of looking beyond the own realm, particularly toward Germany and Switzerland, is standing practice, the method of writing dicta is, too. The latter does not necessarily embrace references to other sources very openly.⁴⁰³ Particularly the more covert approach to utilizing foreign sources will reemerge in the discussion of patterns and the possible approaches to utilizing rulings of other courts.

⁴⁰³ See on other sources and references thereto, *below*.

V. Problems and Limits of Comparative Law

The current debate on usage of foreign citations is frequently interlocked with the contemporary excitement around globalization.⁴⁰⁴ It also cannot be entirely disconnected from neo-liberal frames where “chances” and “opportunities” are buzz-words and processes, imply boundless possibilities and prospects. But even in the absence of such elation one may beg the question: are there any limits?

The nature of law and its manifold strings necessitate a few restrictions: viewing law not as a solitary undertaking but as a thread in the fabric tightly woven into the social web, issues such as language, culture, history, and differences in legal systems – as a random selection – exemplify the inherent boundaries of a given set of law.

1. Language

One of the most obvious limitations of comparative law is language: Full command of the language in which a foreign case or law originates seems a basic necessity, as South African judge Moseneke says about the usage of German precedent by the Constitutional Court of South Africa: “German is not an easy language.”⁴⁰⁵ Importantly, the limitations do not stop there: “No one dreams the same in different languages.”⁴⁰⁶ Put differently: the command of a language on itself is not the same as being at “home” in a language, knowing the connotation and context of terms, as the “true dimensions are found elsewhere.”⁴⁰⁷ What is more: “rules [...] are not the same rules; any similarity stops at the bare form of words itself.”⁴⁰⁸ A case in point is the use of the word “pan” for “bread” and the different connotation the seemingly similar term has.⁴⁰⁹

⁴⁰⁴ See *above* globalization.

⁴⁰⁵ Bentele, interview with *Moseneke*, 243.

⁴⁰⁶ Steiner, “What is comparative literature?,” (1995), 10; as quoted by Legrand, *What legal transplants?*, 63.

⁴⁰⁷ Legrand, *What Legal Transplants?*, 63.

⁴⁰⁸ *Ibid*, 63.

⁴⁰⁹ See *also* Legrand and Kahn-Freund, *On Uses and Misuses*.

As the case of Germany and Austria easily exemplifies – as does the case of the US and Canada – sharing language and relying on very similar legal systems, which intersect in major areas, is not sufficient to claim that there is a “sameness” in language, terms, let alone laws. “Knowing foreign law means crossing a linguistic border’ even when a language base is shared,” as *Gerber*⁴¹⁰ rightly observes.⁴¹¹

Trying to find a “common language” to pave the way to increased comparability, *Sommermann*⁴¹² suggests a “meta language” or “artificial language” (“*Kunstsprache*”).⁴¹³ However, such an exercise would be highly prone to error and fail to reflect the “dimensions”, as *Legrand*⁴¹⁴ cautions.

2. Structural limits

Discussing the limitations of language and knowledge of a particular legal system necessitates a brief digression into structures, such as the ECHR and its jurisprudence by the ECtHR. This system inherently refers and cross-references to a set of principles and rights in connection with different legal systems and therewith languages.⁴¹⁵ There is a force to conform (“*Konformitätszwang*”) on content, which also has implications for language.⁴¹⁶

In addition to the interrelations – and therewith interdependencies – of the Council of Europe, there are also the – more covert – forces of the legal process within the European Union. As *Teitel*⁴¹⁷ highlights, the side-effects of the European unification process include a blurring of lines between comparison, cross-referencing and actual unification.⁴¹⁸ The

⁴¹⁰ David Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, (2001) 75 *Tulane L.R.* 949.

⁴¹¹ Gerber, 967 as cited by Watt, 604.

⁴¹² Sommermann, *Funktionen und Methoden der Rechtsvergleichung*.

⁴¹³ *Ibid*, 667.

⁴¹⁴ See *above*.

⁴¹⁵ See also *above* on the ECtHR.

⁴¹⁶ Sommermann, 668.

⁴¹⁷ Teitel, 2570.

⁴¹⁸ Teitel, 2578; see also Schwenzer, 92.

challenge for people interested in cross-referencing is to withstand the lure of the various systems, which utilize cross-referencing but ultimately pursue other goals.

3. Transnational Law

One strand of thought, which appears to be blurring more lines than it intends to, is the scholarship around transnational law. Transnational law can be viewed as the legal bi-product of globalization.⁴¹⁹ The development of transnational law has particular relevance in the context of trans-governmentalism,⁴²⁰ which is on the rise with various states increasing their cooperation, the European Union being the most high-profile case in point. Economic and business considerations, which are among the strongest forces for increased state-to-state cooperation, lead to a boosting of legal alignment first and foremost in the commercial sector.⁴²¹

As *Nelken*⁴²² highlights, transnational law is not to be confused with harmonization as such.⁴²³ However, it is a legal development that follows in the wake of an increased transnational political ideology.⁴²⁴ The practice of globally acting lawfirms possibly adds to the momentum.⁴²⁵ The alleged or perceived “purity” of the categories “national” and “international,” respectively, are disputed by the transcending and transgressing developments within law.⁴²⁶ Overall then, the literature on transnational law implies that its tendencies lean more toward unification than to establishing a model of comparison that draws a clear line between the original sources. Seen that way, it creates a further challenge to defining the limits and problems of comparative exercises, even though some contend that comparative analysis does not necessarily lead to uniformity of law but can actually help to

⁴¹⁹ See *above*, globalization.

⁴²⁰ See Freedland *Comparative and International Law in the Courts*.

⁴²¹ See on transnational law and commercial law, Glenn, *Comparative Legal Reasoning and the Courts: A View from the Americas*, 227.

⁴²² See Nelken, *Introduction*, 3.

⁴²³ *Ibid*, 3.

⁴²⁴ See Kersch, 356.

⁴²⁵ See Glenn, *Comparative Law and Legal Practice*, 980.

⁴²⁶ On “purity” see Kersch, 376.

explain differences.⁴²⁷ Against this backdrop it is interesting to note that the inaugural congress in Paris in 1900⁴²⁸ viewed uniformity as a goal of comparative law,⁴²⁹ and as a basis for transnational law⁴³⁰ respectively.

4. Legal Families

Non-unification but a high degree of similarities define what is known as legal families (“*Rechtsfamilien*”).⁴³¹ Also described as a legal circle – *Rechtskreis* – they connote legal systems that share a significant degree of resemblance in terms of history, sociology and, importantly, basic features of jurisdiction and laws. The most commonly referred to legal families are common law and civil law. There are subdivisions within – such as Roman Law and German-speaking Law – as well as traces of the Napoleonic Code, famously in Canada and the US State of Louisiana.

The notion of “family,” in the sense of shared features, is still relevant, while proving to be overrated and – due to the dynamics of increasing interrelation – possibly veering towards outdatedness. Tying the division to historic developments such as Colonialism⁴³² or the end of World War II⁴³³, possibly also the end of Soviet-style Socialism,⁴³⁴ reflects the geopolitical nature of the distinction as much as its intrinsic “fuzziness”.⁴³⁵ The various families potentially being “dysfunctional and divided,”⁴³⁶ the categorization lends itself to shrouding the dominance of perceived leading systems under different parameters and runs the potential risk of “essentially categorizing nation status,”⁴³⁷ introducing nationalism through

⁴²⁷ See Canivet, *The Use of Comparative Law before French Private Law Courts*, 325.

⁴²⁸ See on Paris Congress, *above*.

⁴²⁹ See Watt, 581.

⁴³⁰ See Palmer, 284.

⁴³¹ See particularly Zweigert/Kötz, 63.

⁴³² Nelken, *Introduction*, 10.

⁴³³ Van Hoecke/Warrington, *Legal Cultures*, 498.

⁴³⁴ See Kahn-Freund, *On Uses and Misuses of Comparative Law*, 11.

⁴³⁵ See Glenn, *Comparative Legal Families*, 425.

⁴³⁶ *Ibid*, 422.

⁴³⁷ *Ibid*, 435.

the side-door.⁴³⁸ In a purely political assessment this introduces limits to comparison under doubtful disguise. That said, there is also a correlation between the connection between nationhood and constitutional development and the willingness to engage in comparison.⁴³⁹ Touching on nationalism warrants flagging the issue of provincialism,⁴⁴⁰ de-provincialization⁴⁴¹ being among the goals of comparative law.

5. Legal Culture

*Nelken*⁴⁴² is among those criticizing the limitations of legal families, citing the need for both more width and depth in characterizing the nuances that are lost in “packaging” systems together. He advocates for “legal culture” as a means to explain the dependency of law on its social and cultural context; and therewith its limitations in comparison, one may add. Stating that legal culture is “not an easy concept”⁴⁴³, *Nelken* draws up a set of distinctions. Based on *Friedman*’s⁴⁴⁴ notion of internal legal culture – connoting the ideas and practices of legal professionals – and external legal culture – describing the demands on law by wider society, *Nelken* describes legal culture in the realm of legal attitudes within a given society and the wider angle of comparing societies and units within.⁴⁴⁵ Legal culture, then can be defined as

Legal norms, salient features of legal institutions and of their ‘infrastructure’, social behavior in using and not using law, types of legal consciousness in the legal profession and in public.⁴⁴⁶

⁴³⁸ See also Saunders, *The Use and Misuse*, 42.

⁴³⁹ See Baer, 737.

⁴⁴⁰ See Fletcher, see also Frankenberg, *Critical Comparisons*.

⁴⁴¹ See Frankenberg, *Critical Comparisons*, 412.

⁴⁴² Nelken, *Introduction*, 25.

⁴⁴³ *Ibid*, 27.

⁴⁴⁴ Friedman, *The Legal System: A Social Science Perspective*, 1975, cited by Nelken, *Introduction*, 27.

⁴⁴⁵ Nelken, *Introduction*, 27.

⁴⁴⁶ *Ibid*, 25.

Naturally, legal aspects of culture are not disconnected from society at large, they are “embedded in larger frameworks”⁴⁴⁷ of the web that comprises social structure, including the montage that is described as “culture.” It is also expressed through values and *Annus*⁴⁴⁸ points to the difference in values between cultures and countries, sensing that similarities are limited to liberal systems only.⁴⁴⁹ While the relative homogeneity of a culture in social and economic terms is part of the criteria for “membership” in a legal family,⁴⁵⁰ *Cohen*⁴⁵¹ points out that the underlying social and economic issues defining a culture – and the legal culture for that matter – are undervalued as contributing factors, demanding an increase in their recognition.⁴⁵²

The basic elements of legal culture have been aptly summarized by *Van Hoecke/Warrington*.⁴⁵³ 1. The concept of law, 2. The theory of valid legal sources, 3. The methodology of law or interpretation, respectively, 4. The theory of argumentation, 5. The theory of legitimation, and 6. The common basic ideology.⁴⁵⁴

In surmising the limits of comparison, the reference point of a legal family – or a legal circle – has potential to be helpful. This presupposes though that the perceived similarity is somewhat defined, preliminarily sketched, at least basically tangible.

6. “Civilized” World

The discussion, however, by and large uses reference frames that yet again tend to be undefined, verging more toward the obscure than providing clear concepts. A good example for this is the most frequently used marker in academic discussion: the “civilized world.”⁴⁵⁵

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Annus*.

⁴⁴⁹ *Ibid.*, 345.

⁴⁵⁰ See Clark, 191; see also Cotterell, *Is there a Logic of Legal Transplants?*, 84.

⁴⁵¹ Cohen, *Transcendental Nonsense*.

⁴⁵² *Ibid.*, 812, 834.

⁴⁵³ *Van Hoecke/Warrington*, 514.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ References are frequent, Alford, *Annus*, Cohen, Frankenberg, Glenn, Kahn-Freund and Larsen are among many who utilize the term, rarely explaining the underlying notion.

Alternative terms used are “wider civilization”⁴⁵⁶ and “civilized countries”⁴⁵⁷ and “tolerably advanced nations.”⁴⁵⁸ The expression, lacking definition, is described as “other nations, particularly democracies,”⁴⁵⁹ and also specified as “liberal or Western democracies, people with common cultural heritage (...) who are progressive in a particular field.”⁴⁶⁰ *Alford* quickly reframes the reference from the “international community of democracies” to the “leading members of Western Europe,”⁴⁶¹ implying that the scope can shrink pretty fast.

In addition to the “Western” orbit,⁴⁶² the notion of “industrialized”⁴⁶³ is also added. *Smith*⁴⁶⁴ adds the characterization of “socially advanced countries.”⁴⁶⁵ A very telling, almost *Realpolitiquesque*, characteristic is added by *Frankenberg*:⁴⁶⁶ the “relevant” world.⁴⁶⁷ Even the North Atlantic Free Trade Agreement is invoked.⁴⁶⁸ There is no doubt that the focus of comparison is placed on Euro-American jurisprudence⁴⁶⁹ and that one’s own law as “home law” – the “home turf”⁴⁷⁰ – takes precedence to the point of being superior.⁴⁷¹ The economic aspect, which shimmers through these notions is also more bluntly described as the “desirable trading group;”⁴⁷² albeit noting human rights in the same breath.⁴⁷³

⁴⁵⁶ *Alford*, Four Mistakes in the Debate on “Outsourcing,” 670.

⁴⁵⁷ *Larsen*, Importing Constitutional Norms from a „Wider Civilization,“ 1323.

⁴⁵⁸ *Pollock*, Oxford Lectures 10, the author also uses „civilized mankind“ as a reference point, 31.

⁴⁵⁹ *Alford*, Four Mistakes in the Debate on „Outsourcing,“ 690.

⁴⁶⁰ *Drobnig*, The Use of Comparative Law by Courts.

⁴⁶¹ *Alford*, Four Mistakes in the Debate on „Outsourcing,“ 689.

⁴⁶² E.g., *Kahn-Freund*, The Use and Misuse, 76; *Larsen*, 1323.

⁴⁶³ *Larsen*, 1323; see also *Kommers*, The Value of Comparative Law, 695.

⁴⁶⁴ *Smith*.

⁴⁶⁵ *Ibid*, 265.

⁴⁶⁶ *Frankenberg*, Critical Comparisons, 422.

⁴⁶⁷ *Ibid*, 422.

⁴⁶⁸ See *Schneidermann*, Exchanging Constitutions, 302.

⁴⁶⁹ See, e.g. *Watt* 597; see also *Martinez*.

⁴⁷⁰ See on home turf considerations: *Noah Feldman*, When Judges Make Foreign Policy, *New York Times*, Sunday Magazine, 25 September 2008.

⁴⁷¹ See *Frankenberg*, Stranger than Paradise, 265.

⁴⁷² *McCrudden*, 531.

⁴⁷³ See on the complexities: *McCrudden*, 531.

7. Legal Imperialism

“Legal imperialism”⁴⁷⁴ as the supremacy of an international community of higher courts⁴⁷⁵ is a red thread in the discussion of membership in the “civilized world” and therewith the possibility for shared notions that enable comparison. The “forces” of imperialism largely work by way of exclusion of “others:” the dominance of the Euro-American jurisprudence reduces the particles of diversity and blends those bits of distinction seamlessly.⁴⁷⁶ Therewith, the norm concepts of dominant cultures (“*Dominanzkulturen*”)⁴⁷⁷ are perpetuated. *Watt*⁴⁷⁸ summarizes pointedly: “modern law is a gift of the West to the rest.”⁴⁷⁹

The engrained paternalism,⁴⁸⁰ also ethnocentrism,⁴⁸¹ points in the direction of an “epistemological racism of mainstream comparative law.”⁴⁸² There appears to be a tendency to guise politics as some comparative science.⁴⁸³ While that may be a harsh assessment of the predisposition comparative law and the engagement of foreign citations can take, it is a helpful marker for the limits and challenges of the discipline. It is not necessarily a call for rejection of the field but rather a strong note of caution for the usefulness of comparison and much more so any potential “ease” with which it can be applied. After all, the “methodological agenda carries an implicit world view,” as *Watt*⁴⁸⁴ rightly cautions.

The “method” or more precisely the pattern that comes to the foreground in comparison is likely to be largely influenced by practices harnessed during colonial times, a colonialist view seems embedded.⁴⁸⁵ Those non-Western voices that exist in the discourse have

⁴⁷⁴ See Annus, 345.

⁴⁷⁵ Ibid.

⁴⁷⁶ See Watt, 597.

⁴⁷⁷ See Baer, 750.

⁴⁷⁸ Watt.

⁴⁷⁹ Ibid, 597.

⁴⁸⁰ See Frankenberg, *Stranger than Paradise*, 263; see also Peters/Schwenke, 823.

⁴⁸¹ See Frankenberg, *Stranger than Paradise*, 264.

⁴⁸² Watt, 597.

⁴⁸³ Peters/Schwenke, 823.

⁴⁸⁴ Watt, 596.

⁴⁸⁵ See Baer, 752.

frequently been “Westernized.”⁴⁸⁶ As a result, there are a lot of assumptions that underlie comparative exercises; the structural forces of the discourse and methods have fostered a climate in which those assumptions are only reluctantly challenged.⁴⁸⁷ Oversimplifying the complexity, almost invariably puts the legal culture of the West on top of some implied normative scale, threatening the claim to non-ethnocentric and impartial research through self-conforming hierarchies.⁴⁸⁸

Another underlying assumption of comparative law is that of its perceived “neutrality.”⁴⁸⁹ The notion of neutrality is in fact so engrained that *Watt*⁴⁹⁰ contests the “dogma”⁴⁹¹ of neutrality. In that only a part of the foreign law travels or only a fraction of the foreign system is compared, disconnected from the overall system, it tends to be viewed as a clear-cut object, conveying objectivity and therewith neutrality.

The complexity of law – as sketched in the section on legal culture⁴⁹² – implies that there can hardly be such a thing as “neutral” comparative objects. The law in its own context, the process of taking it out of its reference-frame as well as the comparison itself are wrought with choices, values and assumptions, making the process and the outcome everything but neutral. That is not to say that these factors make it objectionable *per se*, it “simply” necessitates some safeguards and caution, particularly with regard to posing as neutral. Again, *Watt*⁴⁹³ comes in with an amplified, yet succinct, summary: “comparative law, while ostensibly neutral supports ideological projects.”⁴⁹⁴

The dominance of one’s own perspective, the (subconscious) belief that the comparative material is neutral in value or so alike to the own value set that no distinction needs to be drawn or something in-between these two scaleends, also points to the role that identity plays in comparative law. Looking out is also a way of looking in, one could summarize in

⁴⁸⁶ Peters/Schwenke, 821.

⁴⁸⁷ See Watt, 590 f.

⁴⁸⁸ See Frankenberg, *Critical Comparisons*, 422.

⁴⁸⁹ See, e.g., *ibid*, 411.

⁴⁹⁰ Watt.

⁴⁹¹ *Ibid*, 592.

⁴⁹² See on legal culture *below*.

⁴⁹³ Watt.

⁴⁹⁴ *Ibid*, 595.

oversimplistically. The search inadvertently also is a quest to the individual's identity and thus a more murky and complex affair than the clean-slated appearance of much of comparative academic writing would make one believe.

The quest surrounding comparison is thus also an examination of the tension caused by relating from oneself to others, or from one's own legal system to another respectively. "Otherness"⁴⁹⁵ hence has multiple functions in comparative exercises, among them as the source of comparative law – the interest in the "other" solutions as the core of comparative engagement, the "other" as a measure against one's own solutions, and the more complicated issue of the "other" as a potential projection for – slightly oversimplified – assumptions.

As the categorization as "different" or "other" already implies the comparison,⁴⁹⁶ the tension stemming from the relation between oneself and the other, the "us vs. them"⁴⁹⁷ theme, is alive in comparative law, too. The elaboration of similarities and differences – to relate the tension closer to the mechanism of comparison – is the core challenge of comparison. As *Baer*⁴⁹⁸ puts it so aptly: the tension between familiar insight and otherness has to be tolerated.⁴⁹⁹ The strain, however, hardly comes to the fore in its full force, as the methods applied and the approaches taken to comparison create what *Dannemann*⁵⁰⁰ describes as "controlled difference:" some researchers will find similarity among differences and other will find differences among similarities.⁵⁰¹

Returning briefly to the – related – challenge of Eurocentricism, there are those who contend that the trend toward unified laws and codes is leading to an erosion of diversity, which could deprive comparative law of its subject.⁵⁰² In a way, developments related to globalization are threatening to undermine the diversity that is necessary for comparison to

⁴⁹⁵ See Watt, 587. For a warning on overemphasizing „otherness“, see Dannemann, *Comparative Law, Study of Similarities or Differences?*, citing James Whitman, 392.

⁴⁹⁶ Grosswald Curran, *Cultural Immersion*, 45.

⁴⁹⁷ See, e.g., Saunders, Watt.

⁴⁹⁸ Baer.

⁴⁹⁹ *Ibid*, 756, *translation* by the author.

⁵⁰⁰ Dannemann.

⁵⁰¹ *Ibid*, 411.

⁵⁰² See Watt, 585.

flourish.⁵⁰³ But it is not necessarily unification⁵⁰⁴ as such that limits diversity, it is in parts also the approach taken to comparison: the focus taken or the purpose for engaging in comparison respectively⁵⁰⁵ can define the result. The emphasis on the outcome of a comparison is a factor in suppressing diversity, too.⁵⁰⁶

In distinguishing similarities, differences and the diversity of legal solutions set against the backdrop of a particular culture, the task of doing so also requires some distancing. This applies particularly to personal preconceptions, including, importantly, ones prejudices.⁵⁰⁷

Creating this distance is described as both a function and a challenge of comparative law.⁵⁰⁸ In another dimension, the distancing exercise allows to see changes and to critically review resistance to change both at the personal and institutional level.⁵⁰⁹ *Frankenberg*⁵¹⁰ suggests that the process does not just involve the effort of “mere distance” but rather the engagement in differencing: consciously taking on board the subjective nuances that are involved in shaping ones opinion, thus giving way to an overt test to notions of neutrality, objectivity, and universality.⁵¹¹ The challenges and possibilities of addressing diversity as part of the method used in comparison will be addressed later.⁵¹²

8. Civil and Common Law

The possible limits of comparative law are frequently described along the lines of the two most referred to legal “families”: civil and common law; said to be dominating the

⁵⁰³ *Ibid*, 586; see *also*, generally, Grosswald Curran, Cultural Immersion.

⁵⁰⁴ See *also*, *above*.

⁵⁰⁵ See *also* Dannemann, 418.

⁵⁰⁶ See Fletcher, 694.

⁵⁰⁷ See on “cognitive control” through distance from prejudice: Palmer, 270.

⁵⁰⁸ See, e.g., Saunders, Comparative Constitutional Law in the Courts, 115.

⁵⁰⁹ See Watt, 590.

⁵¹⁰ Critical Comparisons.

⁵¹¹ *Ibid*, 414.

⁵¹² See, *below*.

comparatist world.⁵¹³ They are described as starkly different models. And: the mode of operation of common law lends itself more easily to comparative law – thus somewhat limiting comparative law to those legal systems based on common law.

Undoubtedly, there is a distinction in the history of the two systems,⁵¹⁴ which is evident in different styles. One flanked with formalized anonymity and the other defined through personal narration.⁵¹⁵ In fact around 1900 – the Paris Congress⁵¹⁶ – it was believed that the “gap” between the two systems was “unbridgeable.”⁵¹⁷ *Legrand* is among those who – still - believe that common and civil law are “irrevocably irreconcilable.”⁵¹⁸ But, as *Zweigert* and *Kötz* observe, the purely “theoretical axiom was belied by the success of the practical” implementation, mainly through the work of *Rabel*⁵¹⁹ and *Lambert*.⁵²⁰

As *Kötz*⁵²¹ draws out the distinctions, it is mainly the different role of the judge and counsel that defines the differences.⁵²² The activism of the counsel in the common law system is countered by the “subdued zeal” in the civil-law realm.⁵²³ The judges’ style in the civil-law system will – as a contrast – strike many common-law lawyers as “activist” in comparison to their experience. Also, the stark differences regarding sources – codified versus judge-made law – are now less distinct,⁵²⁴ in parts due to ongoing unification.⁵²⁵ The bridging – to stay with the *Zweigert* and *Kötz* metaphor – of civil and common law has evolved over the last

⁵¹³ Frankenberg, *Critical Comparisons*, 442.

⁵¹⁴ See, e.g., Kahn-Freund, *Common Law and Civil Law*, 163, see also Rebhahn, *Auf der Suche nach der ratione decedendi*, 576.

⁵¹⁵ Kahn-Freund, 155.

⁵¹⁶ See on Paris Congress, *above*.

⁵¹⁷ *Zweigert/Kötz*, 62.

⁵¹⁸ Legrand, *The Same and the Different*, in: Pierre Legrand and Roderick Munday, *Comparative Legal Studies: Traditions and Transitions* (2003), 240 ff. as cited by Dannemann, 390.

⁵¹⁹ See also *above*.

⁵²⁰ *Zweigert/Kötz*, 62.

⁵²¹ *Kötz*, *The Role of the Judge in the Court-room*.

⁵²² *Ibid*, 35.

⁵²³ *Ibid*; see also Van Hoecke/Warrington, 500.

⁵²⁴ Van Hoecke/Warrington, 500.

⁵²⁵ See, *above*.

century to the point where perceived “boundaries” are increasingly crumbling,⁵²⁶ and replaced by metaphors of migration.⁵²⁷ In a way, the growing linkage between the two systems is also a result of the emergence of comparative law: while the “continental system” as it was then described was seen as an opposite to the common law system, the advancement of comparative law is in essence the convergence between the two systems.⁵²⁸ In the twentieth century, *Zweigert* and *Kötz* observe,⁵²⁹ the perceived differences of common and civil law were overcome, thereby fulfilling *Rabel’s* prediction that comparative law is the comparison of legal solutions, which “are given to the same actual problems by the legal systems of different countries seen as a complete whole.”⁵³⁰

Currently, the sense that the two systems have steadily moved together⁵³¹ to a point where the distinction is not as obvious⁵³² and where difference would not “matter”⁵³³ dominates the discourse. In addition to the trend that comparative law generally has paved, there are two jurisdictions, which are credited with assistance in the bridging exercise: the Supreme Court of Canada and the ECtHR.

*Glenn*⁵³⁴ highlights the active support of the Supreme Court of Canada, which expects counsels to address sources both of common and civil law.⁵³⁵ He also observes that common law has been conceived as “essentially transnational” in character and civil law has become transnational through the practice of citation of the Quebec Courts as well as the Supreme Court of Canada.⁵³⁶ As for the effects of the interpretation of the ECHR, *Van*

⁵²⁶ See Thomas, *The Judicial Process* 125.

⁵²⁷ See Gaudreault-Desbiens, 179.

⁵²⁸ See Zweigert/Kötz, 61; see also, on convergence, Choudhry, *Metaphors*, 26.

⁵²⁹ Zweigert/Kötz, 61.

⁵³⁰ Rabel, *Die Fachgebiete des Kaiser Wilhelm-Instituts für ausländisches und internationales Privatrecht*, in: *25 Jahre Kaiser Wilhelm-Gesellschaft zur Förderung der Wissenschaften III* (1937), 77, 82 gedruckt in Rabel, *Gesammelte Aufsätze III*, 180, cited by Zweigert/Kötz, 61.

⁵³¹ See Grosswald Curran, *Cultural Immersion*, 70.

⁵³² See Markesinis, 9.

⁵³³ See Glenn, *Comparative Law and Legal Practice*, see also Gaudreault, 199.

⁵³⁴ Glenn, *Comparative Law and Legal Practice*.

⁵³⁵ *Ibid*, 987.

⁵³⁶ *Ibid*.

*Hoecke/Warrington*⁵³⁷ observe that the adaptation in light of judgments of the ECtHR has had a direct impact on the legal practice across the Council of Europe member states, narrowing the “paradigmatical” differences between civil and common law.⁵³⁸

Not surprisingly, there is an almost endless variety in summarizing similarities and differences in frames and groups, respectively. Analogous to the concept of family itself, the notions are steadily evolving. Among the frames of reference the macro-micro pairing as well as the oriental-occidental juxtaposition are worth mentioning. Both a clear reflection of categorizing legal regulations – rather than jurisprudence – the former focuses on general questions and specific legal problems, respectively,⁵³⁹ whereas the distinction of occidental and oriental is largely defined by history and culture.⁵⁴⁰

While the premise that “adequate similarity,”⁵⁴¹ as pronounced by *Barak*⁵⁴² suffices for comparison looks and sounds convincing, it still does not provide guidance as to what “adequate” and “similarity” could mean in the context of a given comparison.

9. Method(s) of Comparative Law

Comparative law is characterized as “yearning” for a theory and method,⁵⁴³ the lack thereof is frequently lamented.⁵⁴⁴ The agreement over the repercussions of the absence of a method goes so far that potential users are urged not to avoid comparative law simply because it is lacking a method.⁵⁴⁵

⁵³⁷ Van Hoecke/Warrington.

⁵³⁸ *Ibid.*, 501.

⁵³⁹ See Zweigert/Kötz, 4 ff; see *also* Dannemann, 387 f.

⁵⁴⁰ See Dannemann, 389.

⁵⁴¹ Barak, Response to the Judge as a Comparatist, 200.

⁵⁴² *Ibid.*

⁵⁴³ Alford, Four Mistakes in the Debate, 703.

⁵⁴⁴ See, e.g., Larsen, 1298; Saunders, Comparative Constitutional Law, 110, Frankenberg, Critical Comparisons, 417; Choudhry, Metaphors, 35.

⁵⁴⁵ Saunders, Comparative Constitutional Law, 125.

In their discussion of the “method of comparative law” – in a chapter with said title, *Zweigert and Kötz*⁵⁴⁶ state unequivocally that nothing is clear in terms of a method of comparative law. On the contrary, they emphasize that things are muddy, stressing that the approach taken should be “more a working rule rather than a firm conclusion of comparative methodology, as the matter is more subtle and complex.”⁵⁴⁷ Elsewhere⁵⁴⁸ it transpires that *Zweigert* has a tendency to prefer “inspiration over methodological rigor.”⁵⁴⁹ What does emerge, with the caveat that based on experience it is clear that it is impossible to detail a method of comparison in advance and that the start of any comparison is a hypothesis, an idea.⁵⁵⁰ Testing the usefulness and practicality of that idea is the goal of the comparative undertaking.⁵⁵¹

Searching for comparable solutions, the principle of functionality should be applied.⁵⁵² As part of the process, a string of questions should be posed, many of which address not so much the issue under comparison but rather the outlook of the comparatist and possible preconceived ideas of the searcher.⁵⁵³ *Zweigert and Kötz* urge to look for solutions beyond those places where one would expect to find them in one’s own legal system.⁵⁵⁴ Should the comparatist fail to find a solution, the response should be to ask why the other legal system does not provide a solution and critically reflect on the home legal system.⁵⁵⁵

There are no limits in where to look for solutions: the concept of “sources” should be defined broadly to accommodate “whatever molds or affects the living law in a chosen system.”⁵⁵⁶ Furthermore, it is difficult to foresee any limits as the conditions of each inquiry are so dependent on the precise topic of the search.⁵⁵⁷ Consequently, “the comparatist must

⁵⁴⁶ *Zweigert/Kötz*, 30.

⁵⁴⁷ *Ibid*, 41.

⁵⁴⁸ Michaels, 341.

⁵⁴⁹ *Ibid*, 341.

⁵⁵⁰ *Zweigert/Kötz*, 33 f.

⁵⁵¹ *Ibid*.

⁵⁵² See on functionalism, *below*.

⁵⁵³ See also, *above*.

⁵⁵⁴ See *Zweigert/Kötz*, 35.

⁵⁵⁵ *Ibid*.

⁵⁵⁶ *Ibid*.

⁵⁵⁷ *Ibid*, 40.

sometimes look outside the law.”⁵⁵⁸ In so doing, *Zweigert* and *Kötz* encourage to use those traits that are used in legal science generally: sound judgment, common sense, intuition, imagination and discipline.⁵⁵⁹

The search should be based on the “*praesumptio similitudinis*” – the presumption that the practical results are similar.⁵⁶⁰ Or, differently put: “If law is seen functionally as a regulator of social facts, the legal problems of all countries are similar.”⁵⁶¹ Once such similar practical results are found the comparison starts in earnest. Importantly, this is not just a juxtaposing of results from different jurisdictions but rather the challenge of finding an underlying systemacy, which enables the building of a scheme.⁵⁶² *Zweigert* and *Kötz* suggest to free the unearthed solutions from the context of their own system.⁵⁶³ While that undoubtedly has to happen to a certain degree, the discussion above and also some of the problems and limits that will still be elaborated⁵⁶⁴ pull the wisdom of this methodological step into question. The disconnect from the original context can only go so far: cutting the cord entirely will render comparison difficult and – more importantly – will rob the exercise of the depth and complexity that is triggers the exercise in the first place.

In creating a system for the comparable parts or components,⁵⁶⁵ the comparatist needs to push the boundaries of national structures and cast the net beyond these perimeters: seemingly like a librarian who requires a “supranational system to arrange foreign materials in topical categories,” as *Zweigert* and *Kötz* suggest.⁵⁶⁶ The process should have the comparatist taking a new viewpoint to quasi-neutrally assess the different solutions. Again, there are no set principles in so doing, “it is impossible to lay down any firm rules.”⁵⁶⁷ The core question to be posed is: why are there different solutions and can the other solutions

⁵⁵⁸ *Ibid*, 39.

⁵⁵⁹ *Ibid*, 33, 39.

⁵⁶⁰ *Ibid*, 40; see *also* Dannemann, 388.

⁵⁶¹ *Zweigert/Kötz*, 46.

⁵⁶² *Ibid*, 43 f.

⁵⁶³ *Ibid*, 44.

⁵⁶⁴ See also on context, *below*.

⁵⁶⁵ *Zweigert/Kötz*, 45.

⁵⁶⁶ *Ibid*.

⁵⁶⁷ *Ibid*, 43.

help the question or problem under scrutiny in the own legal system?⁵⁶⁸ In addition the process “adds the international dimension and generates a supply of material beyond the imagination of even the cleverest stay-at-home lawyer.”⁵⁶⁹

These elements of a comparative method by *Zweigert* and *Kötz* are a rare discussion of an actual methodology of comparative law, as most writers lament the lack of a theory.⁵⁷⁰ While some contend that the field is still in its infancy,⁵⁷¹ therewith justifying the untapped potential still to be discovered, others, such as *Choudhry*,⁵⁷² scold the field or the discipline respectively for “being out of step with developments,”⁵⁷³ pointing to the interest it has garnered over the last few years.⁵⁷⁴

Not surprisingly then, demands are being made for features that the methodology of comparative law should contain. These refer in particular to the contextualization of comparative results, i.e., calling for an “organic” method⁵⁷⁵ and warning to avoid “shallow comparativism,”⁵⁷⁶ and for “more subtle methods of inquiry.”⁵⁷⁷ Another way of putting it is *Choudhry*’s⁵⁷⁸ plea for a dialogical method.⁵⁷⁹

Overall, the demand is for a practical method, one that lends itself to the application in real life and that is “feasible.”⁵⁸⁰ Tellingly, the call also includes the aspect of a “non-threatening”⁵⁸¹ method – most likely alluding to the need for a process that reassures the skeptics and critics of comparative law. Hope remains that comparative law methods will

⁵⁶⁸ *Ibid*, 45.

⁵⁶⁹ *Ibid*, 45.

⁵⁷⁰ See, e.g., Larsen, 1298; see also Nelken, Introduction, 10.

⁵⁷¹ Saunders, *The Use and Misuse*, 75.

⁵⁷² Choudhry, *Metaphors*.

⁵⁷³ *Ibid.*, 35.

⁵⁷⁴ See also Choudhry, *Metaphors*, referring to Beatty, *above*.

⁵⁷⁵ See Palmer, 265.

⁵⁷⁶ Saunders, *Comparative Constitutional Law in the Courts*, 125.

⁵⁷⁷ Cossmann, *Migrating Marriages and Comparative Constitutionalism*, 210.

⁵⁷⁸ Choudhry, *Metaphor*.

⁵⁷⁹ Choudhry, *Metaphor*, footnote 108; see also Teitel, 2586.

⁵⁸⁰ Palmer, 263.

⁵⁸¹ *Ibid*.

become more mainstream.⁵⁸² For the time being, there is agreement to disagree on the method(s), a state of “comparative muddling,”⁵⁸³ a playing field for increasing the tolerance for the ambiguity that comes with the territory.⁵⁸⁴ A good starting point would be to settle those questions that should be asked, as even that premise has not been resolved.⁵⁸⁵

10. Functionalism

The presumed muddiness of comparative law’s methodology aside, there is one method that is regularly invoked: functionalism.⁵⁸⁶ While not contended as the only method of comparative law,⁵⁸⁷ functionalism the normative power of the factual. It is essentially the only one that is widely referenced – if not discussed – and certainly the presumed “method” in a field that is uncertain to feature a method to begin with. Differently phrased: functionalism is a “shorthand for traditional comparative law.”⁵⁸⁸ Narrowing in on a rule’s utility, the method of functionalism is said to enable the search for the best solution⁵⁸⁹ and to, in particular, compare the evolvment of constitutional ideas and principles.⁵⁹⁰

While *Glendon*⁵⁹¹ describes functionalism as the principal gift of comparative law to legal science,⁵⁹² there is plenty of criticism: its limited usability⁵⁹³ is the short-hand for contending that it has a “tendency to fetishize the past,”⁵⁹⁴ and more importantly that it de-emphasizes differences⁵⁹⁵ to the point of postulating commonalities in place of

⁵⁸² See Glenn, *Comparative Law and Legal Practice*, 1002.

⁵⁸³ Frankenberg, *Critical Comparisons*, 441.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ See Nelken, *Introduction*, 9.

⁵⁸⁶ See also *above*, Zweigert/Kötz.

⁵⁸⁷ See Samuel, 260; see also Tushnet, *Some Reflections on Method in Comparative Constitutional Law* (henceforth *Reflections*), 68.

⁵⁸⁸ Michaels, 341.

⁵⁸⁹ See Baer, 740.

⁵⁹⁰ See Tushnet, *Reflections*, 68.

⁵⁹¹ Glendon, cited by Palmer, 284.

⁵⁹² Glendon cited by Palmer, 284.

⁵⁹³ Saunders, *Comparative Constitutional Law*, 123.

⁵⁹⁴ Kahn, *Comparative Constitutionalism in a New Key*, 2685.

⁵⁹⁵ Grosswald Curran, *Cultural Immersion* 77.

differences.⁵⁹⁶ Reassessing the importance of functionalism by stating that it “is a - but not *the* factor,”⁵⁹⁷ is countered by those who believe that there is no such thing as “the” functional method but rather a variety.⁵⁹⁸

Indeed, there are several of functional methods derived from various disciplines. As *Michaels*⁵⁹⁹ levels out the playing field by highlighting that in fact most comparative lawyers are picking and choosing from different concepts of functional methodology in different fields, disregarding the issue of compatibility.⁶⁰⁰ In particular, functionalism between sociology and law is used interchangeably, notwithstanding that there are distinctions in the way “function” is understood in sociology and law respectively.⁶⁰¹ Functionalism tends to be used to raise complexity in sociology, while lawyers are inclined to use the legal strand of functionalism to reduce it.⁶⁰² Consequently, the functionalism utilized by *Zweigert* as the foundation for comparative law “is criticized by lawyers as not sufficiently legal and by sociologists as not sufficiently sociological.”⁶⁰³

The *praesumptio similitudinis* – the assumption that the practical results in different legal systems are similar,⁶⁰⁴ is labeled “(in)famous.”⁶⁰⁵ In recapping the criticism, *Michaels* points out that the assumption stands in stark contrast to requirements for scientific methods: firstly, following *Popper*’s critical rationalism, the task should not be to prove a hypothesis but rather to falsify it.⁶⁰⁶ Secondly, the assumption carries an intrinsic bias, therewith violating the scientific standard of neutrality.⁶⁰⁷ Thirdly, the presumption has a reductionist effect: limiting the outlook to find similarities cuts out a lot of the surroundings.⁶⁰⁸

⁵⁹⁶ Watt, 594.

⁵⁹⁷ Palmer, 284.

⁵⁹⁸ Michaels.

⁵⁹⁹ Michaels.

⁶⁰⁰ Ibid, 360 and 363.

⁶⁰¹ Ibid, 360 f.

⁶⁰² Ibid, 361.

⁶⁰³ Ibid.

⁶⁰⁴ See also *above*.

⁶⁰⁵ Michaels, 369.

⁶⁰⁶ Ibid.

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid, 370; see also criticism, *above*.

That said, historical circumstances play an important role in understanding the *praesumptio similitudinis*: much like the Paris Congress,⁶⁰⁹ the contemporary atmosphere had a significant impact on the way the assumption was framed: just coming out of the atrocities of National Socialism and World War II, the emphasis was on similarities rather than differences.⁶¹⁰ The aspect that there is comparability between institutions that are functionally equivalent surely holds despite all criticism of *Zweigert's* take.⁶¹¹ Stressing that functionalism is an under-theorized approach,⁶¹² it is important to see what the presumption assumes and what it does not, what it supposes and what it does not.⁶¹³ The assumption of similarity focuses on the relation between problems and solutions more than anything else.⁶¹⁴

Narrowing on the critical function of functionalism, it is recognized for its role in discerning whether the application of foreign law violates the forum's public policy.⁶¹⁵

An important criticism is that it does not lend itself to the adequate consideration of culture.⁶¹⁶ *Michaels* contends "by reconstructing legal culture in functional terms, functional comparative law helps preserve the culture's otherness,"⁶¹⁷ yet setting it in relation to the "legal home turf"⁶¹⁸, enabling a view on the functions of the foreign law as well as its dysfunctions in its varied forms, including the manifest and the latent.⁶¹⁹

Recommendations by *Michaels* to improve functionalism focus on clarifying the concept of function that is used, particularly to move from the sociologically inspired to a more

⁶⁰⁹ See also *above*.

⁶¹⁰ See *Michaels*, 370 with references.

⁶¹¹ *Michaels*, 370.

⁶¹² *Ibid*, 363.

⁶¹³ *Ibid*, 371.

⁶¹⁴ *Ibid*.

⁶¹⁵ *Ibid*, 378.

⁶¹⁶ See *above*, see also *Michaels*, 379.

⁶¹⁷ *Michaels*, 379.

⁶¹⁸ *Frankenberg*, *Critical Comparisons*, 432, uses this pointed expression.

⁶¹⁹ *Michaels*, 379.

distinctly legally grounded method.⁶²⁰ Furthermore, the undertaking of comparison should emphasize the systematizing aspects rather than the description side.⁶²¹ Finally, there should be more acknowledgement of the fact that within comparative law, functionalism emphasizes the differences within similarity – as opposed to glossing over the former to stress the latter.⁶²²

In his discussion *Michaels* also refers to the work of *Cohen*,⁶²³ which focuses on conceptualism and a constructive theory of values,⁶²⁴ titled “Transcendental Nonsense and the Functional Method.”⁶²⁵ The discussion pertinent to this paper is *Cohen*’s take on which questions of importance law should ask. He zeroes in on two essentials, which relate to the role played by courts. *Cohen* asks: “How do courts actually decide cases of a given kind?” and, “How ought they to decide cases of a given kind?”⁶²⁶ In his contention, any problem that cannot be considered under these two headings is “not a meaningful question and any answer to it must be nonsense.”⁶²⁷ The quip aside, the issue of how courts decide a given case is important and will be dissected further.⁶²⁸

Concluding the methodological limitations of comparative law, it seems evident that the method used in this field has yet to explore the full range of possibilities offered as it “has not yet made sufficient use of the benefits of functionalism.”⁶²⁹ Meanwhile, developments are underway, including neo-functionalism.⁶³⁰ One of its aims should be to utilize the potential of functionalism and serve the ambitious agenda of comparative law by assisting efforts to avoid shallowness.⁶³¹

⁶²⁰ *Michaels*, 379-381.

⁶²¹ *Michaels*, 381.

⁶²² *Ibid*, see also *above*, similarity and differences.

⁶²³ See *Michaels*, 344, citing *Cohen*, *Transcendental Nonsense*.

⁶²⁴ See the reference by *Michaels*, 353.

⁶²⁵ *Cohen*, *Transcendental Nonsense*.

⁶²⁶ *Ibid*, 824.

⁶²⁷ *Ibid*.

⁶²⁸ See, *below*.

⁶²⁹ *Michaels*, 381.

⁶³⁰ See *Dorsen/Rosenfeld/Sajó/Baer Comparative Constitutionalism: Cases and Materials*, see also the review by *Teitel*, 2573.

⁶³¹ See *Saunders, Comparative Constitutional Law*, 119.

11. Selection

Foreign law and its citations offer a “marketplace of ideas.”⁶³² The challenge then is how to make a choice among the various markets and the ideas each one of them offers. The possibilities are self-evidently unlimited and the question of whether there are parameters to be set and also how far this challenge amounts to a limitation of comparative law, shall be sketched here.

As *Hirschl*⁶³³ notes the lack of “methodological coherence” leads to comparative referencing that is “eclectic, at times even scant and superficial.”⁶³⁴ The “case selection is seldom systematic.”⁶³⁵ What is more, the selection of foreign citations is partly described like a fruit-medley: authors refer to “cherry picking”⁶³⁶ as well as to “raisin picking,”⁶³⁷ indicating room for improvement in terms of methodology and consistency. But this is not the only challenge in this realm as selecting foreign citations is as much of a methodological issue of comparative law as well as of more general considerations of judicial methods.⁶³⁸ In particular, the boundaries toward judicial discretion in rendering judgments is very closely related; issues pertaining thereto will be discussed in more detail below.⁶³⁹

The problems of selecting foreign citations appear quite self-evident, they are closely connected to the more general challenges and limitations of comparative law: culture, language and relatedness of systems but also to the perpetual issues of non- or quasi-methodology respectively. In addition, selection questions make the discussion ever more personal: the focus shifts from the abstract system and its challenges to the far more individual sphere: why turn to the pool of ideas of foreign judicial systems? The motivation

⁶³² Rosenfeld/Sajó, 147.

⁶³³ Hirschl.

⁶³⁴ Hirschl, 43.

⁶³⁵ *Ibid*; on eclecticism, see also, Hohfeld.

⁶³⁶ See, e.g., Saunders, *Comparative Constitutional Law*, 117 f., Kentridge, 238, and Hirschl, 66.

⁶³⁷ See Martinez, 8.

⁶³⁸ See Saunders, *Comparative Constitutional Law*, 116; for methods of interpretation see *below*.

⁶³⁹ See, *below*.

of the individual judge, the impulse of looking abroad,⁶⁴⁰ the zest for “inspiration” comes into focus. And with personal and individual choices in tow, the search for “method(s)” and commonalities becomes murkier, even more arduous.

The motivation of judges⁶⁴¹ as such aside, the process of selection is so random that a relation to a systematic or faintly methodological approach seems wanting. There is, apparently, scarcely any discussion of a “method of selection.” One case in point is *Dannemann*⁶⁴² who, under the heading of “selection,” largely discusses functionalism, similarity and difference rather than the selection process as such.⁶⁴³

*Saunders*⁶⁴⁴ is a rare voice to raise the issue of criteria for selection but does not elaborate on it, in favour of a different emphasis.⁶⁴⁵ In trying to avoid the impression of a fad or ornamental game,⁶⁴⁶ which appears primarily intent to show off the judges’ knowledge, the recommendation is to be bold, pick and choose – while providing a justification for the choice.⁶⁴⁷ This aspect of the selection is closely linked to the legitimization of comparative law more generally, which will be discussed later.⁶⁴⁸

Selection processes generally have been completely revamped and essentially redefined during the course of the last decade with the advances of technology, particularly the escalating enthusiasm for and increasing reliance on the internet.⁶⁴⁹ Internet-based search engines parade “choices” that have been pre-selected by an intricate algorithm – to most every user’s delight. Importantly, one needs to keep in mind that both through pre-selection as well as other forms of manipulation, information, including ostracized judgments, can be removed.

⁶⁴⁰ See further, *below*.

⁶⁴¹ See further, *below*.

⁶⁴² *Dannemann*.

⁶⁴³ *Ibid*, 407 f.

⁶⁴⁴ *Saunders*, *Comparative Constitutional Law*, 115 f.

⁶⁴⁵ *Ibid*, 116.

⁶⁴⁶ See *Drobnig*, 17.

⁶⁴⁷ *Choudhry*, *Metaphors*, 10.

⁶⁴⁸ See further, *below*.

⁶⁴⁹ See *Lachmayer*, 172.

“Google” has come to connote a way of seeking information and pretense-choice-making that mocks every old fashion sense of “authority.” The frequently welcome content (sic!) offered by the world wide web – and its search options in particular – is also starting to impact the way that comparative exercises, including law, are incepted, researched and shaped. This paper can only claim so much exception. The term “google-esque legal technique”⁶⁵⁰ is not far from becoming a defining reality of contemporary law. The risks of such “GPS” like “discovery” of foreign references has its apparent risks, the loss of context – see immediately below – being just one of many.

It seems fitting to bridge the contemporary advances of technology with the century-old practice of fruit harvest, thus returning to the cherry-picking metaphor. South African judge *Moseneke* describes the selection process and its intrinsic challenges fruitfully:

“Yes, we cherry pick all the time when we use authorities, foreign or domestic The very process of adjudication implies a selection, and a reasoned and rational process to search for the truth by weeding out what’s irrelevant and finding what is cohesive and that best answers ... the problem before us.”⁶⁵¹

In the absence of a clear set of criteria for selection it is helpful to note that practical guidance for judges has been made available. As *Saunders*⁶⁵² highlights, the 2001 “Practice Direction on the Citation of Authorities”⁶⁵³ provides at least partial guidance. The Lord Chief Justice of England and Wales explains that there is “substantial growth” in the amount of reports and judgments “in this and other jurisdictions”.⁶⁵⁴ His Honor welcomes the “widespread knowledge of the work and decisions of the courts.”⁶⁵⁵ There are, however, challenges in “properly limiting the nature and amount of material” used.⁶⁵⁶ His Lordship

⁶⁵⁰ This particularly apt term was used by Prof Jabloner in a discussions of this text.

⁶⁵¹ Bentele, 239, interview with Moseneke.

⁶⁵² Saunders, Comparative Constitutional Law.

⁶⁵³ Ibid, 116; Practice Direction on the Citation of Foreign Authorities, The Lord Chief Justice of England and Wales, 9 April 2001.

⁶⁵⁴ Practice Direction, Para. 1.

⁶⁵⁵ Ibid.

⁶⁵⁶ Ibid.

directs judges to justify the use of the citation⁶⁵⁷ and the proposition of the law,⁶⁵⁸ among others. The Lord Chief Justice does not elaborate further on how to make these selections.⁶⁵⁹

12. Providing Context

The above limitations and problems of comparative law and foreign citations highlight that the context of a legal solution, a legal principle, is a crucial factor in the transfer from the “host” system to another – “recipient” – legal system. The importance of “context” warrants at least a brief look at the discussion surrounding the necessity for, the challenges of, and the possibilities of looking at the factors surrounding a solution. After all, as the recurrent⁶⁶⁰ fruit metaphor suggests: “it’s good to be a cherry that fits.”⁶⁶¹

*Dannemann*⁶⁶² draws a helpful distinction between legal and non-legal context.⁶⁶³ Legal context relates to institutions, their functioning and procedures as well as to substantive law and how it interacts with the institutions and beyond.⁶⁶⁴ He complements the common⁶⁶⁵ set of non-legal context pointers such as economic, social, political and cultural aspects with religious and geographic considerations,⁶⁶⁶ which could also be viewed as part and parcel of the “cultural” aspect(s).⁶⁶⁷ Importantly, added to these various elements of the context is the certitude that “law does not only have context, it makes its context.”⁶⁶⁸

⁶⁵⁷ Ibid, Para. 7.

⁶⁵⁸ Ibid, Para. 8.1.

⁶⁵⁹ See Practice Direction.

⁶⁶⁰ See *above*, cherry picking.

⁶⁶¹ Bentele, 239, citing Judge Moseneke; see on the non-fitting cherry, *below*.

⁶⁶² Dannemann.

⁶⁶³ Ibid, 413 ff.

⁶⁶⁴ Ibid, 414.

⁶⁶⁵ See on common aspects, *above*.

⁶⁶⁶ Dannemann highlights the discussion between Watson and Ewald on the issue, *ibid*, 414.

⁶⁶⁷ For a discussion on culture, see *above*.

⁶⁶⁸ Nelken, Introduction, 452.

Responding also to the non-legal aspects of context, some authors suggest to look to other disciplines for assistance.⁶⁶⁹ Those most frequently referred to are political and social science.⁶⁷⁰ The overall suggestion though is less to have a bilateral with a single discipline but rather to embrace interdisciplinary approaches as such, by invoking intercultural competence.⁶⁷¹ Leaning on or relying on other disciplines per se does not, however, ensure that the context is actually provided. So doing – stopping short of referring to this process a “method – is most frequently referred to as “thick description.”⁶⁷² British philosopher *Ryle*,⁶⁷³ who coined the term, describes the various and intricate details of a given situation such as two children twitching their eyes for different reasons.⁶⁷⁴ The title of his paper, “Thinking of Thoughts,” is indicative of the aim of describing in detail actions, movements and their relation to the surroundings – the context. *Geertz*,⁶⁷⁵ who is more associated with the term,⁶⁷⁶ is an anthropologist, who uses the phrase to describe the techniques employed to conduct ethnography: the rich recording of situations, persons and events.⁶⁷⁷

*Geertz*⁶⁷⁸ juxtaposes law and anthropology as “skeletonization of fact” versus “schematization of social action,”⁶⁷⁹ albeit not without noting the wonderment of the respective other’s potentially harboring helpful insights.⁶⁸⁰ While his discussion of the

⁶⁶⁹ E.g., Annus, 311; Clark, 211; Baer, 745.

⁶⁷⁰ E.g., Hirschl, 39; Choudhry, Metaphor, 26; Tushnet, Comparative Constitutional Law, 1230.

⁶⁷¹ See, e.g., Baer, 745.

⁶⁷² See, e.g., Frankenberg, Stranger than Paradise, 267; Glendon, Abortion and Divorce in Western Law, 8; Nelken, Comparatists and Transferability, 459; Palmer 265, 270; Hirschl, at footnote 33.

⁶⁷³ Ryle, The Thinking of Thoughts, University Lectures, No. 18, 1968.

⁶⁷⁴ Ibid.

⁶⁷⁵ Geertz, The Interpretation of Cultures.

⁶⁷⁶ Ponterotto, Brief Note on the Origins, Evolution, and Meaning of the Qualitative Research Concept „Thick Description,“ The Qualitative Report, 11 (3) 2006, 538.

⁶⁷⁷ Geertz, the Interpretation of Cultures, Chapter 1, Thick Description: Toward an Interpretative Theory of Culture.

⁶⁷⁸ Local Knowledge: Fact and Law in Comparative Perspective in: Local Knowledge: Further Essays in Interpretative Anthropology.

⁶⁷⁹ Geertz, Local Knowledge, 170.

⁶⁸⁰ Ibid, 169.

challenges of comparative law is helpful,⁶⁸¹ it applies largely to comparison between regulations rather than citations.⁶⁸² Describing various contrasts between law and anthropology, he points to aspects such as means used, symbols deployed, stories told, and distinctions drawn.⁶⁸³ Further to the issue of providing context, *Geertz* underlines the importance by highlighting how entrenched in local matters law is:

Law, I have been saying, somewhat against the pretensions encoded in woolsack rhetoric, is local knowledge; local not just as to place, time, class, and variety of issue, but as to accent--vernacular characterizations of what happens connected to vernacular imaginings of what can. It is this complex of characterizations and imaginings, stories about events cast in imagery about principles, that I have been calling a legal sensibility. This is doubtless more than a little vague, but as Wittgenstein, the patron saint of what is going on here, remarked, a veridical picture of an indistinct object is not after all a clear one but an indistinct one. Better to paint the sea like Turner than attempt to make of it a Constable cow.⁶⁸⁴

The painter of light, *Turner*, is a helpful inspiration with regard to the skill and technique needed to provide context: he embarked on extended trips to Italy to study the details of architecture and landscape and spent hours fishing to analyze the reflection of sun light on water.⁶⁸⁵ But rather than opening another angle of interdisciplinary engagement: *Geertz*, in spite of merited criticism⁶⁸⁶ provides a helpful core element in describing “legal sensibility.” The essence of context is the appreciation of having to be sensitive to its central role: without roots, the tree cannot be replanted. And this seemingly common-sense fact, if implemented, ensures that at least a sketch of contributing factors – the context – will be added. After all, context is another way of being aware of ones own baggage, of avoiding self-confirmation.⁶⁸⁷ Developing the sensibility further by providing details, local specifics and intricate minutiae provides context and can amount to thick description, i.e., context.

⁶⁸¹ Ibid, 214.

⁶⁸² See, *above* on the distinction between the two, Chapter 1.

⁶⁸³ Geertz, 175.

⁶⁸⁴ Ibid, 215.

⁶⁸⁵ See, e.g., Hamilton, Joseph Mallord William Turner.

⁶⁸⁶ See, in particular, Ponterotto.

⁶⁸⁷ Frankenberg, *Critical Comparisons*, 442.

Those authors who acknowledge a need for increased provision of detail, recognizing that the web surrounding a case, requires explanation, refer to “thick description.”⁶⁸⁸ In a text entitled “refined comparativism,”⁶⁸⁹ *Fontana* alludes to “thick genealogical comparativism.”⁶⁹⁰ Genealogy is linked to those countries from which a state borrowed in drafting its constitution as well as those with which it shares “common heritage,” in terms of culture and law.⁶⁹¹ This minimum requirement – or “thin genealogical version” as *Fontana* describes it by utilizing *Geertz*⁶⁹² albeit without reference – is enriched by the actual practice of utilizing “state constitutional practice”, embarking on the usage of foreign citations.⁶⁹³ Overall, the underpinning of “thick genealogical comparativism” seems to be more a distinction between the basic needs for comparative law and the sketch of what could amount to providing context by way of thick description in *Geertz*’s sense.

Linking constitutional comparativism and anthropology, *Scheppele*⁶⁹⁴ discusses constitutional ethnography as a way of presenting the “complex and potentially contradictory intertwining of institutions, individuals, sensibilities, histories, and meanings.”⁶⁹⁵ Ethnography understood as a wide range of modi collecting “whole specimens”⁶⁹⁶ of a social web or fabric, such as life circumstances or – in this case: constitutional context. Variety and flexibility is a given: “A whole specimen of a constitutional regime will call for a different frame than a whole frame of a constitutional court,”⁶⁹⁷ for example. *Scheppele*’s take on “thick accounts” is as simple as important: retrieving answers to theoretical questions by “studying actual constitutional regimes.”⁶⁹⁸ This description seems to provide sufficient leverage to accommodate not just the

⁶⁸⁸ See, e.g., *Fontana*, 568; *Frankenberg*, *Stranger than Paradise*, 267; *Glendon*, *Abortion*, 8; *Nelken*, *Comparatists and Transferability*, 459; *Palmer* 265; *Hirschl*, at footnote 33.

⁶⁸⁹ *Fontana*, *Refined Comparativism*.

⁶⁹⁰ *Ibid*, 572.

⁶⁹¹ *Ibid*, 572; see *above* on borrowing.

⁶⁹² See *above* on thick and thin description.

⁶⁹³ *Fontana*, 572.

⁶⁹⁴ *Scheppele*, *Constitutional Ethnography*.

⁶⁹⁵ *Scheppele*, *Constitutional Ethnography*, 399.

⁶⁹⁶ An apt analogy to biology drawn by *Scheppele*, 397.

⁶⁹⁷ *Ibid*.

⁶⁹⁸ *Ibid*, 401.

comparison of regulations – staple comparative law – but also context to situate foreign citations. Adding a further simple, yet important truth she underscores the notion of less is more: to know a lot about a few cases is of greater importance than to know less about many cases.⁶⁹⁹

In addition to the above mentioned requisite insight that an element of reflection needs to be included in an exercise of utilizing foreign citations, legal sensibility as an act of providing details, of showing sensibility for its challenges and limits is important. The key term is potentially “nuance” – to ensure that the subtledies are not lost, that the differences are not just washed over, brushed aside and made invisible when they actually need to be exposed.⁷⁰⁰

13. Interim Findings

There are manifold challenges in comparative law, not least language and culture. Which notion of “culture” underlies the discussion, whose understanding of that term is transported – that of lawyers only, .e.g? A further balancing act is the direction that comparative material takes: from one cluster of countries and legal systems to another in the form of a one-way-street or are there more multi-directional approaches that defy the re-emergence of seemingly neo-colonial modes? As the various elements sketched for the purpose of this paper highlight, the selection of material plays a significant role, even more important: the provision of context to the choice made. Approaches such as “thick description” can assist this effort.

Conscious of the challenges, the question of providing context will reemerge in this paper as part of the patterns that have been established or that could be advised to ensure that the milieu of the foreign material is not entirely lost.

⁶⁹⁹ Ibid, 401.

⁷⁰⁰ See on subtle modes, Cossmann, *Migrating Marriages*, 210.

VI. Purpose of Comparative Law

The accumulation of building material, which remains unutilized, warn some, is an inherent danger of comparative efforts;⁷⁰¹ others perceive a danger of eclecticism-exercises.⁷⁰² What, then is the rationale for seeking comparisons in reaching a constitutional judgment? The reasons, it turns out, are manifold and more often than not scarcely substantiated. In the following section a quasi-tour-de-force through the glimpses, which have been offered as explanation are described first. Secondly, two aspects, which emerge as more frequent rationale, are elaborated in more detail: the role of (primarily legal) education and the principle of legitimacy.

The purpose of comparative constitutionalism is regularly focused on the potential of reducing the level of difference between legal systems.⁷⁰³ An effort, which appears to be greatly influenced by private law, especially commercial law, to “ease” cross-border contracts and therewith trade. Particularly in the European context, the regionalisation of legislation under the mantle of the EU provides new meaning and value to a levelling of legislation. One may, however, pause to consider whether that is the purpose – or intent, respectively – of comparative exercises and comparative constitutionalism in particular. The danger of lowering legal standards appears imminent, if one believes that the diversity of approaches is a value onto itself.

At the other scale end human rights are said to be universal;⁷⁰⁴ the ways and means of determining their meaning are, however, everything but unified. On the contrary: it is the breadth of interpretation of human rights, which brings comparative constitutionalism as a means of specifying insufficiently clear terms into the fold.⁷⁰⁵ The same can be said for constitutional principles, where the impetus to seek solutions beyond the national realm is a

⁷⁰¹ Binder, cited in: Zweigert, Rechtsvergleichung als universale Interpretationsmethode, 8.

⁷⁰² Following Zweigert’s warning on abusing comparative material in legislating, Zweigert, *ibid*, 9.

⁷⁰³ See on transnational law and others, *above*.

⁷⁰⁴ See, e.g., Mary Ann Glendon, *A World Made New*.

⁷⁰⁵ See, among others Barak, former President of the Israeli Supreme Court, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 111; Mössner, *Rechtvergleichung*, 198 ff; Zweigert, *Die soziologische Dimension*, 153.

given due to the unspecified nature of some constitutional principles.⁷⁰⁶ Obviously, the edges of human rights and constitutional principles respectively can be intertwined and seemingly conjoined. Forming concepts internally through the development of terms and their connotations in a specific national context as well as in an external relation is something that can benefit from reflection,⁷⁰⁷ thus, shielding judges, in particular, from the “*potential harm of ignorance*.”⁷⁰⁸

The perspective of foreign courts provides a “pool of solutions”,⁷⁰⁹ *Martinez*⁷¹⁰ fittingly refers to a pool of rationality – “*Rationalitätspool*” – of foreign countries.⁷¹¹ The exercise of comparative constitutional engagement has also been said to be “inspirational”⁷¹² as well as “reflective.”⁷¹³ *Van Hoecke/Warrington*⁷¹⁴ go so far to assert that comparative law “forces self-reflection.”⁷¹⁵ Indeed, studying foreign examples is frequently embraced as a way of reflection upon one’s own perception.⁷¹⁶ It provides an opportunity to wedge some critical distance between one’s own judgments and preconceived conceptions. Studying foreign experience thus turns into a study – and therewith frequently liberation from – one’s possible prejudices, stereotypes, and misconceptions.⁷¹⁷ The opportunity to critically reflect one’s value scheme is, it appears, more easily done in an approach, which is liberated from “national introversion.”⁷¹⁸ This detour via the “other”, the unknown, also opens possibilities to explore one’s (legal) identity.⁷¹⁹

⁷⁰⁶ See Mössner, *Rechtsvergleichung*, 213.

⁷⁰⁷ See Zweigert, *Rechtsvergleichung als universale Interpretationsmethode*, 14.

⁷⁰⁸ Jackson, *Narratives*, 278.

⁷⁰⁹ Sommermann, *Bedeutung der Rechtsvergleichung*, 1020.

⁷¹⁰ *Martinez*.

⁷¹¹ *Martinez*, 4.

⁷¹² See, e.g., Barak, *Response to the Judge as a Comparatist*, 96, see *also* Saunders, *Courts* 96; see, *further* Baer, 738.

⁷¹³ Saunders, *Misuse*, 51.

⁷¹⁴ *Van Hoecke/Warrington*.

⁷¹⁵ *Ibid*, 497.

⁷¹⁶ See in particular, Zweigert, *Rechtsvergleichung*, 13.

⁷¹⁷ On potential prejudice: Zweigert, *Rechtsvergleichung*, 13.

⁷¹⁸ Sommermann, *Bedeutung der Rechtsvergleichung*, 1020.

⁷¹⁹ On Interculturism: Baer, 745.

As *Frankenberg*⁷²⁰ puts it, there is a threefold learning process involved, which firstly raises the awareness of assumptions, secondly puts a hold on the projection of one's own path, and thirdly, allows for reconsideration(s).⁷²¹ The emphasis of self-criticism,⁷²² brings about a participant observer status,⁷²³ or as *Frankenberg* ventures in inter-disciplinary style, a Freudian scenario of reaction formation.⁷²⁴ Infused by comparative thinking, identity – understood in a broad sense – makes way for a deeper understanding of one's own legal system.⁷²⁵ The notion of the former president of the Israeli Supreme Court, *Barak* that gleaned from foreign discussions equates to “learning from an experienced friend,”⁷²⁶ is extended by *Nelken*: “little can be borrowed but much can be learned.”⁷²⁷ A similar take on the purpose of comparative exercises by *Glenn*:⁷²⁸ “aid is sought where it can be found [...] there are no limits.”⁷²⁹

Indulging in foreign experience is also a means of seeking pedagogical guidance,⁷³⁰ or the consequence of following a pedagogical impulse for that matter.⁷³¹ This way comparative constitutionalism also becomes an “intellectual substitute” for the lack of opportunity to hold discussions with outsiders.⁷³² If nothing else, it is a way of “keeping the judicial mind open.”⁷³³

⁷²⁰ Frankenberg, *Critical Comparisons*.

⁷²¹ *Ibid*, 416.

⁷²² *Ibid*, 441.

⁷²³ *Ibid*.

⁷²⁴ *Ibid*, 440.

⁷²⁵ Siehe Mössner, *Rechtsvergleichung*, 203.

⁷²⁶ Barak, *A Judge on Judging*, 111.

⁷²⁷ Nelken, *Comparatists and Transferability*, 457.

⁷²⁸ Glenn, *Persuasive Authority*.

⁷²⁹ *Ibid* 267.

⁷³⁰ Annus, 347.

⁷³¹ McCrudden, 518.

⁷³² Jackson, *Constitutional Comparisons*, 119.

⁷³³ Saunders, *Courts*, citing Ackerman, 102.

1. Predisposition of Judges

Something would be amiss if one were to reflect on the rationale for comparative constitutionalism without taking into account the motivation of those engaging in the exercise; potentially the most important factor.⁷³⁴ Conceding that the variety of factors that go into a judgment “are almost infinitely variable,”⁷³⁵ one should acknowledge that the “judicial psychobiography” is a vital factor.⁷³⁶ Frequently, it is pertinent experience of one’s own, which triggers the inclination.⁷³⁷ Baer⁷³⁸ aptly refers to “*Migrationserfahrung*”⁷³⁹ – the exposure to foreign approaches – as a decisive factor. This paper proves the point, given that research was originally started as part of a course on comparative constitutional law at a US university.⁷⁴⁰ Biographies of judges who utilize comparative exercises, have by and large had some degree of personal exposure to foreign legal systems. US Supreme Court Justice Kennedy’s inclination to engage in comparative exercises is said to be influenced by his participation in the so-called Salzburg Seminars – out of all places.⁷⁴¹

Education and training are thus a vital factors in the predisposition of judges.⁷⁴² More generally, a new generation of lawyers and subsequently judges is emerging for whom law is no longer merely a matter of national systems.⁷⁴³

While one may not wish to go as far as *Goldsworthy* who believes that comparative exercises require a “statesmen like” broader and “higher” apprehension,⁷⁴⁴ it does require a

⁷³⁴ Cf Markesinis/Fedtke, 173. Somewhat surprisingly, Markesinis/Fedtke seem intent to dwell on what they term „hostile mentality,“ which is an unfortunate choice of word and a peculiar focus in the opposite direction, cf in particular Markesinis/Fedtke, 206 ff.

⁷³⁵ Markesinis/Fedtke, 174.

⁷³⁶ Ibid.

⁷³⁷ See also Foster, 133.

⁷³⁸ Baer, *Verfassungsvergleichung*.

⁷³⁹ The apt description by Baer of lawyers who have studied abroad, Baer, *Verfassungsvergleichung*, 739; see also Markesinis/Fedtke, 200 on impact of studying abroad.

⁷⁴⁰ A research project with Professor Donald Kommers at the University of Notre Dame Law School in the fall of 2003 was the starting point for this research.

⁷⁴¹ See Toobin, *The Nine*, 221.

⁷⁴² See in particular Thomas, 245.

⁷⁴³ Samuel, 262.

sense of humility, a “reluctance to assume exclusive propriety of truth,” as *Grosswald Curran*⁷⁴⁵ puts it. This is more often than not brought about by education. The effects of legal education should not be underestimated.⁷⁴⁶ As President *Higgins* of the International Court of Justice, in reference to international law, states, there is a psychological effect in not knowing a certain area of law, which – not only but particularly in the case of international law – leads to a perception as something “exotic” and thus in need of avoidance.⁷⁴⁷ Notwithstanding the distinctions between public international and public national law, this sentiment can easily be attributed to the attitude toward comparative constitutionalism.

Not entirely surprisingly, the notion of globalization⁷⁴⁸ makes an entry here: increased mobility – a key feature of globalization – is a vital factor in enabling the migration of judges and therewith the “migration of constitutional ideas.”⁷⁴⁹ It is, however, also fair to say that comparison has become trendy, even “chic” and thus evolved into a *modus operandi* of its own.⁷⁵⁰ The assertion that comparative constitutionalism is prone to show-off, putting a judge’s knowledge on display, therefore cannot be dismissed entirely.⁷⁵¹ Some already muse that comparative exercises will become increasingly institutionalized and less dependent on individuals’ motivation, developing into a far more self-evident factor of the judging process.⁷⁵² Responses such as the Practice Direction⁷⁵³ provide some of the necessary caution that needs to escort these endeavours to fend of the pitfalls that have been highlighted.⁷⁵⁴

⁷⁴⁴ Goldsworthy, 16.

⁷⁴⁵ Grosswald, 88.

⁷⁴⁶ See Markesinis/Fedtke, 200.

⁷⁴⁷ Higgins, 206.

⁷⁴⁸ See *above*.

⁷⁴⁹ See the corresponding title of Choudhry’s book: *The Migration of Constitutional Ideas*.

⁷⁵⁰ For example see the description by Slaughter.

⁷⁵¹ Drobniig, 17.

⁷⁵² See generally Baer, *Verfassungsvergleichung*.

⁷⁵³ See on the Practice Direction, *above*.

⁷⁵⁴ See on challenges, *above*.

Clearly though, the buck stops with each judge and the role of the individual is undisputedly formed and defined by judicial discretion.⁷⁵⁵ “The way [these] variables coalesce can be complex,”⁷⁵⁶ and in that sense anxieties over an abuse for the purpose of “dynamic interpretation”⁷⁵⁷ or even a “rights expanding agenda”⁷⁵⁸ seem slightly exaggerated.⁷⁵⁹

2. Legitimacy

An important aspect of comparative constitutionalism is its potential in adding weight to judgments, in increasing the legitimacy of a court’s ruling. While the empowerment aspect of utilizing comparisons is acknowledged, there is a special place for what is referred to as “persuasive authority.”⁷⁶⁰ While *McCrudden*⁷⁶¹ holds that the line between persuasive and binding – and thus legitimacy – is “thin,”⁷⁶² there is a distinction to be appreciated, which warrants trying to distinguish the two:

Persuasive authority then is a “dominant legal concept, which is well known but imprecise,” observes *Glenn*.⁷⁶³ While it remains unclear to *Annus*,⁷⁶⁴ what persuasive actually means,⁷⁶⁵ he points out that it is usually the reasoning of the case rather than the specific decision made, which is persuasive.⁷⁶⁶ The most helpful approach is offered by *Michelman*⁷⁶⁷ who denies that persuasive authority accords formal authority but that it rather constitutes an act of according weight to an opinion or principle.⁷⁶⁸

⁷⁵⁵ McCrudden, 517.

⁷⁵⁶ Markesinis/Fedtke, 174.

⁷⁵⁷ Martinez, 7.

⁷⁵⁸ McCrudden, 527.

⁷⁵⁹ See Bentele, 232.

⁷⁶⁰ See on the concept of persuasive authority, Rebhahn, 584 ff.

⁷⁶¹ McCrudden, A Common Law of Human Rights?.

⁷⁶² McCrudden 505.

⁷⁶³ Glenn/McGill, 264.

⁷⁶⁴ Annus.

⁷⁶⁵ Ibid, 319.

⁷⁶⁶ Ibid.

⁷⁶⁷ Michelman, Frank, Integrity-Anxiety, in: Ignatieff, American Exceptionalism.

⁷⁶⁸ Ibid, 258 f.

Increasing “sophistication”⁷⁶⁹ is the more ostentatious way of describing how comparative constitutionalism can potentially add to the quality and thereby the legitimacy of judgments. Indeed the goal of “better judgments”⁷⁷⁰ is what many authors seem to allude to, when they describe how the usage of comparative constitutionalism increases legitimacy. *Kersch*,⁷⁷¹ in describing the purpose of justifying and thereby legitimizing decisions, provides a helpful three-tier model: moral universalism, refinement of competence, and foreign policy considerations.⁷⁷² The tacit issue of judicial activism peeks through this model and shall be discussed at a later stage.⁷⁷³

“Old Wine in New Bottles?” – *Baudenbacher* remarked rather incredulously about the new found zest for comparative law in 2003.⁷⁷⁴ Indeed, there are ample examples to document the utilization of foreign citations as a long-standing tradition for newly emerged courts, seemingly trying to assure themselves – and thereby bolster their legitimacy – in writing their first, weighty, dicta. In addition to the recurrent case of South Africa, there are clear traces of legitimacy by way of foreign citation in the Supreme Court of India.⁷⁷⁵ Historic ties obviously played a significant role. A case in point is the early period of the US Supreme Court, which in one of its infant judgments referred to a decision from “England.”⁷⁷⁶ Another interesting example is Singapore, where one of the most important decisions relies also on foreign citations. In a rather sharp political twist, that practice was immediately condemned by the government.⁷⁷⁷ In the not-too-recent past, constitutional courts in newly emerged democracies, such as Hungary, referred to foreign jurisprudence.⁷⁷⁸ Recourse to

⁷⁶⁹ McCrudden, 528.

⁷⁷⁰ Among others, McCrudden, 528.

⁷⁷¹ Kersch, 352.

⁷⁷² Kersch, 352.

⁷⁷³ See on open methods of interpretation, *below*.

⁷⁷⁴ Compare: Baudenbacher, *Judicial Globalization*.

⁷⁷⁵ See the references in conference paper by Thiruvengadam, *The Use of Foreign Constitutional Cases in India and Singapore – Trends and Theoretical Concerns*, Mexico 2010.

⁷⁷⁶ Cf *Rose v Hamely*, *above*.

⁷⁷⁷ See Thio, *Beyond the “Four Walls.”*

⁷⁷⁸ See Sadurski, *Postcommunist Courts in Search of Political Legitimacy*.

foreign academics, such as *Kelsen*, to bolster acceptance, is also utilized as a way of introducing foreign concepts and ideas in an effort to increase legitimacy.⁷⁷⁹

One has to tread carefully though, as the issue of legitimacy in this context is closely built on the edge of international waters.⁷⁸⁰ As *Annus*⁷⁸¹ rightly points out, international law is a frequent instigator for comparative exercises. The example of jurisprudence surrounding the interpretation of the European Convention on Human Rights and Fundamental Freedoms is a case in point.⁷⁸² Then again, it is the universal character of some constitutional norms, many of which are derived from human rights provisions, which lend themselves to an increase of legitimacy by referral to discussions abroad.⁷⁸³ Human rights, then, can be a trigger for increased legitimacy, the discussion thereof adding to the weight of the overall argument.⁷⁸⁴ “*Kindred problems*,”⁷⁸⁵ foster the use of comparative material to add legitimacy by joining the discussion of those with shared challenges in “judicial globalization.”⁷⁸⁶ The recourse to the international – as in the non-national – renders a decision more legitimate.⁷⁸⁷

Then again, legitimacy is an “*elusive concept*” – as is illegitimacy, as *Weiler* once remarked.⁷⁸⁸ In addition to the normative and empirical stance one can take,⁷⁸⁹ legitimacy can be a highly subjective affair: its level frequently depends on the audience.⁷⁹⁰ Thus, if the audience is inclined, the uncertainty of judgments may also be decreased by utilizing

⁷⁷⁹ Cf Shuman, *Justification of Judicial Decisions*, 59 *California Law Review* 715 (1971) see on Foreign citations as a source, *below*.

⁷⁸⁰ See also, *above*, Kersch on foreign policy considerations.

⁷⁸¹ *Annus*, 331.

⁷⁸² See *above*.

⁷⁸³ *Annus*, 309.

⁷⁸⁴ *Teitel*, 2593.

⁷⁸⁵ *Fontana*, 584.

⁷⁸⁶ *Kersch*, 352.

⁷⁸⁷ *Saunders*, *Courts* 97.

⁷⁸⁸ *Weiler*, *Epilogue*, in: *Slaughter/ Stone Sweet/Weiler*, *The European Court and National Courts – Doctrine and Jurisprudence*, 372, cited by *Saunders*, *Court*, footnote 107.

⁷⁸⁹ See generally: *Damman*, *also* on the evaluative aspect and further: *Saunders*, *Court*, 108, as well as *Annus*, 313.

⁷⁹⁰ *Jackson*, *Narrative*, 262.

comparative examples.⁷⁹¹ Added to that, legitimacy may also vary depending on the issue.⁷⁹² *Saunders*⁷⁹³ quips: “necessarily excepting the United States, no problem of legitimacy is raised by the mere fact of reference to foreign legal experience of either a constructive or reflective kind.”⁷⁹⁴ In this context a brief reference to the situation in the US: there is a sense that justices, particularly of the US Supreme Court, sense a quasi-responsibility for *political* legitimacy, which, one may venture to say, is not shared at this level by other judges.⁷⁹⁵

Finally, a brief note on the methodological aspect of legitimacy: *Choudhry*⁷⁹⁶ contends that legitimacy hinges on the interpretative method.⁷⁹⁷ *Dammann*⁷⁹⁸ refers to the general discourse theory developed by *Habermas*⁷⁹⁹ that “the truthfulness of legal analysis is supported by the fact that legal decision-makers who follow similar procedural rules also reach similar conclusions.”⁸⁰⁰

Above all, the purpose of comparative usage is slightly loftily to “further justice” and “better the lot of human kind,”⁸⁰¹ stopping short of verging on kitsch. There is also something to be said for the strengthening the inherent tension of judgments and therewith an increased tolerance for that very ambiguity,⁸⁰² which adds value and thus furthers the rationale for comparative engagement. Exercising the “*freedom of appreciation*”,⁸⁰³ however, seems to most aptly summarize the sense of purpose of comparative engagement.

⁷⁹¹ Annus, 347.

⁷⁹² Jackson, *Constitutional Comparisons*, 125.

⁷⁹³ *Saunders*, *Courts*.

⁷⁹⁴ *Ibid*, 126.

⁷⁹⁵ See also Michelman, 272.

⁷⁹⁶ *Choudhry*, *Methaphors*.

⁷⁹⁷ *Ibid*, 5.

⁷⁹⁸ *Dammann*.

⁷⁹⁹ Habermas’ discourse theory will not be elaborated here.

⁸⁰⁰ Summary by Annus, 310, see *Dammann*, 540-54.

⁸⁰¹ Frankenberg, *Critical Comparisons*, 413.

⁸⁰² *Ibid*, 441.

⁸⁰³ Glenn, *Persuasive Authority*, 264, see also *below*.

Excursus: The (In)voluntary Nature of Comparative Constitutionalism

The premise of this paper is that the engagement of comparative cases is choice based.⁸⁰⁴ The voluntary nature is such a given in the discourse that only a few authors highlight this fact.⁸⁰⁵ The prominent example of the other scale end – a discussion on prohibiting references derived from outside the national legal system, e.g., the discussion in the US Senate⁸⁰⁶ – is more frequent. That said, there are scenarios in which courts are instructed – by Constitution or otherwise – to consult sources outside national legislation. The term “instructed” is used in place of the term “obligation” as the binding nature of these rules varies greatly.

Surprisingly, the “obligation” to consult foreign sources is alluded to⁸⁰⁷ without much scrutiny of the degree and impact of these rules. This being an excursus, the sources are only briefly highlighted.

Contrary to some descriptions, the South African Constitution in its “unusual provision”⁸⁰⁸ – “an informed and permanent choice of the constitutional legislator”⁸⁰⁹ – Article 39 does not so much make citation of foreign sources an “obligation” but gives “permission” to utilize such information⁸¹⁰:

39. Interpretation of Bill of Rights

When interpreting the Bill of Rights, a court, tribunal or forum

- must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- must consider international law; and
- may consider foreign law.

⁸⁰⁴ See Introduction, *above*.

⁸⁰⁵ See, e.g., Bernhardt, Clark, 179.

⁸⁰⁶ On the discussion in the US Senate, compare Choudhry, *above*.

⁸⁰⁷ Compare, e.g., Saunders, Courts, 113, *also* Barak, Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia, Fulbright Convention, 2006..

⁸⁰⁸ Bentele, 227.

⁸⁰⁹ Markesinis/Fedtke, 29.

⁸¹⁰ See *also* Markesinis/Fedtke, 25.

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.⁸¹¹

Such a “permission” in combination with the obligation to apply international law certainly creates a sense of strong encouragement: the use of foreign sources is framed as welcome, to say the least. The provision as such, which has been labeled “normatively weak”⁸¹² is viewed as a “bold”⁸¹³ yet possibly necessary move.⁸¹⁴ There was a strong sense of wanting to belong to the “world”⁸¹⁵ again, following decades of being ostracized.⁸¹⁶

*Jackson*⁸¹⁷ describes the South African rule as “manifesting a vision of the constitution as a site of possible convergence with transnational constitutional, or international, norms.”⁸¹⁸ The first major decision of the Constitutional Court of South Africa – *S v Makwanyane and Another*⁸¹⁹ – proves that the message was understood by referring to the US Supreme Court, the Supreme Court of Canada, the Federal Constitutional Court of Germany and the Supreme Court of India, among others.⁸²⁰ As a side note: while some hail the “impressive mastery” of the case,⁸²¹ others are critical of the reliance on indirect resources.⁸²²

The direct and indirect effect of the South African interpretation rule is tangible in rulings in neighboring Namibia, where the judiciary, including the Supreme Court, now make

⁸¹¹ Act to introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto, previously Constitution of the Republic of South Africa Act 108 of 1996.

⁸¹² Lachmayer, 168.

⁸¹³ Bentele, 227, citing Deputy Chief Justice Dikgang Moseneke.

⁸¹⁴ On the history of the provision: Lollini, Legal Argumentation, 63 f.

⁸¹⁵ On the varying concepts of the „world,“ including the „civilized,“ see *above*.

⁸¹⁶ See, e.g., Bentele, 229.

⁸¹⁷ Jackson, Constitutional Comparisons.

⁸¹⁸ *Ibid*, 113.

⁸¹⁹ *S v Makwanyane and Another*, CCT3-94, 6 June 1995.

⁸²⁰ Compare, among others, Para 16.

⁸²¹ Cf Kentridge, a Constitutional Court judge, in: Markesinis/Fedtke: 332.

⁸²² Cf Markesinis/Fedtke, 159.

extensive use of foreign precedent.⁸²³ In the Namibian case the justification is less in the formalities – for obvious reasons – but the assistance found for the interpretation of ambiguous and uncertain wording.⁸²⁴

Among the many examples cited⁸²⁵ for being under some kind of obligation to refer to foreign law, it is surprising to see how often the constitutional rule to uphold obligations under international law is subsumed as an obligation or open invitation, respectively, to allude to foreign law generally. For example, *Martinez*⁸²⁶ compares the South African rule to the Spanish one, claiming it is “similar” (*ähnlich*).⁸²⁷ As highlighted above⁸²⁸ the lines between international law and comparative law are by nature of both fields easily blurred. As a result, some⁸²⁹ use the primacy of international law as an entry point for comparative exercises “instructed” by law. Examples are Germany,⁸³⁰ as well as Greece,⁸³¹ and Spain.

In case of the latter, Article 10 of the Spanish Constitution⁸³² – Human Dignity and Human Rights – requires:

“the norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.”⁸³³

Similar rules can be found elsewhere, e.g., the Constitution of Tanzania, “human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human

⁸²³ See *below*.

⁸²⁴ See Spigno, citing *Kausesa v Minister of Home Affairs and Others* 1995 (1) SA 51 (*NmHC*).

⁸²⁵ See, e.g., Drobnič, Glenn, *Comparative Law and Legal Practice*, Hogg, Baer, Saunders.

⁸²⁶ Göttinger Online Beiträge zum Europarecht. Nr. 48.

⁸²⁷ *Martinez*, 4; on the Spanish clause see immediately, *below*.

⁸²⁸ See section on international law, ECHR, *above*.

⁸²⁹ See, e.g., Drobnič.

⁸³⁰ Compare Article 25 of the Basic Law: The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

⁸³¹ See Drobnič, 6.

⁸³² Spanish Constitution of 29 December 1978.

⁸³³ Article 10 Spanish Constitution.

Rights”,⁸³⁴ as well as Angola:

“Constitutional and legal norms related to fundamental rights shall be interpreted and incorporated in keeping with The Universal Declaration of the Rights of Man, the African Charter on the Rights of Man and Peoples and other international instruments to which Angola has adhered.”⁸³⁵

Most of these rules seem to echo the Statute of the International Court of Justice.⁸³⁶ Even the preamble of the Charter of Fundamental Rights of the European Union⁸³⁷ could be said to be nodding towards such rules.⁸³⁸

These rules – or notes of instruction and guidance, respectively⁸³⁹ – overall reflect an invitation to embark in comparative exercises with citations of foreign courts, rather than a reflection of the growing importance of international law, particularly human rights law, in the domestic realm. This may also be attributed to the Bangalore Principles, a non-binding set of values on judicial conduct, which stipulate the following about the value of competence and diligence:

A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and

⁸³⁴ Article 9 Constitution of the United Republic of Tanzania; see *also* Baer, 737.

⁸³⁵ Article 21 Constitution of Angola, see *also* Baer, 737; note also further examples such as Congo and Mauritania.

⁸³⁶ Compare Article 38 Statute of the International Court of Justice: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

See, on the Statute of the International Court of Justice, *also*: Vogenauer, 881.

⁸³⁷ Charter of Fundamental Rights of the European Union, 2000/C 364/01.

⁸³⁸ See Baer, 737.

⁸³⁹ See on practice direction, *above*.

other instruments establishing human rights norms.⁸⁴⁰

The “obligation” to engage in comparison can also be derived from the necessity to better understand the meaning of a clause. As has been outlined above,⁸⁴¹ this is particularly true of the more ambiguous terms used in the realm of human rights. Not surprisingly then, Canadian constitutional scholar *Hogg*⁸⁴² compellingly describes how the vague language of the new 1982 Canadian Charter of Rights and Freedoms required Canadian judges, particularly those of the Supreme Court of Canada “to look at a wider range of sources than the Court was accustomed to consult.”⁸⁴³ *McCrudden*⁸⁴⁴ predicts a related dynamic for the 1998 UK Human Rights Act: the deep ties between the Act and the ECHR are likely to influence the interpretation: “the deep questions, which the British courts will be called upon to consider in interpreting”⁸⁴⁵ the Act will probably lead to a consideration of sources outside the UK.

This dynamic of seemingly being “forced” to look for interpretations by the nature of the task at hand – deduce meaning in layered and ambiguous terms – seems to be growing and is no doubt the core source of the current attention given to comparative law.

The (in)voluntary nature of paying recourse to foreign citations has caused the British judicial system to respond from an entirely different entry point: resources. Citing the mounting pressure on stakeholders in- and outside of the court in properly limiting the usage of material, particularly derived from abroad, the *Lord Chief Justice of England and Wales* issued the “Practice Direction on the Citation of Authorities.”⁸⁴⁶ His Lordship asserts:

[This] is a matter of rapidly increasing importance. Recent and continuing efforts to increase the efficiency, and thus reduce the cost, of litigation, whilst maintaining the interests of justice, will be threatened if courts are

⁸⁴⁰ Compare Value 6.4 Bangalore Principles of Judicial Conduct; see also Jackson, *Constitutional Comparison*, 113 as well as Jackson, *Transnational Discourse, Relational Authority and the U.S. Court: Gender Equality*, n. 136.

⁸⁴¹ See on human rights interpretation, *above*.

⁸⁴² Hogg in: Goldsworthy (Ed.), *Interpreting Constitutions*.

⁸⁴³ Hogg, 103.

⁸⁴⁴ McCrudden, *A Common Law of Human Rights?*

⁸⁴⁵ *Ibid*, 505.

⁸⁴⁶ Practice Direction; see also Saunders, *Misuse*, 42 & 61; see also, *above*.

burdened with a weight of inappropriate and unnecessary authority, and if advocates are uncertain as to the extent to which it is necessary to deploy authorities in the argument of any given case.⁸⁴⁷

With regard to possible “instruction” or guidance to use foreign law, the Lord Chief Justice states:

Cases decided in other jurisdictions can, if properly used, be a valuable source of law in this jurisdiction. At the same time, however, such authority should not be cited without proper consideration of whether it does indeed add to the existing body of law.⁸⁴⁸

In his assertions about the rationale for obliging courts to utilize foreign sources, *Martinez*⁸⁴⁹ points to the need to provide a legitimate source to enable judges to “speedily arrive at an appropriate human rights standard.”⁸⁵⁰ He contrasts this with an implied mistrust that judges would make use of the “voluntary integration of comparative findings” on their own account.⁸⁵¹

3. Typologies

Inherent to the purpose of an undertaking is its aim, intention – its plan. The ambiguities surrounding comparative usages are also manifest in the absence of a clear plan, a common typology. The following section therefore can only be a sketch of a sample of randomly selected typologies that have been offered in search of a “game plan” for comparative engagement. The random selection then follows the characterisation of most comparative exercises as “cherry picking”⁸⁵² or “random.”⁸⁵³ Added to that are the not so happenstance results of google-esque data base searches.⁸⁵⁴ An aleatoric propensity certainly cannot be denied. That said, the following typologies are those that stuck out in the vast material on

⁸⁴⁷ Practice Direction, para 2.

⁸⁴⁸ Practice Direction, para 9.1.

⁸⁴⁹ *Martinez*, 4.

⁸⁵⁰ *Ibid.*

⁸⁵¹ *Ibid.*

⁸⁵² See on cherry picking, *above*.

⁸⁵³ Hirschl, 43.

⁸⁵⁴ See on the impact of technology, particularly internet based research, *above*.

comparative law, which rarely focuses on the creation of categories or typologies for that matter.

Comparison of solutions – or problem solving respectively (“*Problemlösungsvergleichung*”) – is the main type of comparative exercises in constitutional law, according to *Mössner*.⁸⁵⁵ Evidently, this category echoes the characterization of comparative engagement as a means of (self)reflection, providing a pool of rationality,⁸⁵⁶ and sources for the advancement of argument via a trip abroad – into foreign findings. This category emphasizes the extension of arguments beyond one’s own set and – importantly – postulates the exercise of reflection as a value onto itself.⁸⁵⁷

With regard to fundamental – and implied human – rights, *Merli*⁸⁵⁸ suggests three functions of cross-references to foreign systems: affirming, complementing, and stimulating. His categorization, stemming from a discussion of the relationship between judgments of the ECtHR and the Austrian Constitutional Court, the caveat of the intrinsic relationship set by the system,⁸⁵⁹ may briefly be reemphasized.

The purpose of affirming is to strengthen the conviction of a judgment and therewith also the legitimacy of the reasoning;⁸⁶⁰ it is a way of reassuring oneself of increasing legitimacy.⁸⁶¹ The affirming function also reinforces the harmonization between legal systems, if this is a desired effect.⁸⁶² *Merli* also highlights the contribution that such affirmative references have to increasing common benchmarks.⁸⁶³ While this aspect is a result of the systemic dependencies in a scenario such as the ECtHR,⁸⁶⁴ the development of

⁸⁵⁵ Mössner, *Rechtsvergleichung*, 197.

⁸⁵⁶ See Martinez, 4 “Rationalitätspool des Auslandes.”

⁸⁵⁷ Siehe Mössner, *Rechtsvergleichung*, 240; see also Zweigert, *Die soziologische Dimension*.

⁸⁵⁸ Merli, *Rechtsprechungskonkurrenz*, 405.

⁸⁵⁹ See on ECtHR *above*.

⁸⁶⁰ See further on legitimacy, *below*.

⁸⁶¹ See McCrudden, 505.

⁸⁶² Merli, 405; on harmonization as a factor see *also, above*.

⁸⁶³ *Ibid.*

⁸⁶⁴ See on ECtHR, *above*.

shared standards is also a factor in non-system related-discussions of principles such as human rights, also because of their ambiguities but much more so – it seems – because of their application in highly comparable circumstances.⁸⁶⁵ The affirmation then is not only of the judgment at hand but also of the standards applied.

The complementing function of comparisons is to fill a legal gap (“*Rechtslücke*”), when either legislation or jurisprudence leaves a legal issue unresolved.⁸⁶⁶ The function of comparative usage as a “gap-filler” is frequently taken up in the discussion of comparative law as a method or as part of methods of interpretation.⁸⁶⁷

A stimulating function is frequently ascribed to comparative usage under the headline of: “marketplace of ideas”⁸⁶⁸, “source of practical wisdom”⁸⁶⁹, “foreign rationality pool”⁸⁷⁰ as well as the intellectual substitute for not being able – or allowed – to discuss issues with someone from outside.⁸⁷¹

*Larsen*⁸⁷² – reviewing both the use of comparative and international law – creates a slightly broader set of categories: expository, empirical, and substantive.⁸⁷³ The expository function uses foreign law as a means to explain a rule, also by way of contrast.⁸⁷⁴ The contrasting function of comparative experience is further developed into the “negative model” – that is, drawing a distinction between a court’s choice and that of another by framing the foreign usage disapprovingly. As will be explained further,⁸⁷⁵ this elaboration of the contrasting function is used rather frequently.

⁸⁶⁵ See further on comparable circumstances, above.

⁸⁶⁶ Merli, 405.

⁸⁶⁷ See further, *below*.

⁸⁶⁸ Rosenfeld/Sajó, 147; the notion of “marketplace” is also used by Andenas.

⁸⁶⁹ Choudhry, 4.

⁸⁷⁰ Martinez, 4.

⁸⁷¹ Jackson, *Constitutional Comparisons*, 119.

⁸⁷² Larsen, *Importing Constitutional Norms*.

⁸⁷³ *Ibid*, 1288.

⁸⁷⁴ *Ibid*.

⁸⁷⁵ See on negative model, *below*.

The empirical usage of foreign experience or cases is a variant of *Merli*'s substantiating function, focused on the use of data: an argument is verified by referring to data used in a similar case in another court. The example *Larsen* uses is the famous *Washington v Glucksberg* ruling of the US Supreme Court.⁸⁷⁶ In the discussion of the ban on physician-assisted suicide in 1997, the Court referred to experience in the Netherlands – back then the only country permitting physician-assisted suicide – for data on the rate of assistance and cases of voluntary euthanasia, respectively. The court utilized a study by the Dutch government for reference purposes.⁸⁷⁷ The third category is a hybrid of *Merli*'s first and third category: affirming and stimulating. *Larsen* describes the substantive function both as seeking affirmation - looking for information with bearing on the question – as well as for guidance and assistance in shaping a rule and therewith a judgment.⁸⁷⁸

The substantive category is broken down into the aspects of “reason-borrowing”⁸⁷⁹ and “moral fact finding.”⁸⁸⁰ Reason-borrowing, utilizing the arguments of a foreign – or international in *Larsen*'s analysis – court “to support a domestic constitutional interpretation.”⁸⁸¹ Moral fact-finding in contrast focuses on what the content of a constitutional rule should or could be. The examples used by the author highlight the shift of the focus from “reasons” to “facts” in substantiating judgments with foreign rulings.⁸⁸²

The recent rulings of the US Supreme Court illustrate this type of moral comparative constitutional fact-finding – such as *Lawrence v Texas*⁸⁸³ and *Stanford v Kentucky*⁸⁸⁴ – make reference to “the Western European community.”⁸⁸⁵ Using foreign citations to substantiate and reinforce, respectively, the moral compass has a notable role in the discussion of human rights: the application of the more generally worded principles in this realm of law makes

⁸⁷⁶ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁸⁷⁷ 521 U.S. 702, 734; see also *Larsen*, 1290.

⁸⁷⁸ See *Larsen*, 1291.

⁸⁷⁹ *Ibid.*

⁸⁸⁰ *Ibid.*, 1293.

⁸⁸¹ *Ibid.*, 1292.

⁸⁸² *Ibid.*, 1295.

⁸⁸³ *Lawrence v Texas*.

⁸⁸⁴ *Stanford v Kentucky*.

⁸⁸⁵ See, e.g., *Thompson v Oklahoma*.

support in reducing ambiguities very welcome. As has been discussed and will be detailed below,⁸⁸⁶ the reliance on moral aspects in particular essentially necessitates that there is a shared culture to start with. The nature of morals and values call for a common ground as a starting point.

An aspect, which appears to be inadequately covered, is that of using comparative exercises as a form of surveillance of national jurisprudence and law (*“Kontrollfunktion”*). It is a facet highlighted by *Zweigert*⁸⁸⁷, which may prove useful in the discussion of the basic requirements of comparative undertakings.⁸⁸⁸

There are other typologies – as stated earlier, the selection is random – most of which are tied to private comparative law or the functions of comparative law more generally.⁸⁸⁹ Importantly, there is one mechanism of categorizing, which applies both to comparative law generally and usage of foreign citations more specifically, which – while not a category onto itself – should be briefly mentioned: *Nelken*,⁸⁹⁰ critiquing “legal transplants”, also in the field of “law and development,”⁸⁹¹ brings up the notion of “success” vs. “failure” in comparative law. In so doing he plays out the rather rhetoric question as to how “success” is defined or what its meaning actually is.⁸⁹² More helpful though than the juxtaposition of success versus failure is the underlying question of what goals comparative law and usage of foreign citation aspire to. Because, as *Nelken* rightly states, “success assumes that law has goals, which can be measured,”⁸⁹³ the query should be turned around and directed at the rather scant typologies of comparative constitutional law: what are the goals? Are there any? And if so: can they be broken down in a way that enables the creation of categories that go beyond solution comparison in the groupings of affirmation, substantiation, and others?

⁸⁸⁶ See problems, *above*.

⁸⁸⁷ See *Zweigert*, *Rechtsvergleichung*, 16.

⁸⁸⁸ See further on “how to,” *below*.

⁸⁸⁹ See as one example, *Hirschl* in: *Choudhry*.

⁸⁹⁰ *Nelken*, *Comparatists and Transferability*.

⁸⁹¹ See *Nelken*, *Introduction*, 45.

⁸⁹² *Ibid*, 35.

⁸⁹³ *Ibid*, 46.

Almost in passing, *Saunders*⁸⁹⁴ puts out three types – which can easily be utilized also as methods – of comparative usage: adoption, adaptation and rejection.⁸⁹⁵ Without further explanation by the author, these three dimensions may be assessed as follows: adoption would be a case where another country’s law or judgment is incorporated in full; adaptation the overt usage of parts of a law or judgment, and rejection the case where foreign sources are overtly discussed but ultimately not incorporated as they are deemed unfit for the scenario at hand. The last “category” is featured so recurrently that it warrants a separate discussion.

4. Negative Model: Rejection of Comparative “Material”

Invoking the “cherry metaphor,”⁸⁹⁶ Judge *Moseneke* states bluntly: “If [a cherry] doesn’t fit, it’ll just roll off, and it will actually be destructive of the argument.”⁸⁹⁷ Surprisingly, “rejection” is a frequent category in the description of comparative usage’s purpose. It implies that a certain level of engagement with a foreign citation or – in the broader sense – borrowing of constitutional principles and law has taken place. The examination or testing of such foreign experience led in turn to the conclusion that the citation or principle or other source did not fit the national context or the specific case and thus was rejected. “Rejection” appears to derive from the discussion of legal “transplants” and the refusal to follow a given legal option. While some refer to this as “non-borrowing”⁸⁹⁸, *Osiatynski* labels this “rejection.”⁸⁹⁹

In the context of foreign citations, then, rejection follows a discussion of a foreign case and reasoning, respectively. This necessitates that the foreign material is at the very least acknowledged as such and that some degree of consideration – or discussion – does in fact

⁸⁹⁴ See *Saunders*, *Misuse* 51.

⁸⁹⁵ *Ibid.*

⁸⁹⁶ See *above*.

⁸⁹⁷ *Bentele*, 239.

⁸⁹⁸ See *Epstein/Knight*, *Constitutional Borrowing and Nonborrowing*, as cited by *Scheppele*, *Aspirational*, 297.

⁸⁹⁹ See *Osiatynski*, *Paradoxes of Constitutional Borrowing* (2003) 1 *International Journal of Constitutional Law* 244, 251, as cited by *Scheppele*, *Aspirational*, 298.

take place. *Annus*⁹⁰⁰ discerns an “inapplicability” of a foreign case due to “different legal, social, or economic circumstances.”⁹⁰¹ Highlighting the rejection of US Supreme Court reasonings by the Canadian Supreme Court, *Annus* cites the case of *R. v. Keegstra*,⁹⁰² where the judges hold: “Canada and the United States are not alike in every way.”⁹⁰³ And:

“It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada’s constitutional vision depart from that endorsed in the United States.”⁹⁰⁴

At the far end of the spectrum of rejection are those cases, where the discussion is broadened from distinct right and principles to the breadth of entire governing systems. *Alford*⁹⁰⁵ refers to cases such as *Shaughnessy v United States*⁹⁰⁶ to pinpoint a comparison – and therewith rejection – with regimes of Nazi Germany and at that point in time also the Soviet Union.⁹⁰⁷ He refers to the usage of comparative experience in “less dramatic” cases such as rejecting a notion of granting legal standing to certain entities⁹⁰⁸ as “negative pragmatism.”⁹⁰⁹ The purpose of the examination is then to weigh options and – at least partly – declare objections to an opinion.

Examining the rejections of US Supreme Court rulings, *Kommers*⁹¹⁰ highlights the discussion by the German Supreme Court, such as in an abortion case,⁹¹¹ which made reference to the famous *Roe v. Wade*⁹¹² judgment.⁹¹³ *Kommers* uses the rejection of the US

⁹⁰⁰ *Annus*.

⁹⁰¹ *Ibid*, 216.

⁹⁰² *R. v. Keegstra*, (1990) S.C.R. 697.

⁹⁰³ *Ibid*, 740.

⁹⁰⁴ *Ibid*.

⁹⁰⁵ *Alford*, In Search of a Theory.

⁹⁰⁶ *Shaughnessy v. United States*, 345 U.S. 206 (1953).

⁹⁰⁷ *Alford*, In Search of a Theory, 699.

⁹⁰⁸ Compare *Raines v Byrd*, 521 U.S. 811 (1997), as cited by *Alford*, 699.

⁹⁰⁹ *Alford*, 699.

⁹¹⁰ *Kommers*, The Value of Comparative Constitutional Law.

⁹¹¹ 19 BVerfG 129 (4 October 1965).

⁹¹² *Roe v. Wade*, 410 U.S. 113 (1973).

ruling as an incentive for the US court to try harder in engaging with rulings by foreign courts, hopefully observing that “constitutional principles and theories could be blended fruitfully and seasonably to produce more equitable balances between rights and duties.”⁹¹⁴ Moving beyond the US-American – German trajectory, *McCrudden*⁹¹⁵ exemplifies the rejection of British jurisprudence by Singaporean courts despite the shared history of Commonwealth derived common law. The modifications of British law due to the decisions of the ECtHR – and subsequently the 1998 UK Human Rights Act – lead the judges to believe that British cases do not offer any assistance such as in the cases of contempt.⁹¹⁶ Similarly, the Constitutional Court of Namibia deferred from a ruling of the US Supreme Court, citing national particularities as a line not to be crossed.⁹¹⁷ The limits of comparison, particularly with regard to national and cultural characteristics will be discussed further.⁹¹⁸

The notion of rejection is also used as a converse to “positive comparativism” – where a court involves itself in the practice of utilizing foreign citations by confirming them in its rulings – in so called “negative comparativism.”⁹¹⁹ The latter focuses on the “failures” of other constitutional regimes.⁹²⁰ As *Fontana*⁹²¹ surmises:

A court can see what it clearly believes is our constitutional law is *not* by locating the paradigmatic example of what it considers our constitutional regime to *reject*, and thus help us understand what our Constitution is by reasoning by analogy from those negative paradigm cases.⁹²²

Applying theoretical analysis to practice, *Kentridge*,⁹²³ a former judge of the Constitutional Court of South Africa, describes the struggle dealing with the “freedom to select” in the

⁹¹³ Kommers, 694.

⁹¹⁴ *Ibid*, 695.

⁹¹⁵ *McCrudden*.

⁹¹⁶ *McCrudden*, 508.

⁹¹⁷ *S. v. Tcoeb*, (2001) AHRLR 158 (NaSC 1996), 1996 (7) BCLR 996 (NmS), 1996 (1) SACR 390 (NmS); as cited by Baer, 737.

⁹¹⁸ See on limits of comparative constitutionalism, *below*.

⁹¹⁹ See *Fontana*, 569.

⁹²⁰ *Ibid*, 551.

⁹²¹ Refined Comparativism.

⁹²² *Fontana*, 569; emphasis added.

⁹²³ *Kentridge*, in: *Comparative Law before the Courts*.

above mentioned *Makwanyane* case.⁹²⁴ Reviewing the case law on the abolition of the death penalty entailed a discussion of various judgments by “great democracies” around the world. Albeit, as *Kentridge*⁹²⁵ observes in slightly resigned tone, finding the death penalty not compatible with a democratic society meant that “the practices of the two great democracies of the United States and India,”⁹²⁶ had to be rejected.

As will become more evident in the course of the next chapter, it is striking that the rejection of foreign experience happens far more overtly compared to the far more concealed usage.⁹²⁷ The reasons for a seeming tendency to be more open about disapproving of another court’s judgment are manifold. An immediate thought is the political tilt that the issue has generally: national politics, indeed nationalism, are an undercurrent in the pros – but much more the – cons of citing foreign experience.⁹²⁸

5. Interim Findings

Why utilize foreign citations? Bolstering legitimacy is an obvious reason, the notion of “persuasive authority” a helpful expression, which captures the element of sheltering under the clout of an established institution as well as the process of convincing oneself as well as the audience of a certain set of arguments. There are some typologies emerging in the process of leaning on foreign institutions, e.g., Merli’s affirming, complementing and stimulating. The typologies highlight that the negative example is a frequent and far more covert practice in comparative constitutionalism. This insight will assist the further discussion of patterns that emerge between eclectic and random approaches to more systematic lines.

⁹²⁴ See *above*, *Makwanyane*.

⁹²⁵ See *Kentridge*, 238.

⁹²⁶ *Kentridge*, 238.

⁹²⁷ See on covert usage, *below*.

⁹²⁸ See in particular the debate in the USA, including a motion for a Senate Bill against foreign citations, *above*.

VII. Using Foreign Citation

“Comparison today is inevitable.”⁹²⁹ And: “ultimately, the real question is not whether it is good to look abroad or not, but rather whether, in a particular case, it is done well or done poorly.”⁹³⁰ The sentiment in favour of utilizing the reasoning of foreign courts, despite the acknowledged shortcomings in theory and method,⁹³¹ is so strong that *Saunders*⁹³² speaks for many in the field when she observes that against the backdrop of the practice of using non-binding sources, also the use of foreign citations is “unobjectionable if used properly.”⁹³³

Given the methodological uncertainty – or gradual development – of methods in the realm of foreign-citation usage, one may pause to wonder what the term “proper” may imply in this context. “Properness” as another term for “appropriate” or “accurate,” as implied also by the Practice Direction,⁹³⁴ as a way of moving closer to the question of “how” does the utilization of foreign precedents take place?

1. Interpretation Methods

Earlier⁹³⁵ the question of the methodological acumen of comparative law was raised. The question of method re-enters at this point as the search for patterns in utilizing foreign citations necessarily entails a discussion of the methods used in interpreting law,

⁹²⁹ Jackson, *Constitutional Comparisons*, 119.

⁹³⁰ Kersch, 369.

⁹³¹ See particularly, *above*.

⁹³² *Saunders, Misuses*.

⁹³³ *Saunders, Misuses* 64; see also Teitel on a „consensus within parameters on the relevance of foreign sources,“ 2590.

⁹³⁴ See on Practice Direction, *above*.

⁹³⁵ See on comparative law as a method, *above*.

constitutional law in particular.⁹³⁶ The patterns of reasoning⁹³⁷ have produced a wealth – for lack of a more inflated term – of literature on the intricate and more mundane aspects of how exactly interpretation happens and which modi it follows. A random start is *Pollock's*⁹³⁸ Oxford Lecture,⁹³⁹ cautions: “unguarded analytical speculation tends to make jurisprudence a thing of abstract formulas – as if it were a sham exact science – instead of a study of human life and action.”⁹⁴⁰ *Rebhahn*⁹⁴¹ rightly cautions that methods are specific for each legal order and that methodology is “a constitutional question,” which is frequently overlooked.⁹⁴²

Pollock outlines four methods of jurisprudence: practical, historical, comparative and analytical.⁹⁴³ The significance attributed to comparative aspects shall be put aside for the time being in favour of a closer look at the canons of interpretation and potential entry points for foreign citations therein.

Preceding *Pollock* by two generations, *von Savigny* spelled out the auspicious cloverleaf of 1. grammatical, 2. logical, 3. historical, and 4. systematic strands of interpretation.⁹⁴⁴ Despite criticism, including the basic premise of working through such a catalogue, reliance on *von Savigny* is unabated.⁹⁴⁵ Keeping in mind the special nature of the “modus austriacus,”⁹⁴⁶ the Savigny-spin-offs in Germany and Austria warrant specific mention.⁹⁴⁷

⁹³⁶ The distinction is also determined by the differences between private and public law, which were also discussed in relation to the differences in comparative law in these fields, *above*.

⁹³⁷ Cf Goutal, 44.

⁹³⁸ Pollock, Oxford Lecture.

⁹³⁹ As cited by Ehrlich, footnote 14.

⁹⁴⁰ *Ibid*.

⁹⁴¹ Rebhahn, Auf der Suche nach der *ratio decidendi*.

⁹⁴² *Ibid*, 576.

⁹⁴³ Pollock, 11.

⁹⁴⁴ Cf the respectful bow by Lollini, 62 who highlights Alexy's Theorie der juristischen Argumentation, 19 favourably.

⁹⁴⁵ See, e.g., Kramer, 50.

⁹⁴⁶ See, including on the term's explanation by Wiederin, *above*.

⁹⁴⁷ The Swiss experience, e.g., Kramer, is duly taken note of.

Larenz,⁹⁴⁸ whose work has been reassessed critically,⁹⁴⁹ espouses five “criteria of interpretation.”⁹⁵⁰ 1. literal meaning, 2. contextual meaning, 3. regulatory purposes, normative intentions of the historical legislator, 4. objective-teleological criteria, and 5. the requirement of conformity of interpretation to the constitution.⁹⁵¹ The latter aspect leans on both moral and historical developments, reflecting developments in German law following the end of National Socialism and the subsequent adoption of the Basic Law, which enshrines the dignity of human beings, among others.⁹⁵² In Germany’s case the reference to the constitution and therewith the Basic Law is also a bridge to human rights, making for a feasible entry point for utilizing foreign citations, which frequently entail human rights.⁹⁵³

Among the various angles carved out in Germany, *Wolff*⁹⁵⁴ stands out for adding comparison as an element, while adapting the focus of other strands to varieties of *von Savigny’s*⁹⁵⁵ canon: Wolff’s list then comprises of 1. philological, 2. logical, 3. systematic, 4. historical, 5. comparative, 6. genetic, and 7. teleological.⁹⁵⁶ With regard to practical methodology – the application by the Federal Constitutional Court – *Jestaedt*⁹⁵⁷ observes a certain level of pragmatism: the Court’s approach to methodology is rather “eclectic” without “theory based advance determination.”⁹⁵⁸ In Switzerland, *Kramer*⁹⁵⁹ sketches the lines along *von Savigny’s* model: 1. grammatical or language, 2. systematic, 3. historic, and 4. teleological interpretation.⁹⁶⁰ The utilization of foreign citations is accommodated as a logical

⁹⁴⁸ Canaris/Larenz, *Methodenlehre der Rechtswissenschaft*⁴.

⁹⁴⁹ See Canaris, Karl Larenz, in: Grundmann/Riesenhuber, *Deutsche Juristenlehrer des 20. Jahrhunderts in Berichten ihrer Schüler*, Band 2 (2010), 263; see also Canaris, Karl Larenz, *Nachruf*, JZ8/1993, 404; and Dreier, Karl Larenz und seine Haltung im „Dritten Reich“, JZ 9/1993, 454, see also Jabloner, Richter im Zwiespalt, 323.

⁹⁵⁰ Canaris/Larenz, 141.

⁹⁵¹ *Ibid.*

⁹⁵² See on the Basic Law Canaris/Larenz, 159.

⁹⁵³ See discussion, *above*.

⁹⁵⁴ As cited by Alexy, *Theorie der juristischen Argumentation*, 19.

⁹⁵⁵ See *above*.

⁹⁵⁶ Compare Alexy, 19 as well as Lollini, 61.

⁹⁵⁷ Jestaedt, in: Lienbacher, *Verfassungsinterpretation in Europa*.

⁹⁵⁸ Jestaedt, (theoriefundierte Vorabfestlegung), 21.

⁹⁵⁹ Kramer, *Juristische Methodenlehre*.

⁹⁶⁰ *Ibid*, 50 f.

consequence of using foreign law to draft legislation: if imports can be made for the level of law making, they can surely be used in interpretation, including “foreign judge-made law.”⁹⁶¹ The legitimacy of recourse to foreign precedent is further emboldened by the nautical regulations of landlocked Switzerland, which specifically prescribe reference to such imports.⁹⁶²

The Austrian canon provides a slight variation in focusing first on the meaning of the word itself, followed by considerations of the grammatical context, a logical-systemic approach and finally an interpretation of the intent (“*Wille*”).⁹⁶³ The generally recognized rules of interpretation are largely derived from the 1811 Civil Code, which in prosaic terms⁹⁶⁴ highlights the meaning of the word itself as well as the intent of the legislator. In spite of the civil-law origin, the rule has left its mark on constitutional law.⁹⁶⁵ The potential of teleological interpretation is perceived as “limited.”⁹⁶⁶ *Wiederin*⁹⁶⁷ contends pointedly: “We are skeptical about teleological arguments but are increasingly less reluctant to have them set sail under the false flag of historic [interpretation].”⁹⁶⁸ Entry points for the utilization of foreign precedent are far and few inbetween.⁹⁶⁹

Again, the academic debate(s) is somewhat disconnected from application, as academics describe the Constitutional Court’s findings as a “seemingly unmethodical juxtaposition”⁹⁷⁰ or lacking a “discernible”⁹⁷¹ methodological track. A poignant summary concedes: “the

⁹⁶¹ Kramer, 230 f., citing Meier-Hayoz, in: *Liver u.a., Berner Kommentar, Band I.*

⁹⁶² See Kramer, 231 with reference to Section 7 Seeschiffahrtsgesetz; also referring to Großfeld *Macht und Ohnmacht der Rechtsvergleichung*, 1984.

⁹⁶³ The discussion is best summarized in contemporary constitutional treatises by Walter/Mayer/Kucsko-Stadlmayer¹⁰, 66 as well as Öhlinger, *Verfassungsrecht*⁹ 33.

⁹⁶⁴ ABGB § 6. *Einem Gesetze darf in der Anwendung kein anderer Verstand beygelegt werden, als welcher aus der eigenthümlichen Bedeutung der Worte in ihrem Zusammenhange und aus der klaren Absicht des Gesetzgebers hervorleuchtet.*

⁹⁶⁵ Cf Potacs, 21 with referene to a ruling of the Administrative Supreme Court: VwSlg 9428(A)/1977; see also briefly *Wiederin*, in: Lienbacher, 103

⁹⁶⁶ Walter/Mayer/Kucsko-Stadlmayer¹⁰, 66.

⁹⁶⁷ *Wiederin* in: Lienbacher.

⁹⁶⁸ *Wiederin*, 105.

⁹⁶⁹ See excursus on the special case of Austria, *above*.

⁹⁷⁰ Öhlinger, 38.

⁹⁷¹ Walter/Mayer/Kucsko-Stadlmayer¹⁰, 68.

jurisprudence clearly shows that the Constitutional Court does not feel committed to any particular jurisprudential interpretation method.”⁹⁷² The “gap between methodology and interpretation praxis”⁹⁷³ is also acknowledged in that “we do not always say what we do, let alone always do what we say.”⁹⁷⁴

In a legal space that is so intrinsically defined by one particular strand of legal thought, namely, the Pure Theory of Law, that one can state more factually than boldly that lawyers seem to inhale the writing of *Kelsen*, a discussion of interpretation methods has to include that school of thought.⁹⁷⁵ The debate largely hovers around one of the final sections of *Kelsen*’s seminal work, sub-titled “The So-Called Methods of Interpretation”.⁹⁷⁶

From a point of view directed at positive law, there is no criterion by which one possibility within the frame is preferable to another. There simply is no method (that can be characterized as a method of positive law), by which only one of several meanings of a norm may gain the distinction of being the only “correct” one – provided, of course, that several possible interpretations are available.

Interpreters of this seeming reluctance to weigh the possibilities and potential results respectively of interpretation describe the subsequent debate and general stance in Austria as “interpretation skepticism”⁹⁷⁷ (“*Auslegungsskeptizismus*”), which took a while to overcome.⁹⁷⁸ The politics in the interpretation of interpretation have some religious overtones, not least manifest in the labeling of some of *Kelsen*’s critics as implying an “interpretation agnosticism”⁹⁷⁹ (“*Auslegungsagnostizismus*”), which self-evidently is an incorrect rendition.⁹⁸⁰ The essence of the interpretation of the Pure Theory’s stance on interpretation is then summarized as follows: “The central purpose of a positivist

⁹⁷² Ibid.

⁹⁷³ Wiederin, 105.

⁹⁷⁴ Wiederin, 105.

⁹⁷⁵ On the impact of positivism to the outsider’s perception, see also Wiederin in: Lienbacher, 101.

⁹⁷⁶ Kelsen, *Pure Theory of Law*, 352.

⁹⁷⁷ Wiederin, 102.

⁹⁷⁸ Wiederin, 102 with reference to Walter.

⁹⁷⁹ Walter/Mayer/Kucsko-Stadelmayer¹⁰, 65.

⁹⁸⁰ See quote, *above*.

interpretation doctrine has to be the intent of the authority endowed to legislate, which naturally can be limited by way of a distinct positively legal form.”⁹⁸¹

As a justice of the Constitutional Court, *Kelsen* was far less attached to the letter of the law, more prone to teleological rather than historical considerations and far more daring than frequently implied.⁹⁸² *Jabloner*⁹⁸³ points to the multitude of normative orders that play a part in these considerations, emphasizing that *Kelsen* distinguished moral and legal consideration on their level of organization: the former being randomly amassed, the latter the product of constraints.⁹⁸⁴ *Kelsen* himself stated that the result of interpretation could (only) be the discerning of a reference frame, providing for a variety of possibilities.⁹⁸⁵ The overall approach to the act of interpretation – as an intellectual process⁹⁸⁶ – does not *per se* rule out the utilization of foreign influences, notwithstanding the fact that its interpretation does not provide for the most hospitable environment either.

Competing models of interpretation, i.e., verses of canons, exist in all judiciaries, raising the question of resolving such antagonisms, including possible priorities. While there is general agreement that there are no rules on the relationship between and among methods, the responses vary. *Kramer*⁹⁸⁷ is on the verge of scolding as he sees a potential of undermining of the entire dogmatic authority of methodology as long as it lacks a hierarchy.⁹⁸⁸ *Potacs*⁹⁸⁹ proposes a versatile response, arguing for a flexible system (“*bewegliches System*”),⁹⁹⁰ while *Larenz*⁹⁹¹ suggests a sequence by which the meaning of the term by way of language analysis and subsequent provision of grammatical and overall context build a first step to set limits. In a second phase, the intent of the legislator and therewith the teleological

⁹⁸¹ Walter/Mayer/Kucsko-Stadelmayer¹⁰, 67.

⁹⁸² Cf Wiederin, in: Lienbacher, 101 f, with references to alternative assessments.

⁹⁸³ Jabloner, Richter im Zwiespalt.

⁹⁸⁴ Ibid, 324.

⁹⁸⁵ Kelsen, zur Theorie der Interpretation, 1366.

⁹⁸⁶ Ibid, 1363.

⁹⁸⁷ Kramer, Juristische Methodenlehre.

⁹⁸⁸ Cf Kramer, 151.

⁹⁸⁹ Potacs, Auslegung im öffentlichen Recht.

⁹⁹⁰ See in particular, 38 f.

⁹⁹¹ Canaris/Larenz, Methodenlehre.

considerations come into focus.⁹⁹² The discussion is generally inward bound: arranging set elements and weighing them rather than looking to accommodate additional strands, including above mentioned references to comparative elements.

Reading through *Pollock's*⁹⁹³ 1890 Oxford Lecture one cannot help but violate the rule of restricted citation, too much holds true more than a century later: “Every method is in its place legitimate and necessary, but is bound to secure itself against mistakes by taking due account of its fellows.”⁹⁹⁴ And:

“The prevalence of one or another method of jurisprudence depends in the first place, [...], on the historical conditions of legal systems and institutions. But there is no reason why in England, Germany, or America, we should make ourselves the slaves of such conditions, or why one method should be cultivated to the exclusion of others. The false pride and exclusiveness of a favourite method will always bring their own punishment.”⁹⁹⁵

2. Open Method(s) of Interpretation - Entry point for foreign citations in interpretation methodology?

Inching closer yet to patterns of foreign citation, possible entry points for comparative law, particularly foreign citations, in interpretation methodologies could be potentially necessary and at the very least helpful given that models are being sought. After all, the “application” – stopping short of calling it technique or something more straight forwardly methodological – is under significant scrutiny as a “methodology in search of a theory”⁹⁹⁶ and also as needing a place within interpretation methodology. *Canivet*⁹⁹⁷ uses classical exegetical interpretation as a departure point,⁹⁹⁸ to use “free scientific research”⁹⁹⁹ as a springboard to suggest the

⁹⁹² See Canaris/Larenz, 163 ff.

⁹⁹³ Pollock, Oxford Lecture.

⁹⁹⁴ Pollock, 34 as cited by Ehrlich, footnote 14.

⁹⁹⁵ Ibid.

⁹⁹⁶ Alford, In Search of a Theory, 712.

⁹⁹⁷ Canivet in: Fedtke/Markesinis, 309.

⁹⁹⁸ See Canivet, 316.

⁹⁹⁹ Ibid, 317 with references to Gény, Léon, Mazeaud and Chabat.

inclusion of certain external elements.¹⁰⁰⁰ The “open methods of interpretation” seem to develop out of at least two distinct discussions: the challenges to standard interpretation methods that have been tested for a very long time and a judiciary in evolving – political – circumstances such as a significant addition to the constitution, Canada as a case in point, or fundamental changes to the constitution and therewith the political climate – the former Socialist countries such as Hungary, the Czech Republic and South Africa as examples.¹⁰⁰¹

The views that are “shaped and dominated by a grid of concepts, research techniques, professional ethics, and politics, by which the prevailing culture imposes on the individual scholar its canons of how legal scholarship is to be conducted,”¹⁰⁰² then appear to be in need of a review. The dialogic process¹⁰⁰³ is invoked by Kirby¹⁰⁰⁴ to suggest that the latest move toward linking the national and international realm of law “is simply the latest element in [a] process of reconciling popular will and enduring values.”¹⁰⁰⁵

The, preliminary, result is an abandoning of strict textual positivism and perceived ideologies of interpretation.¹⁰⁰⁶ The conflation of positivism and natural law in the realm of legal interpretation by way of comparison is not entirely new, as, e.g., Zweigert¹⁰⁰⁷ would imply. With that the nod to comparison as an element of interpretation methodologies by Pollock¹⁰⁰⁸ and Wolff¹⁰⁰⁹ could then be accommodated by unlocking standardized interpretation methods to be overtly “open” and therewith consciously, rather than overtly embracing foreign citations. After all, “the legitimacy of constitutional comparativism

¹⁰⁰⁰ Ibid, 317.

¹⁰⁰¹ See on the impact of the Canadian Charter of Rights and Freedoms as well as the South African Constitution, Justice Ginsburg in an interview in January 2012, cited in Liptak, „We the People“ Loses Appeal with People Around the World, New York Times, 6 February 2012.

¹⁰⁰² Frankenberg, *Stranger than Paradise*, 270.

¹⁰⁰³ See Kirby, *International Law – Impact on National Constitutions*, footnote 117; see on the dialogic method more generally, Choudhry, *Metaphors*.

¹⁰⁰⁴ Kirby, *International Law – Impact on National Constitutions*.

¹⁰⁰⁵ Ibid, at Footnote 117.

¹⁰⁰⁶ Komárek, *Inter-Court Constitutionalism*, 64.

¹⁰⁰⁷ Cf Zweigert, *Rechtsvergleichung*, referring to Spranger’s Model of an elastic natural law combined with über-positive guidance, 20.

¹⁰⁰⁸ See *above*.

¹⁰⁰⁹ See *above*.

should be determined by constitutional theory. Comparativism is not a constitutional theory; it is a methodology that is employed depending on a judge's particular theory."¹⁰¹⁰ That choice of method and theory, respectively, as a personal one is part of the judge's discretion – “indispensable for individualized justice, for creative justice”¹⁰¹¹ – which also determines the inclination to utilize foreign citations: “One's willingness to engage in constitutional comparativism will depend on one's theory of constitutional decision making.”¹⁰¹² Rather than constructing an entirely new canon, the idea is to bolster the control function of existing interpretation methods,¹⁰¹³ by utilizing comparative material.

3. Pathway of Judgments

Fortifying the purpose of interpretation as the pathway to judgments: the goal is to arrive at the best judgments,¹⁰¹⁴ which support the establishment of a consistent and predictable body of law.¹⁰¹⁵ Rendering an opinion or judgment is not merely a statement providing reasons¹⁰¹⁶ but really an act of craftsmanship, with the leaders of the trade following aesthetic ideals.¹⁰¹⁷ The aim of such aestheticism can be more justification than interpretation,¹⁰¹⁸ or less justification and more persuasion.¹⁰¹⁹

*Goutal*¹⁰²⁰ elaborates on the “path of justification” in judicial opinions as “marked by fashions unconsciously established and modified through centuries of adjudication. At a given stage of the evolution, every legal system has its own ways.”¹⁰²¹ In that line of thought

¹⁰¹⁰ Alford, *In Search of a Theory*, 641.

¹⁰¹¹ Davis, *Discretionary Justice*, 216 f as cited by Atiyah/Summer, 77; see also *above*, McCrudden, 517.

¹⁰¹² Alford, *In Search of a Theory*, 641.

¹⁰¹³ Cf Zweigert, *Rechtsvergleichung*, 17.

¹⁰¹⁴ Annus, 349.

¹⁰¹⁵ Kommers, *Germany: Balancing Rights and Duties*, in: Goldsworthy (Ed.), *Interpreting Constitutions*.

¹⁰¹⁶ Cf Atiyah/Summer, 71.

¹⁰¹⁷ Cohen, 845; see also Goutal, 55.

¹⁰¹⁸ Cf Kommers.

¹⁰¹⁹ Cf Lawson, *Comparative Judicial Style*, 368.

¹⁰²⁰ Goutal, *Characteristics of Judicial Style*.

¹⁰²¹ *Ibid*, 43.

it would seem that a conscious modification is underway that reflects the growing impact of human rights as well as inter-connectedness between judiciaries, which has multiple reasons.¹⁰²² The “own ways” of an individual judge or a country’s judiciary are prone to change only slowly – dramatic modifications are, fortunately, rare.¹⁰²³ Paths of justification – the craft of rendering opinions, have their own peculiarities.¹⁰²⁴ To provide a randomly chosen example: the general style in the US is to provide full explanations, aiming at persuading other judges, guarding against judicial overreaching and overall justifying judicial creativity.¹⁰²⁵ *Lasser*,¹⁰²⁶ in his comparison of various judicial styles, observes that the provision of explanations depends on the “weight” a judgment has.¹⁰²⁷ This statement would reflect observations made that foreign citations are particularly utilized in the early stages of a new court, when making the first inroads.¹⁰²⁸

“Not everything, which has in fact helped shape a judgment, will necessarily be mentioned in that judgment,”¹⁰²⁹ Justice *Schiemann* wryly contends about the transparency of sources. The “mild”¹⁰³⁰ and intermittent or “accidental”¹⁰³¹ references make the tracing of foreign citations a thing of guesswork with a detective-twist. Omissions are attributed influence,¹⁰³² the “untraceable”¹⁰³³ turns out to be a much-surmised feature of judgments.¹⁰³⁴ The challenge then is that as such there is no obligation for any judge to state the reasons that led her or him to a certain conclusion.¹⁰³⁵ Accordingly, there is also no duty to make overt

¹⁰²² See in particular the section on globalization, *above*.

¹⁰²³ Compare though the supposed changes in the Austrian Constitutional Court in the 1980ies on fundamental rights issues, cf Öhlinger, 36 ff.

¹⁰²⁴ For a detailed study, see: *Lasser*, *Judicial Deliberations*.

¹⁰²⁵ Cf *Lasser*, 152.

¹⁰²⁶ *Lasser*, *Judicial Deliberations*.

¹⁰²⁷ *Ibid*, 308.

¹⁰²⁸ Compare examples in India, Singapore, South Africa but also the emerging democracies in Hungary, Czech Republic; to a lesser extent the German Constitutional Court, see *above*.

¹⁰²⁹ *Schiemann* in: *Fedtke/Markesinis*, 362.

¹⁰³⁰ *Tushnet*, *Some reflections*, in: *Choudhry* (Ed.), *Migration of Constitutional Ideas*, 46.

¹⁰³¹ *Drobnig*, 4 & 18.

¹⁰³² *Baer*, 741.

¹⁰³³ *McCrudden*, 510.

¹⁰³⁴ Cf *Gossman*, 220.

¹⁰³⁵ A largely unwritten rule, cf *Lawson*, 368.

references to comparative material, including foreign citations. However, there are those who contend that overt references to foreign citations would not only be a form of accountability but specifically an increase of “constitutional accountability.”¹⁰³⁶

The frequent call for transparency undoubtedly has its merits,¹⁰³⁷ not least in boasting the credibility of both judgments and the utilization of foreign citations.¹⁰³⁸ *Saunders*¹⁰³⁹ hits the nail on the head stating: “the failure to refer is not abuse but an opportunity lost.”¹⁰⁴⁰ An increase of overt usage would have manifold benefits, not least in bolstering what *Baer*¹⁰⁴¹ terms “assessment transparency” (“*Wertungstransparenz*”)¹⁰⁴² – a conscious move to provide the contextualization of terms and values that have relevance and are applied beyond the immediate national realm. While the term “controlled comparison”¹⁰⁴³ seems less fitting in that it has overtures of restraint that seem ill placed here, the desire to increase “fair”¹⁰⁴⁴ – that is overt and adequate – references in order to develop a sense of where the discussion on certain issues stands, seems timely and gradually necessary.

Even a brief discussion of the paths of justification and transparency of judgments needs to at least fleetingly touch on the issue of the boundaries of judicial creativity and activism, as it seems that the overstepping thereof is the most frequent of all charges against even the subtlest changes to adjudication. *Kirby*¹⁰⁴⁵ contends: “judicial activism, far from being a threat to national security or the development of a nation state, is imperative for the attainment of such objectives.”¹⁰⁴⁶ Anticipating the rejection of lawyers in both developed as

¹⁰³⁶ Jackson, *Narratives*, 261, see also Jackson, *Constitutional Comparisons*, 120; see also McCrudden, citing Shapiro.

¹⁰³⁷ Cf Lasser, 299 ff, see also Jackson, *Constitutional Comparisons* 118; and McCrudden, 510.

¹⁰³⁸ See, e.g., *Saunders*, *Courts*, 115.

¹⁰³⁹ *Saunders*, *Misuse*.

¹⁰⁴⁰ *Saunders*, *Misuse*, 71.

¹⁰⁴¹ *Baer*.

¹⁰⁴² *Baer*, 756.

¹⁰⁴³ *Hirschl*, 40.

¹⁰⁴⁴ Jackson, *Constitutional Comparisons*, 126.

¹⁰⁴⁵ *Kirby*, *The Role of the Judge in Advancing Human Rights*, 514.

¹⁰⁴⁶ *Ibid*, 517; citing the result of a workshop held by the International Centre for Ethnic Studies of Sri Lanka and the Public Law Institute of Kenya on „The Role of the Judiciary in

well as developing countries in quintessential Kirby-style, he predicts the shock over the notion of judicial activism, particularly in the context of national security, as “the concept of the judicial function would be more passive, reactive and restrained.”¹⁰⁴⁷

As for the possibilities of judicial creativity, the focal point and delineation is a perceived gap or loophole (“*Rechtslücke*”): the German Federal Constitutional Court once famously held:

“Occasionally, the law can be found outside the positive legal rules erected by the State; this is law which emanates from the entire constitutional order and which has as its purpose the “correction” of written law. It is for the judge to “discover” this law and through his opinions give it concrete effect.”¹⁰⁴⁸

The pathways of judgments that utilize foreign citations should then be one marked by transparency and a certain depth of analysis that espouses, what *Geertz* terms, “thick description.”¹⁰⁴⁹ The “reader should not be left in the dark on the influence”¹⁰⁵⁰ of foreign citations. Overall, there seems to be growing support for a stance according to which judges should cite the foreign citation relied on, providing criteria for the selection and carefully explaining the choice;¹⁰⁵¹ the Practice Direction is but one such guidance.¹⁰⁵²

4. Foreign Citations as a Source

What sources do judges use to arrive at a conclusion, what inspires them and which materials assist them in their search for a decision? But is there a set list of appropriate sources? Are there requirements that need to be fulfilled? From those judges that covertly invoke historic and daily-life examples to those who write as if their knowledge was unaffected by outside-of-court sources, nevertheless related to the real world: a vast scope of

Plural Societies“ published in (1985) 16 Center for the Independence of Judges and Lawyers Bulletin 45, 46.

¹⁰⁴⁷ Cf Kirby, 517.

¹⁰⁴⁸ BVerfGE 34, 269 ff, 14 February 1973; as cited by Markesinis/Fedtke, 33.

¹⁰⁴⁹ See on thick description, *above*.

¹⁰⁵⁰ Markesinis/Fedtke, 157.

¹⁰⁵¹ See McCrudden, 515.

¹⁰⁵² See on Practice Direction, *above*.

possibilities exists. *Schiemann*¹⁰⁵³ describes the “internationally varied intellectual company”¹⁰⁵⁴ in flamboyant detail:

“The Bible, Socrates, Aeschylus, Plato, Shakespeare, Milton, Wilde, Goethe, Schiller, Mann, Racine, Voltaire, Montesquieu, Balzac, Dante, Tolstoy, Solzhenitsyn, Bach, Schubert, Mozart, Berlioz, Verdi, Einstein, Wren, Kant, Marx, Benedict, Aquinas, Luther, Hume, Rembrandt, Picasso, Thoreau, Hemingway, Wilder and so on and so on – most of these could be found on a single judge’s shelves or walls, accompanied by many others.”¹⁰⁵⁵

The list is a helpful reminder of the variety that can spark thoughts and has an impact on the process of judging and interpretation; one would hope that the list of old-school Eurocentric classics is permeated by truly international, i.e., globe-spanning, names, importantly including women. As *Scheppele*¹⁰⁵⁶ highlights, one justice of the US Supreme Court quoted reports Amnesty International¹⁰⁵⁷ and another referred to deterrent historic “images of others days”¹⁰⁵⁸ such as Hitler’s Berlin, Stalin’s Moscow, and white supremacist South Africa,¹⁰⁵⁹ as points of comparison and demarcation.

The judge’s freedom of discretion obviously also includes the freedom to choose her or his source(s).¹⁰⁶⁰ In addition to legal sources,¹⁰⁶¹ academic writing appears to be a frequently used and also often disclosed informant of judges. Somewhat self-servingly, academics point out that their work is being utilized in judgments.¹⁰⁶² As *Shuman*¹⁰⁶³ highlights, courts,

¹⁰⁵³ Schiemann in: Markesinis/Fedtke, 358.

¹⁰⁵⁴ Schiemann, 367.

¹⁰⁵⁵ Ibid.

¹⁰⁵⁶ Scheppele, Aspirational and aversive constitutionalism.

¹⁰⁵⁷ Justice Stevens in *Allen v. Illinois*, 478 U.S. 364 (1986), cited by Scheppele, Aspirational and aversive constitutionalism, 316, see also, *above*.

¹⁰⁵⁸ Justice Thurgood Marshall in *Florida v. Bostick*, 501 U.S. 443 (1991), cited by Scheppele, Aspirational and aversive constitutionalism, 316.

¹⁰⁵⁹ Ibid.

¹⁰⁶⁰ See Glenn, Persuasive Authority.

¹⁰⁶¹ Cf Atiyah/Summers, 54 f; including on the role of European Law.

¹⁰⁶² Tushnet, in: Goldsworthy, 44; Hogg, in: Goldsworthy 80; Goldsworthy, Devotion, in: Goldsworthy (Ed.) *Interpreting Constitutions*, 136; Kahn-Freud, *Common Law and Civil Law*, 155; Saunders, *Misuse*, 54; Hirschl, 42, Alford, *In Search of a Theory*, 700; Ehrlich, 641; Glenn, *Comparative Law and Legal Practice*, 990.

¹⁰⁶³ Shuman, *Cal L Rev*.

in bolstering discussions on legitimacy and efficacy have cited the writing of *Kelsen*, including Pakistan,¹⁰⁶⁴ Cyprus,¹⁰⁶⁵ and Uganda.¹⁰⁶⁶

Foreign citations could, in a way, be seen on a par with academic writing in terms of (non)binding nature, the entry point in the process of judging, namely, choice of the judge, and the level of hierarchy in the unwritten list of “sources.” Foreign sources as “one element of a complex endeavor,”¹⁰⁶⁷ are frequently, introduced by one of the case’s parties or,¹⁰⁶⁸ to a lesser extent, by way of an Amicus Curiae Brief. As Chief Justice *Abrahamson*¹⁰⁶⁹ so succinctly states:

In fact, foreign opinions could function like superstar amicus briefs, offering otherwise unavailable viewpoints, delivered from unique perspectives, by some of the world’s leading legal minds. But as far as I can tell from their opinions, American courts are not reading these superstar amicus briefs.¹⁰⁷⁰

Assumedly, more often than not, judgments do not reveal the source of inspiration, the (in)direct cause for a conclusion: the search for obvious sources and their categorization therefore will produce little output or results that are informative.

Two further assumptions are being made at this juncture: there are basically no limits in the kind of source that judges can potentially utilize in developing conclusions and judgments. Common sense suggests that a turn of phrase in a novel could be as helpful as a fact in an Amicus Curiae Brief or an independent report. The assumption that there are very few limits, if any, on the kind of source that may inspire an individual, here: a judge turns the use of foreign sources into a viable option. The eclecticism of sources as well as their “mixed use,”¹⁰⁷¹ are thus taken as a given.

¹⁰⁶⁴ *State v Dosso* (1958) 1 P.L.D. Pak. S. Ct. 533, 539 f, as cited by Shuman, 716.

¹⁰⁶⁵ *Attorney General v Ibrahim* (1964) Cyprus L.R. 195, as cited by Shuman, 716.

¹⁰⁶⁶ *Madzimbamuto v Lardner-Burke* (1968) 2 S. Afr. L.R. 284, 315 ff, as cited by Schuman, 716.

¹⁰⁶⁷ Bernhardt, *Comparative Law*, 37.

¹⁰⁶⁸ See on the role of counsel to plaintiff: Kentridge in: Fedtke/Markisinis, 335

¹⁰⁶⁹ Abrahamson, Chief Justice, Wisconsin.

¹⁰⁷⁰ Abrahamson; see *also* Fontana, 566.

¹⁰⁷¹ Saunders, *Misuse*, 56.

Excursus: Incorrect Citations

It is hardly surprising that in the challenges that comparison generally entails – with details being lost, taken as a given – that regulations and citations are provided wrongly. From a misspelling of a case name – e.g., “Qakes” instead of “Oakes”¹⁰⁷² – to misunderstanding and subsequently misrepresenting facts and regulations, there are boundless possibilities to get the comparative exercises wrong.

Contending that even a wrongly interpreted or utilized foreign regulation or citation can be helpful, *Markesinis* and *Fedtke* rightly raise the issue of adequate information about the finality of judgments: does one need to check whether the judgment is final before using it? What happens, if the ruling is successfully appealed?¹⁰⁷³ While one may debate the level of responsibility, here is a recent pointed reminder of the importance of this issue:

In his April 6, 2009, statement on *S v Zuma*, the National Director for Public Prosecutions in South Africa provides a plethora of foreign citations in responding to allegations of collusion between the former heads of the Directorate of Special Operation and the National Prosecuting Authority in the wake of elections of the African National Congress (ANC).¹⁰⁷⁴ The National Director provides legal considerations, which list decisions from Zimbabwe, New South Wales (Australia), and South Africa, among others. While not directly referencing to the judgment, the same sequence of references, in a slightly more elaborate form can be found in a decision by the High Court of Hong Kong, S.A.R., Court of first instance in 1999.¹⁰⁷⁵ The decision was successfully appealed and the substance of the cases quote dismissed, in a decision rendered a year later, well before the Public Prosecutor of South Africa made his statement.¹⁰⁷⁶

¹⁰⁷² See *Molefi Tsepe v Independent Electoral Commission and Others*, High Court of Lesotho, 135/2005, 27 April 2005, p 18.

¹⁰⁷³ Cf *Markesinis/Fedtke*, 144.

¹⁰⁷⁴ See *Zuma Decision: Full Statement by Director of Public Prosecution*.

¹⁰⁷⁵ Cf, *HKSAR v Lee Ming Tee*, HCCC 191/1999, 13 December 2002.

¹⁰⁷⁶ Cf, *HKSAR v Lee Ming Tee*, FCCC 1/2003, 22 August 2003.

5. “Guidelines”

There are no “models” as such as to how foreign citations should “properly” be utilized. Given the multiple rough edges of comparative constitutionalism, generally, and the usage of foreign citations, more specifically, one is reminded of a raw gem in need of a carat-increasing cut. Instructions for how to properly cut and how to achieve more value are hard to come by in a field that is trying to follow-up on multiple loose ends.

The Practice Direction¹⁰⁷⁷ provides rare and seemingly much needed guidance, requesting explicit citation, reasons for the reference, including the value-add of the citation used as well as certification of the permissibility of employing such foreign citation.¹⁰⁷⁸ This largely echoes *McCrudden’s*¹⁰⁷⁹ suggestion to establish criteria for usage, ensure that the citation is made, and provide careful justification, which upholds the value of legal craftsmanship.¹⁰⁸⁰ Another recommendation is that one should rely on more than two sources.¹⁰⁸¹ As Justice *Canivet*¹⁰⁸² suggests, the utilization of foreign citations should be guided by prudence, a consciousness of the difficulties involved, precision, and transparency.¹⁰⁸³

The guidance on how to adequately employ foreign citations still requires a lot of perfecting.¹⁰⁸⁴ Following this brief interlude on elements that could provide guidance, it is high(est) time to see how foreign citations are put to good use in practice.

¹⁰⁷⁷ See on the Practice Direction of the Lord Chief Justice of England and Wales, 2001, *above*.

¹⁰⁷⁸ Cf Practice Direction, in particular Paras 8 & 9.

¹⁰⁷⁹ *McCrudden*, 515.

¹⁰⁸⁰ *Ibid*, 515 ff.

¹⁰⁸¹ Cf *Markesinis/Fedtke*, 160.

¹⁰⁸² *Canivet* in: *Markesinis/Fedtke*.

¹⁰⁸³ *Canivet*, 325.

¹⁰⁸⁴ To borrow a line by Fentiman used in a slightly different context, in: *Canivet, et al*, 22.

6. Cases

How then, does the utilization of foreign citations work in practice? The following cases serve to show(case) how foreign citations are used. The cases are randomly chosen from databases that are readily available.

They were chosen with a view to reflect the main criticism of the practice as well as providing examples of how such utilization can actually be done.

a. Slowly drowning out the source ...

In a 1996 decision the Supreme Court of Namibia¹⁰⁸⁵ on the constitutionality of life imprisonment, Chief Justice *Mahomed* discusses, among others, the “application of the relevant constitutional provisions to the statutory mechanisms”¹⁰⁸⁶ under Namibian law. His Honor sets out by briefly referencing the now famous – first – decision of the South African Constitutional Court in *S v Makwanyane*,¹⁰⁸⁷ but immediately turns to an unreported decision of the High Court of Namibia.¹⁰⁸⁸ The rather lengthy quote spells out an argument for the unconstitutionality of life imprisonment, which essentially equates the impact of life imprisonment with a death sentence.¹⁰⁸⁹ The Chief Justice goes on to disagree with that equation, stating that the distinction drawn by the Namibian Constitution between “protection of life” and “protection of liberty,” respectively, would indicate a sharp distinction in that life imprisonment is “only” an invasion of liberty.¹⁰⁹⁰

¹⁰⁸⁵ *State v Tcoeib* (2001) AHRLR 158 (NaSC 1996), 6 February 1996.

¹⁰⁸⁶ See Para 16.

¹⁰⁸⁷ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1; 2011 (7) BCLR 651 (CC) (6 June 1995); see the discussion *above*.

¹⁰⁸⁸ *S v Xehemia Tjijo*. High Court of Namibia, 4/9/91 (unreported).

¹⁰⁸⁹ Cf Para 16 of *State v Tcoeib*.

¹⁰⁹⁰ See Para 17.

Next, His Honor briefly quotes from a 1976 US Supreme Court decision¹⁰⁹¹ in which Justice Stewart held: “the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”¹⁰⁹² The Chief Justice bolsters his argument that life imprisonment and the death penalty are not the same and narrows in on the impact of dignity considerations for the constitutionality of life imprisonment. Following a brief reference to what is permissible in “civilised countries,” His Honor moves on to the gravity of life imprisonment by way of a decision by the European Court of Human Rights,¹⁰⁹³ which, surprisingly, is referred to as “the Court.” Following a quote from the ECtHR¹⁰⁹⁴ His Honor concedes that justifications are necessary given the severity of life imprisonment.¹⁰⁹⁵ Referring to the culture of Namibia and its humane values, the Chief Justice holds that the Namibian Constitution “eloquently portrays the vision of a caring and compassionate democracy determined to liberate itself from the cruelty, the repression, the pain and the shame of its racist and colonial past,”¹⁰⁹⁶ with due references in a footnote.¹⁰⁹⁷

¹⁰⁹¹ *Woodson v North Carolina* 428 U.S. 280.

¹⁰⁹² *Ibid*, at 305, cited Para 17, *S v Tcoeib*.

¹⁰⁹³ *Thynne, Wilson and Gunnell v United Kingdom*, (1990) ECHR 29, (1990) 13 E.H.R.R. 666.

¹⁰⁹⁴ "Life sentences are imposed in circumstances where the offence is so grave that even if there is little risk of repetition it merits such a severe, condign sentence and life sentences are also imposed where the public require protection and must have protection even though the gravity of the offence may not be so serious because there is a very real risk or repetition..."; at 669.

¹⁰⁹⁵ *Mahomed* observes, among others:

“But, however relevant such considerations may be, there is no escape from the conclusion that an order deliberately incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilized community and can therefore only be upheld if it is demonstrably justified.”, see Para 20.

¹⁰⁹⁶ *S v Tcoeib*, Para 20.

¹⁰⁹⁷ Footnote to Para 20 reads: *S v Acheson* 1991 (2) SA S05 (Nm) at S13 A-C; *Government of the Republic of Namibia and Another v Cultura 2000 end Another* 1994(1) SA 407 (NmS) at 411C-412D. No evidential enquiry is necessary to identify the content and impact of such constitutional values. The value judgment involved is made by an examination of the aspirations, norms, expectations and sensitivities of the Namibian people as they are expressed in the Constitution itself and in their national institutions. Cf the remarks of O'Linn J in the application for leave to appeal in the present matter.

Discussing dignity and worth, His Honor refers to the German Federal Constitutional Court and its life-imprisonment case.¹⁰⁹⁸ The reference in the footnote is an almost unintelligible – 45 BverfGE157 – adaptation to common law citation rules of what should be BVerfGE 45, 187. The reference is derived from an article in a public law journal, which His Honor acknowledges with regard to the – necessary – translation of the quote:¹⁰⁹⁹ “the essence of human dignity is attacked if the prisoner, notwithstanding his personal development, must abandon any hope of ever regaining his freedom.”¹¹⁰⁰ After a further substantial quote from the judgment of the Federal Constitutional Court of Germany regarding the importance of re-socialisation efforts to balance out the negative impact of life imprisonment, His Honor concludes that if a life prison sentence in Namibia essentially means being abandoned for the rest of his or her life, it is unconstitutional.¹¹⁰¹ Walking back to the provisions in Namibian law that call for rehabilitation efforts, His Honor discusses the central provisions of the Namibian Prison Act and their compliance with the country’s constitution.

In the next paragraph, the Chief Justice addresses a question that still “nags” him,¹¹⁰² namely ensuring that the statutory mechanisms have to provide prisoners with life-long sentences with a viable expectation of a dignified future. His Honor goes on to “concede” that leaving the fate of the prisoner in the hands of a prison authority is risky, given the possibilities of the prison authority to react to the likely happenstance mood of a prisoner.¹¹⁰³ *Mahomed* points out that this concern “dominated the thinking of the German Federal Court”¹¹⁰⁴ in the decision referred earlier. His Honor outlines that the discretion is left to the authorities and that their good judgment needs to be trusted. He alludes to the power disparities in the prison system, observing:

“Every prisoner, however, dastard be the crime he or she has committed, is entitled to be treated lawfully and fairly and every official entrusted with the

¹⁰⁹⁸ BVerfGE 45, 187 - Lebenslange Freiheitsstrafe, 21 June 1977.

¹⁰⁹⁹ See Dirk van Zyl Smit, *Is Life Imprisonment Constitutional? The German Experience*, Public Law 1992, 263; note that the author published a number of articles about life imprisonment in South(ern) Africa at the time.

¹¹⁰⁰ BVerfGE 45, 187 at 4. a), cited in *S v Tcoeib*, at 21.

¹¹⁰¹ *S v Tcoeib*, Para 22.

¹¹⁰² Compare opening phrase of Para 24, *S v Tcoeib*: „the nagging question still remains ...“

¹¹⁰³ *S v Tcoeib*, Para 24.

¹¹⁰⁴ *S v Tcoeib* Para 25.

administration of the Prisons Act, however eminent be his or her office, is obliged, [by the Constitution], to act fairly and reasonably.”¹¹⁰⁵

Reflecting further on the various aspects of life imprisonment, the balancing act between the punitive necessities and the belief that society needs to be protected. In discussing the ongoing debate by “some jurists in Europe”, His Honor turns to the stance taken by the ECtHR. With reference two decisions by the Court,¹¹⁰⁶ *Mahomed* cites Article 5 (4) ECHR¹¹⁰⁷ and the findings on the question of the punitive component of a sentence expiring in the course of a life imprisonment. After discussing the “interesting questions” that arise from the approach taken by the ECtHR at considerable length – two paragraphs, the Chief Justice concludes that in the present case it would be unnecessary to “deal with any of these complexities.”¹¹⁰⁸ Stopping short of a summary, one of the final paragraphs of the judgment reads as follows:

“Suffice it for me to say that if and when issues are properly raised in the future, they will have to be addressed by having regard to the international jurisprudence but ultimately, by the proper interpretation of the relevant provisions of the Namibian Constitution and the applicable statutes to which I have referred.”¹¹⁰⁹

Chief Justice *Mahomed*'s usage of foreign citations in this case seems to follow the basic tenants of comparative law: life imprisonment is a legally, morally, and politically “weighty” issue. Interpreting the constitution on such an issue is a delicate task, which involves not only probing questions on the limits of values enshrined in the country's foundational text but also puts the country's highest court into the role of providing guidance on fragile ground. How to deal with persons who have committed particularly grievous crimes?

¹¹⁰⁵ *S v Tcoeib* Para 25.

¹¹⁰⁶ *Weeks v United Kingdom* (1987) 10 EHRR 293 and *Thynne, Wilson and Gunnell v United Kingdom*, (1990) ECHR 29, (1990) 13 E.H.R.R. 666.

¹¹⁰⁷ For ease of reference Article 5 (4) ECHR reads: „Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.“

¹¹⁰⁸ *S v Tcoeib*, Para 29.

¹¹⁰⁹ *S v Tcoeib*, Para 30.

In guiding a society that – in His Honors words – is “determined to liberate itself from the cruelty, the repression, the pain and the shame of its racist and colonial past,”¹¹¹⁰ the Chief Justice looks to other “civilised nations.” The choice of Germany is not entirely surprising, given that the South African Constitutional Court had so famously discussed that particular example in its decision on the constitutionality of the death penalty.¹¹¹¹ While, as mentioned earlier, the discussion by the South African Constitutional Court has been criticized for its usage of secondary sources,¹¹¹² it provides helpful “guidance” – the trait of comparative material so frequently heralded.¹¹¹³ Chief Justice *Mahomed* mentions that judgment briefly and has obviously read it but his source for the references used is a different one, he turns to a Dutch-British professor who provides both a translation of the German Federal Constitutional Court’s decision and an – obviously – helpful discussion thereof.¹¹¹⁴ Interestingly, an earlier discussion of this important judgment seems to have gone unnoticed.¹¹¹⁵ *Mahomed* quotes the judgment with a citation from the text as well as the case number, the latter may or may not have been provided incorrectly or warped by technical issues in the process of electronic transfer.¹¹¹⁶

In his discussion, which is clearly linked to the foreign sources – both the German Federal Constitutional Court and the ECtHR – the Chief Justices provides summary of the main arguments and points to distinctions between the cases as well as the general challenges faced in Namibia versus Europe: here Germany and Great Britain. What is interesting to see is that His Honor uses the judgment to carve out the way in which he believes the constitutional requirements point with regard to treating prisoners with dignity and establishing a prison environment that provides a “future” for the inmates. In so many words

¹¹¹⁰ See *above*, *S v Tcoeb*, Para 20.

¹¹¹¹ Compare, *S v Makwanyane*, see also the criticism of the decisions by Markesinis.

¹¹¹² *S v Makwanyane and Another*, see *above*.

¹¹¹³ See on „guidance,“ *above*.

¹¹¹⁴ See Dirk van Zyl Smit, *Is Life Imprisonment Constitutional? The German Experience*, Public Law 1992, 263 as cited by His Honor in *S v Tcoeb*, Para 20.

¹¹¹⁵ See K.C. Horton, *Life Imprisonment and Pardons in the German Federal Republic*, 29 *The International and Comparative Law Quarterly* (1980), 530.

¹¹¹⁶ See on „incorrect“ case number, *above*.

the Chief Justice calls for a prison system that trumps re-integration over retaliation.¹¹¹⁷ While Mahomed does nod to “international jurisprudence”,¹¹¹⁸ it is his reflection on the judgments from Karlsruhe and Strasbourg that provides the substance of arguments. The independence of thought and argument is clearly displayed, while the sources of inspiration are equally transparent and easy to follow. The style is far more convincing than that of his predecessor, Chief Justice *Berker* in an earlier decision on corporal punishment.¹¹¹⁹ There, a listing of pertinent provisions against corporal punishment is followed by a brief reference to “impressive judicial consensus”, followed by a trail of case citations.¹¹²⁰ In comparison, there is substantially less discussion provided, reflecting the foreign sources and their application to Namibia.

The utilization of foreign citations in *S v Tcoelib* clearly falls into the category of a judgment where “inspiration” or “guidance” is sought on a delicate issue, seeking to bolster the legitimacy of the judgment. It also proves that foreign citations are invoked for judgments that have significance, here both legally and politically. Also, the use of foreign citations in comparatively new countries or legal systems in transition can be applied here: Namibia gained independence from South Africa in 1990.

While Chief Justice *Mahomed* does not employ a vast amount of judgments, it is certainly a good variety: neighboring South Africa, with which Namibia obviously shares a lot of ties, the example from Germany as well as the cases of the ECtHR examples of societal model, which the Chief Justice sees as attainable inspirational models. The quotations used are helpful in underscoring points the Chief Justice makes, they seem to provide the material to bring out the nuances and delicacies of the life-imprisonment issue under discussion.

¹¹¹⁷ It would go too far to bring the important debate over the pros and cons of reintegration and confinement into the fold here.

¹¹¹⁸ See Para 30 *S v Tcoelib*, *above*.

¹¹¹⁹ Cf *Attorney General in Re: Corporal Punishment*, Supreme Court of Namibia, 5 April 1991.

¹¹²⁰ Compare p 22, *Attorney General in Re: Corporal Punishment*, Supreme Court of Namibia, 5 April 1991: “There is an impressive judicial consensus concerning most of these general objections. (*S v Ncube & Others*, (supra) at p 722 A to E; *Tyrer v United Kingdom* (1978) 2 EHRR, 1 (paragraph 32 and 33 of the judgment;); *S v Petrus and another* (supra); *S v A Juvenile* 1990(4)SA151(ZSC); sy *Kumalo and Other*, 1965(4) SA 565 (N) at 574; *S v Masondo and Another*, 1969(1) PH, H58 (N) ; *S v Motsoesoana*, 1986(3) SA 350 (N) at 352D to 354E and 358D to F; *S v Ruiters and Others*, 1975(3) SA 526 (C) at 530 531.”

b. The next appearance:

The *S v Tcoelib* case appears five years later in a judgment by the South African Constitutional Court in *Niemand v S*.¹¹²¹ Mr. *Niemand* had been declared a “habitual criminal” after a series of offences, the last criminal act having taken place while he was on parole. The question put to the Constitutional Court was whether it was constitutional for a Parole Board rather than a Court to decide the imprisonment for a person for at least seven years. In his discussion, Justice *Madala* walks through the pertinent provisions in South African law and cites a number of judgments from South African courts, including obviously the Constitutional Court. The aforementioned case related to the constitutionality of the death penalty, *S v Makwanyane*¹¹²² is invoked twice.

The only non-South African reference in the *Niemand* case is *S v Tcoelib*. Justice *Madala*:

The effect of an indeterminate sentence on a detained person’s right to dignity was eloquently expressed by Mahomed CJ in *S v Tcoelib*, albeit in the context of a life sentence:

It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and the heart of the prisoner is much too faint and much too unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded.¹¹²³

In the next sentence His Honor contends that there are repeated offenders who make “themselves a menace to society,” concluding that imprisonment with a view to rehabilitation should be the aim. There is no further mention of the Namibian judgment and no context other than the caveat that the case related to life-imprisonment provided.

The citation that Justice *Madala* espoused here is taken straight from Chief Justice *Mahomed*’s discussion of the German Federal Constitutional Court’s decision. Wedged between the above-mentioned¹¹²⁴ paragraph where the Chief Justice discusses the pertinent Namibian regulations and reflects on the German Constitutional Court’s ruling, His Honor

¹¹²¹ *Willem Hendrik Niemand v The State*, CCT 28/00, 8 October 2001.

¹¹²² See *above*.

¹¹²³ *Niemand v State*, Para 24; footnotes omitted.

¹¹²⁴ Compare, *above*.

muses about the “residue of dignity” as cited by Justice *Madala*. The fact that the citation refers to the Namibian context as well as the fact that it is taken straight out of a discussion of a ruling from far away Germany go unmentioned and therewith unnoticed.

While the case citation is provided and a quote is incorporated, there is little else that Justice *Madala* provides: no particular reason – other than the eloquence of the statement – in terms of inspiration or impact. The web surrounding the quote, namely the backdrop of the German decision and possibly also the decisions by the ECtHR, let alone South Africa’s very own *S v Makwanyane* decision, is cut out entirely. One cannot help but be reminded of *Saunders’s*¹¹²⁵ observation mentioned earlier¹¹²⁶ on the failure to refer as an opportunity lost. Providing some of the discussion by Chief Justice *Mahomed* would have certainly bolstered the argument further and allowed for some clarity as to why a foreign citation was incorporated. The way the quote from *S v Tcoelib* is used here, it has more a ring of abuse, i.e., the former quasi-colony being incorporated as if it still were part of the country. The non-mention of even the country let alone the hierarchical level of the decision – Supreme Court – would seem to sustain that impression. Overall, the mention in *Niemand v S* thus amounts not too much more but random plunder, seemingly prepping up but stopping short of an actual utilization.

c. The Under-acknowledged, yet Frequently Invoked Proportionality Test

In 1986 the Supreme Court of Canada set out “the famous Oakes test,” as contemporary awareness benchmark Wikipedia states.¹¹²⁷ David Edwin Oakes charged with violations of a Canadian narcotics statute, challenged the burden of proof for the accused, i.e. a potential violation of the presumption of innocence in according with the 1982 Canadian Charter of Rights and Freedoms, Section 11.¹¹²⁸ The Supreme Court, Chief Justice *Dickson* providing the reasoning, discussed the potential limits of non-absolute rights in a democratic society. The Supreme Court concluded a violation of the presumption of innocence if a provision

¹¹²⁵ Saunders, Misuse.

¹¹²⁶ Compare, *above*.

¹¹²⁷ See http://en.wikipedia.org/wiki/R._v._Oakes (last visited 25 September, 2012).

¹¹²⁸ *R v Oakes*, (1986) 1 S.C.R. 103, 28 February 1986.

“requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question.”¹¹²⁹

In his reasoning, the Chief Justice works his way through Canadian Charter jurisprudence¹¹³⁰ towards case law of the US Supreme Court¹¹³¹ on presumption of innocence. Following the partial citation of the pertinent provision of the ECHR,¹¹³² His Honour outlines some of the ECtHR case law.¹¹³³ “This review of the authorities lays the groundwork for formulating some general conclusions regarding reverse onus provisions and the presumption of innocence,”¹¹³⁴ he stipulates. Inching closer to the question of whether the burden of proof is “reasonable” and demonstrably justified in a free and democratic society – as the Canadian Charter of Rights and Freedoms requires¹¹³⁵ – His Honour invokes a landmark decision rendered a year earlier, which touches on a plethora of constitutional questions,¹¹³⁶ setting out two criteria for limitations in a free and democratic society: firstly, the objective must “relate to concerns, which are pressing and substantial” in such circumstances, and, secondly, the means chosen must be proven to be reasonable and justified.¹¹³⁷ Next, His Honour sets out “three important components of a proportionality test.”¹¹³⁸

¹¹²⁹ Summary of *R v Oakes*.

¹¹³⁰ On the influence of Canadian Charter jurisprudence see, *above*.

¹¹³¹ Cf Para 50 *R v Oakes*.

¹¹³² For ease of reference, Article 6 (2) ECHR, which reads: Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

¹¹³³ Cf Para 54 *R v Oakes*.

¹¹³⁴ Para 56 *R v Oakes*.

¹¹³⁵ Section 11 (d) Canadian Charter of Rights and Freedoms.

¹¹³⁶ *R. v. Big M Drug Mart Ltd* [1985] 1 S.C.R. 295.

¹¹³⁷ Para 69 & 70 *R v Oakes*, with references to *R v Big M Drug Mart Ltd*:

“To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom”: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives, which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns, which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question.¹¹³⁹

Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".¹¹⁴⁰

The proportionality test, obviously based on the provisions of the Canadian Charter of Rights and Freedoms and recent jurisprudence of the Court, which is essentially based on arguments grounded in Canadian jurisprudence,¹¹⁴¹ went on a globe-spanning tour.

It is neither feasible nor attainable to trace the many citations of the Oakes proportionality test. The examples provided are consequently chosen at random and cited to further the discussion of models of utilization of foreign citations. In *Government of the Republic of South Africa v. The Sunday Times Newspaper*¹¹⁴² the proportionality test for reasonable justification was adopted by Justice *Joffe* in South Africa. Subsequently, the test was also applied by Chief Justice *Gubbay* of the Supreme Court of Zimbabwe, who adapted the wording of Justice *Dickson*.

In effect the Court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:

- (i) the legislative objective is sufficiently important to justify limiting a fundamental right;

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test."

¹¹³⁸ *Ibid.*

¹¹³⁹ Reference to *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352.

¹¹⁴⁰ Para 70 *R v Oakes*.

¹¹⁴¹ See *R. v. Big M Drug Mart Ltd.*

¹¹⁴² [1995] 1 L.R.C. 168.

- (ii) the measures designed to meet the legislative objective are rationally connected to it; and
- (iii) the means used impair the right or freedom no more than is necessary to accomplish the objective.

The Chief Justice took due note of the Canadian origin of the test, stating immediately in the next paragraph: “*See R v Oakes* (1986) 26 DLR (4th) 200 (SCC) at 227 [...] (a decision of the Supreme Court of Canada)”.¹¹⁴³ Notably, the Supreme Court of Zimbabwe immediately reapplied the test.¹¹⁴⁴ Lord *Clyde*, in a decision of the House of Lords a few years later, points out the fact that their Lordships had been referred to three judgments in which the reasonableness test was invoked. His Lordship duly cites the South African and the two Zimbabwean decisions, noting that Chief Justice *Gubbay* had drawn on South African and Canadian jurisprudence.¹¹⁴⁵ Other than the brief reference to “Canadian jurisprudence” there is no trace of the *Oakes* test such as citation of text or the case name.

In subsequent judgments,¹¹⁴⁶ their Lordships have restated the discussion about proportionality as follows:

The European Court has not identified a consistent or uniform set of principles when considering the doctrine of proportionality: see Richard Clayton, *Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle* [2001] EHRLR 504, 510. But there is a general international understanding as to the matters which should be considered where a question is raised as to whether an interference with a fundamental right is proportionate. These matters were identified in the Privy Council case of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 by Lord Clyde. He adopted the three stage test which is to be found in the analysis of Gubbay CJ in *Nyambirai v National Social Security Authority* [1996] 1 LRC 64, where he drew on jurisprudence from South Africa and Canada: see also *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532, 547A-B per Lord Steyn. The first is whether the objective, which is sought to be achieved is sufficiently important to justify limiting the fundamental right.

¹¹⁴³ *Id.*, at 647

¹¹⁴⁴ *Retrofit (Pvt.) Ltd. v. Posts and Telecommunications Corporation*, [1996] 4 L.R.C. 489

¹¹⁴⁵ *de Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others* (Antigua and Barbuda) [1998] UKPC 20; [1999] 1 A.C. 69, at 72.

¹¹⁴⁶ E.g., *R v Shayler* (On Appeal from the Court of Appeal), [2002] UKHL 11, 21 March 2002 as well as *AS (Somalia) (FC) and another v Secretary of State for the Home Department*, [2009] UKHL 32, 17 June 2009.

The second is whether the means chosen to limit that right are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible. In *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, para 26, Lord Bingham of Cornhill summed the matter up succinctly when he said that the limitation or interference must be directed to a legitimate purpose and must be proportionate in scope and effect.¹¹⁴⁷

There is a reference to the Zimbabwean case, there are numerous references to the jurisprudence of their Lordships but the origins of the proportionality test in Canada are only mentioned as a “side kick.” The derivation of the principle is hidden in the citations made, chiefly in the House of Lords’ judgment *Regina v Secretary of State for the Home Department Ex Parte Daly*,¹¹⁴⁸ where their Lordships refer to the “approved and adopted” three-pronged test per their findings in *Regina v A (No 2)*¹¹⁴⁹ and *Equal Opportunity Commission v Director of Education*¹¹⁵⁰ where it was held:

“[T]he analysis originally made by *Gubbay* CJ comes from a distillation of South African, Canadian and Zimbabwean authorities. It has been adopted by the Privy Council and the House of Lords. It appears entirely complementary to the analysis earlier made in our own courts.”¹¹⁵¹

The punctuated style, down to the bare necessities and straight forward or overly assured – depending on perspective and personal stylistic preferences – appears to be commonplace. Looking at the elaboration of the principle of legality in the aforementioned case of two Somalis,¹¹⁵² *Lord Phillips of Worth Matravers* spells out three questions, namely is there a legal basis for a restriction, is the rule sufficiently accessible to the person affected by the restriction, and, thirdly, whether it was potentially applied arbitrarily. His Lordship goes on

¹¹⁴⁷ Para 18, *AS (Somalia) (FC) and another v Secretary of State for the Home Department*, [2009] UKHL 32; see the almost identical wording – save the very last sentence and one small omission – seven years earlier in *R v Shayler*, Para 60 & 61.

¹¹⁴⁸ [2001] UKHL 26.

¹¹⁴⁹ [2001] UKHL 25, [2002] 1 A.C. 45.

¹¹⁵⁰ [2001] 2 HKLRD 690.

¹¹⁵¹ [2001] 2 HKLRD 690, 737.

¹¹⁵² *AS (Somalia) (FC) and another v Secretary of State for the Home Department*, [2009] UKHL 32, see *above*.

to state that the principles are derived from a string of ECtHR judgments, mentioning four as an example.¹¹⁵³

d. A Different approach

The Constitutional Court of Uganda in the case of *Obbo and Mwenda v Attorney General*¹¹⁵⁴ discussed potential limits of freedom of speech with regard to two journalists who had been imprisoned on allegations of publishing false news about Ugandan President *Kabila*. Justice *Twinomujuni* lays out the constitutional and statutory provisions that apply and are under dispute respectively. Stating the challenge of some of the fundamental rights and freedoms of the Ugandan Constitution being non-absolute, His Honour sets out the history of some of the pertinent provisions. With regard to the punishment of false news, Justice *Twinomujuni* reaches far into the trove of history by pointing to the 1275 Statute of Westminster, which introduced the offence of *De Scandalis Magnatum* or *Scandalum Magnatum*.¹¹⁵⁵ His Honour immediately reveals the reason for the reference and the source of the text: a 1992 judgment by the Supreme Court of Canada.¹¹⁵⁶ The provision was enacted in Uganda's Penal Code and subsequently inherited without review upon Uganda's independence.¹¹⁵⁷ In turning to the question whether the said provision contradicts the 1995 Ugandan Constitution, Justice *Twinomujuni* observes that a lot of time has passed since gaining independence in 1962. Possibly in an ironic twist, His Honour invokes an English proverb for time lapse, namely, the passing of a lot of water under the bridge, to make that observation. Immediately thereafter, His Honour states: "the country has witnessed the comings and goings of brutal, repressive and tyrannical dictators and regimes."¹¹⁵⁸ Referring to the violation of fundamental rights during that period, Justice *Twinomujuni* implores the intentions of the

¹¹⁵³ Cf Para 17, *AS (Somalia) (FC) and another v Secretary of State for the Home Department*, [2009] UKHL 32.

¹¹⁵⁴ *Charles Onyango Obbo and Andrew Mujuni Mwenda v Attorney General*, Case 15/1997, 21 July 2000.

¹¹⁵⁵ *Obbo and another v Attorney General*, p 7.

¹¹⁵⁶ *Zundes v The Queen and Others* [1992] 10 CRR (20) 193 Canada, as cited in *Obbo and another v Attorney General*, p 8.

¹¹⁵⁷ *Ibid*.

¹¹⁵⁸ *Ibid*, p 10.

Ugandan Constitution and quotes from its preamble, which invokes the principles of peace, equality, democracy, freedom, social justice and progress.¹¹⁵⁹

Next, His Honour sets out the applicable general legal principles. Immediately, he turns to a case in which the Ugandan Constitutional Court set out the principles of constitutional interpretation.¹¹⁶⁰ Justice *Twinomujuni* points out that he restated most of both cases in dicta he wrote and cites those.¹¹⁶¹ His Honour lays out the constitutional principles of interpretation and goes on to state: “In the application of these principles of constitutional construction, I take heed of two other pieces of advice drawn from other, but similar jurisdictions, which I find highly persuasive,”¹¹⁶² adding that those are also cited in the aforementioned judgments.¹¹⁶³ Justice *Twinomujuni* goes on to quote from a judgment by the Supreme Court of South Africa,¹¹⁶⁴ which states:

“When interpreting the Constitution and more particularly the bill of rights it has to be done against the backdrop of our chequered and repressive history in the human rights field. The state by legislative and administrative means curtailed ... the human rights of most of its citizens in many fields while the courts looked on powerless. It is this malpractice, which the bill seeks to combat. It does so laying out the ground rules for state action, which may want to interfere with the lives of its citizens. There is now a thresh hold which the state may not cross. The Courts guard that door.”¹¹⁶⁵

¹¹⁵⁹ Preamble of Ugandan Constitution as cited by Justice *Twinomujuni*, Ibid, p 10.

¹¹⁶⁰ Reference is made of *Major General David Tinyefuza v Attorney General*, 1/1997 (unreported).

¹¹⁶¹ Reference is made to *Zachary Olum and Another v Attorney General*, 6/1999 (unreported) and *Dr. James Rwanyarare and Another v Attorney General*, 5/1999 (unreported).

¹¹⁶² *Obbo and another v Attorney General*, p 12.

¹¹⁶³ Those would be *Zachary Olum and Another v Attorney General*, 6/1999 (unreported) and *Dr. James Rwanyarare and Another v Attorney General*, 5/1999 (unreported).

¹¹⁶⁴ *De Clerk & Suc v Du Plassis & Another* [1994] 6 BLR 124, at 128 f; the case was later referred to the Constitutional Court, *Du Plessis and Others v De Klerk and Another* (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658;; 2011 (7) BCLR 651 (CC) (15 May 1996), which duly notes part of the quote in a citation, p 22 at footnote 41.

¹¹⁶⁵ Quote from *De Clerk* as cited by Justice *Twinomujuni*, p 12; emphasis added by Justice *Twinomujuni*.

Immediately, His Honour goes on to quote from *Trop (sic!) v Dulles*¹¹⁶⁶ at length, including the citation on provisions of the Constitution as “vital, living principles that authorise and limit government powers in our nation.”¹¹⁶⁷ Justice *Twinomujuni* emphasizes that he must bear “these principles of constitutional interpretation”¹¹⁶⁸ in mind in balancing the right of the individual and the needs of society. Immediately turning to the burden of proof, Justice *Twinomujuni* quickly refers to “other Commonwealth jurisdictions, which have operated written constitutions for much longer periods”¹¹⁶⁹ and their establishment of the burden of proof. With regard to possible restrictions, His Honour cites the *Oakes* test¹¹⁷⁰ with the case name. Instantaneously he adds a citation from the High Court of Zimbabwe,¹¹⁷¹ which places the onus of proof on the State.

In the next paragraph, Justice *Twinomujuni* returns to the 1992 judgment of the Canadian Supreme Court, *Zundel v The Queen*,¹¹⁷² stating that it deals with a comparable situation. His Honour lists the Canadian statutory provisions and shows how they equate with Ugandan regulations and immediately cites twice from a decision in the Supreme Court of Ontario,¹¹⁷³ on the government’s obligation to proving the validity of limitations it imposes. Justice *Twinomujuni* adds that Ugandan courts have recently upheld said principle.¹¹⁷⁴ Concluding this part of the judgment, His Honour holds that “these principles are now firmly entrenched” in Ugandan law and those enacting laws, which restrict the rights and freedoms set out in the Ugandan Constitution had to bear the onus of proof, adding: “the burden is quite high.”¹¹⁷⁵

¹¹⁶⁶ *Trop v Dulles* 356 U.S. 86 (1958).

¹¹⁶⁷ *Trop v Dulles*, quoted by Justice *Twinomujuni*.

¹¹⁶⁸ *Obbo and Another v Attorney General*, p 14.

¹¹⁶⁹ *Ibid*.

¹¹⁷⁰ *See above*.

¹¹⁷¹ *Patel v Attorney General* (1963) ZLR 99.

¹¹⁷² *See, above*.

¹¹⁷³ *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1983), 147 D.L.R. (3d) 58, 41 O.R. (2d) 583 (Div. Ct.), aff’d. 45 O.R. (2d) 80n (C.A.).

¹¹⁷⁴ Reference is made to *Major General Tinyefuza v Attorney General, Obbo and Another v Attorney General*, p 17.

¹¹⁷⁵ *Obbo and Another v Attorney General*, p 17.

Turning to the question whether the decision to prosecute Obbo and Mwenda was made consistent with the Constitution, Justice *Twinomujuni* again provides a blend of Ugandan provisions and citations from foreign courts, this time the Supreme Court of India and again the Supreme Court of Canada¹¹⁷⁶ all of which are focused on the purpose of freedom of speech in a democracy. Finally, His Honour cites the “leading American philosopher” *Meiklejohn*, quoting from “Political Freedom”¹¹⁷⁷: “conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant.”¹¹⁷⁸ Justice *Twinomujuni* ends this part of the judgment stating:

“I have taken the liberty to quote experts on freedom of expression at length to demonstrate its importance in a free and democratic society and to show to what extent it must be enjoyed if it is to be meaningful. It follows therefore that any one seeking to restrict that freedom must be prepared to show that special and clear circumstances do exist that justify such restriction of the freedom. The task is not insurmountable but it is quite a demanding one.”¹¹⁷⁹

The approach taken by Justice *Twinomujuni* shows an example of transparent citation of foreign sources and therewith their utilization as part of developing a judgment. There is hardly any justification for why those cases were selected and there is almost no background provided on the cases used. The final paragraph from the judgment, which is provided above, sums things up by stating that the importance of freedom of speech is to be underlined through the cases cited. Thus, the focus is not so much a legal problem analyzed but rather a value eloquently stated by others. Justice *Twinomujuni* provides evidence of the thoughts he has on and the vision he has for freedom of speech in Uganda through descriptions and explanations that reflect his viewpoint. Given that the purpose here is more to discuss the value of a right in the larger context of a democratic society, the fact that the foreign citations seem more lined up on a string rather than woven into the national

¹¹⁷⁶ Reference is made to *Rangarajam Ram v Jigjiram* 1990 LRC (Const) 412, *Edmonton Journal v Alberta* [1989] 45 CRR 1, and *Manika Ghandi v Union of India* [1978] 2 SCR 621.

¹¹⁷⁷ Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960).

¹¹⁷⁸ Meiklejohn, 17, as quoted in *Obbo and Another v Attorney General*, p 23 f.

¹¹⁷⁹ *Obbo and Another v Attorney General*, p 24.

context, seems to be far less of an encroachment of judicial craftsmanship than if it were discussing an intricate legal detail. The judgment of Justice *Twinomujuni* also highlights the challenge of using dicta of lower courts, here: Supreme Court of South Africa.¹¹⁸⁰

f. Central Europe

While the courts within the Commonwealth seem to easily embrace foreign sources outside their nations,¹¹⁸¹ it is a good deal harder to find traces of this happening in the reverse. The German Federal Constitutional Court cites an awe-inspiring number of sources that makes for hefty citation analysis,¹¹⁸² there are two main sources: the ECtHR and academic writing. Frequently, the German Constitutional Court will combine the two – tying a judgment of the ECtHR with literature about that verdict or the legal problem under scrutiny in the case cited. One such example is the following, concerning the constitutionality of criminalizing the preparation of data surveillance:¹¹⁸³

Furthermore the additional requirement of Article 5 para 2 lit e ECHR of the other lawfulness of deprivation of liberty (compare the recent comprehensive judgment of the ECtHR of 9 July 2009, Nr. 11364/03 *Mooren J., Germany*, Para 72) has to be taken into account, which aims at avoiding arbitrariness and thus particularly requires the foreseeability of the deprivation of liberty. The requisites of the prohibition of arbitrariness depend on the nature of the deprivation of liberty and the pertinent ground of justification within the system of Article 5 Para 1 ECHR, respectively (compare ECtHR, *ibid*, Para 76 f, 29 January 2008, Nr. 13229/03, *United Kingdom, NVwZ 2009*, p 375, 377, Para 67 ff.)¹¹⁸⁴

As stated above,¹¹⁸⁵ the structural linkages¹¹⁸⁶ intrinsic to the system of the Council of Europe make for a scenario, which does not necessarily fit into the notion that foreign citations are utilized outside a systemic paradigm. The example from Germany shows very

¹¹⁸⁰ Reference to *Du Plessis*, *above*.

¹¹⁸¹ Compare, e.g., usage of US Supreme Court and German Federal Constitutional Court.

¹¹⁸² See on citation analysis, McCrudden, 531 f. references there.

¹¹⁸³ BVerfG, 2 BvR 2365/09 4.5.2011, Absatz-Nr. 154.

¹¹⁸⁴ Translation by the author.

¹¹⁸⁵ See excursus on ECtHR, *above*.

¹¹⁸⁶ See Oeter, *above*.

clearly though, how a „proper“ citation of material should work: it seems from the quantity and quality of citations and references made that there is almost nothing left to hide and that copyright regulations as well as citation rules have been taken to heart and are followed meticulously. Another such example can be found in neighbouring Switzerland, where the Swiss Federal Court discussed an administrative complaint pertaining to an alleged violation of the right to life and liberty:¹¹⁸⁷

a) According to recent opinion, fundamental rights do not only have a function to ward off adverse effects by the state but also constitute a state's obligation to protect against dangers caused by third parties. This opinion was primarily developed in Germany (seminal BVerfGE 39 1 (41); 46 160 (164); 49 89 (141 f.); GEORG HERMES, *Das Grundrecht auf Schutz von Leben und Gesundheit*, Heidelberg 1987, passim; HANS H. KLEIN, *Die grundrechtliche Schutzpflicht*, DVBl 1994 S. 489-497; DIETRICH MURSWIEK, *Die staatliche Verantwortung für die Risiken der Technik*, Berlin 1985). It is also held by Swiss academia and jurisprudence (**BGE 119 Ia 28** E. 2 S. 31; ULRICH HÄFELIN/WALTER HALLER, *Schweizerisches Bundesstaatsrecht*, 4. Aufl., Zürich 1998, S. 377 Rz. 1095; JÖRG PAUL MÜLLER, *Grundrechte in der Schweiz*, 3. Aufl., Bern 1999, S. 18 f., 28; HANS REINHARD, *Allgemeines Polizeirecht*, Diss. Bern 1993, S. 78; PETER SALADIN, *Kernenergie und schweizerische Staatsordnung*, Fs. Huber, Bern 1981, S. 297 ff., 311 ff.; MARTIN SCHUBARTH, *Risikogesellschaft oder Opfergesellschaft, Zur Realität des Rechts auf Leben in der Schweiz und in der Europäischen Union*, Fs. Hangartner, S-t.Gallen/Lachen 1998, S. 1055-1064, passim; SEILER, a.a.O., S. 69 ff.; BEATRICE WEBER-DÜRLER, *Der Grundrechtseingriff*, VVDStRL 57 S. 57 ff., 77 ff.; compare also **Art. 35 BV** 20. November 1996 on a new Federal Constitution, BBl 1997 I 1ff., 191 ff.). Also **Art. 2 ECHR** obliges Member States to positively protect the right to life (see ECtHR 28. October 1998 i.S. OSMAN C. VEREINIGTES KÖNIGREICH, zit. in Pra 88/1999 Nr. 44 S. 254, § 115 f.; ARTHUR HAEFLIGER/FRANK SCHÜRMAN, *Die Europäische Menschenrechtskonvention und die Schweiz*, 2. Aufl., Bern 1999, S. 55 ff.). The ECtHR derived a State obligation to protect threatened fundamental rights from the right to privacy and family life (**Art. 8 EMRK**) (judgment 9. December 1994 i.S. Lopez Ostra c. Spanien, Serie A 303 C, § 51; vgl. ANDREAS KLEY-STRULLER, *Der Schutz der Umwelt durch die Europäische Menschenrechtskonvention*, EuGRZ 1995 S. 507-514).¹¹⁸⁸

¹¹⁸⁷ *Schweizerisches Bundesgericht* 126 II 300, 3. Mai 2000 i.S. Ruth Gonseth gegen Stadtrat Liestal, Regierungsrat und Verwaltungsgericht des Kantons Basel-Landschaft (Verwaltungsgerichtsbeschwerde).

¹¹⁸⁸ Translation by author

Similar to the German example above,¹¹⁸⁹ the Swiss Federal Court uses its structural ties with the ECtHR to reference to Strasbourg's jurisprudence. Akin to the the German style, the jurisprudence cited is linked to academic writing about the case and the underlying legal question(s). The example here is also noteworthy for clearly stating that a principle was developed elsewhere, here: Germany's stance on the state's obligations derived from the Basic Law. The judgment laying the foundation is duly referenced to but the reasons for why it is applicable across the border are not even covertly touched upon: geographic and cultural similarities plus the mutual ties of the ECHR are seemingly sufficiently self-evident. There is a sense of self in the realm of referencing to other sources that renders explanations unnecessary. It is, self evidently, a sign of the confidence that the court has of its place that the previously quote courts, such as in Namibia and Uganda, are aspiring to.

Lastly, an example from Hungary, one of the first rulings of the Constitutional Court concerning the constitutionality of capital punishment, rendered in the fall of 1990:¹¹⁹⁰

In terms of the above framework, the decision of the Constitutional Court is deliberately subjective and tied to history: even if the Constitutional Court proclaims absolute values, it reveals their meaning in the given period; and its decision, for example, in the questions of capital punishment or abortion, should not lay claim to eternity. The Constitutional Court's image of man, choice of philosophy and conception of a judge's duty are all subjective features. That is why it is desirable for the Constitutional Court to consider the contemporary international approach to capital punishment as an objective criterion; the evaluation of this subject already belongs to the Constitutional Court's realm of permissible political engagement.

In 1972 the US Supreme Court proclaimed that all laws on capital punishment were unconstitutional and set an example of liberating effect to other countries. Since 1976, however, we have witnessed the restoration of capital punishment. On the other hand, the Council of Europe - based on the development in most of the Member States - considered the abolition of capital punishment as a general trend and in 1983 it attached a protocol on the abolition of capital punishment to the European Convention on Human Rights 1950. (Of the 22 Member States, 15 have signed and 12 have ratified this Sixth Protocol - but for example in the non-ratifying Federal Republic of Germany, there is no capital punishment.) Article 22 of the Declaration on Fundamental Rights and Fundamental Freedoms,

¹¹⁸⁹ See *above*.

¹¹⁹⁰ Decision 23 of 1990: 31 October 1990 on Capital Punishment, *East European Case Reporter of Constitutional Law* 1 (no. 2) (1994), 177.

adopted by the Council of Europe on 12 April 1989, declares the abolition of capital punishment. This made most of the European nations eliminate the compromise included in the International Covenant on Civil and Political Rights allowing capital punishment: nevertheless, this compromise was followed by the Hungarian Constitution as late as October 1989 when only the prohibition against arbitrary deprivation was included.

The Constitutional Court has good reasons to rely on our own historical situation when it increases the respect of the right to life through the abolition of capital punishment and drives back the criminal jurisdiction of the State from this area. It is more than a symbolic opposition to a political system that sacrificed human life, without restraint, for its political purposes; the abolition of capital punishment for political crimes could have been on the agenda in 1960, in the same way as the prohibition against capital punishment was a current issue in 1949 in the *Grundgesetz* of the Federal Republic of Germany. The current historical task now is to establish and bind the legislature because as a constitutional order that is interpreted and protected by the Constitutional Court, the State cannot afford to deprive someone of their life.¹¹⁹¹

The Hungarian decision, which is also discussed as an example of a newly emerged court's effort to gain legitimacy,¹¹⁹² provides a combination of various strands of comparative law: reference to international law – the ECHR and the Covenant on Civil and Political Rights respectively – is made as much as to provisions in other countries on the same issue, here: Germany. Woven into that is a reference to a decision by the US Supreme Court, which is only reflected through its holding and the year rendered. The case of *Furman v. Georgia*¹¹⁹³ as such is not mentioned, the reference to the US American court comes across largely as flagging the fact that the Hungarian court is aware of – and actually well acquainted – with the stance on the issue of capital punishment in a country that is largely seen as a model for a democratic society.

Similar to the value discussion by Justice *Twinomujuni* in the Ugandan decision,¹¹⁹⁴ the discussion of values is a red thread: here it is the lessons that the court derives from Hungary's recent past, the responsibility that it senses from recent societal developments. An element of transitional justice, of reconciliation work that borders on psychological

¹¹⁹¹ Ibid, p 18 f.

¹¹⁹² Cf Sadurski.

¹¹⁹³ 408 U.S. 238 (1972).

¹¹⁹⁴ See above.

catharsis is not to be denied. Quite possibly another element that relying on more established democracies harbors for emerging countries and their (highest) courts.

The discussion of sample cases could be continued for a while still, there are sufficient variations with twists and turns that are telling or inspiring and at occasion disturbing. The point here is to try and find models of how foreign citations could be and more importantly should be utilized. *Markesinis/Fedtke*¹¹⁹⁵ highlight an “ideal” case: *Fairchild v Glenhaven*.¹¹⁹⁶ While the authors do not provide much of an explanation for why they believe the case is ideal, a brief look at the decision, which concerns a private law matter – negligence and torts – shows the craftsmanship of a sophisticated utilization of foreign citations, a random excerpt reads:

Gardiner v Motherwell Machinery and Scrap Co Ltd [1961] 3 All ER 831, [1961] 1 WLR 1424, another Scottish case, concerned a pursuer who had worked for the defenders for a period of some three months, demolishing buildings, and had contracted dermatitis. In an action against the defenders he claimed that they should have provided him with washing facilities but had failed to do so and that their failure had caused him to suffer from dermatitis. This contention was upheld by the Lord Ordinary (Lord Kilbrandon) who awarded him damages. The defenders did not on appeal challenge the finding of breach but contended that the pursuer had failed to prove any connection between his disease and the work which he had been doing. The First Division accepted this argument and found for the defenders, a decision against which the pursuer appealed. In his leading opinion in the House, Lord Reid considered at some length the conflict of medical evidence at the trial and its treatment by the First Division, and expressed his conclusion:

‘In my opinion, when a man who has not previously suffered from a disease contracts that disease after being subjected to conditions likely to cause it, and when he shows that it starts in a way typical of disease caused by such conditions, he establishes a prima facie presumption that his disease was caused by those conditions. I think that the facts proved in this case do establish such a presumption. That presumption could be displaced in many ways. The respondents sought to show, first, that it is negated by the subsequent course of the disease and, secondly, by suggesting tinea pedis as an equally probable cause of its origin. I have found the case difficult but, on the evidence as it stands, I have come to the opinion that they have failed on both points. If the appellant’s disease and consequent loss should be attributed to the work which he was doing in the respondents’ service, it was not argued that they were not liable.’ (See [1961] 3 All ER 831 at 832–833, [1961] 1 WLR 1424 at 1429.)

¹¹⁹⁵ *Markesinis/Fedtke*.

¹¹⁹⁶ *Fairchild v Glenhaven Funeral Services Ltd and others Fox v Spousal (Midlands) Ltd Matthews v Associated Portland Cement Manufacturers (1978) Ltd and others* [2002] UKHL 22 [2002] 3 All ER 305.

Lord Cohen and Lord Guest agreed, as did Lord Hodson although with some initial hesitation. Lord Guest ([1961] 3 All ER 831 at 833, [1961] 1 WLR 1424 at 1431) described the question as a pure question of fact whether on the balance of probabilities the dermatitis had arisen from the pursuer's employment. The House would seem to have regarded the pursuer as establishing a *prime facie* case which the defenders had failed to displace.¹¹⁹⁷

Lord Bingham of Cornhill provides a textbook example of the emerging “guidelines” for, indeed, properly citing foreign sources. Granted, within the Commonwealth system the foreignness only goes so far. Elsewhere providing reasons for his *tour de horizon* of negligence caselaw, his Lordship provides a succinct summary of the case he refers to with the full case title, information about the sequencing of the judgment – “considered at some length” – as well as the varying opinions among their lordships, e.g. “with some initial hesitation.”

Ideally this provision of context, which seems to go a long way toward a constitutional-law version of “thick description,”¹¹⁹⁸ should state the reasons for the comparability or “similarity,” respectively. For obvious reasons – the case derives from Scotland – his Lordship does not dwell on cultural, legal and political context, as it is taken as similar, even though it is known that some people would think otherwise.

The citation from the Scottish case is wedged between a summary of the case as well as the discussion among their Lordships, thus providing a richly filled nutshell for the reader to understand the similarities of the underlying legal issues and the value of the citation utilized.

Overall the cases provide a good reflection of the contemporary debate over the usage of foreign citation. In one form or another everyone is doing “it.” The reasons vary greatly – increasing legitimacy, showing “off”, substantiating arguments made, seeking reassurance, looking for inspiration in a transparent fashion, providing textbook models for citations. The degree of transparency varies greatly, from hinting to a case – compare Hungary's reference to a 1974 decision – to providing background of the case and a citation. The two sorest

¹¹⁹⁷ Ibid, Para 16.

¹¹⁹⁸ See on thick description, *above*.

points of comparative usage of citations are the explanation or justification for why the cases are sought out in the first place and a proper provision of context for the foreign case, such as its basic facts and holdings. The utilization of the citations works comparatively well in most cases: the process of “weaving” the findings into the judgment is either self-evident or quite well argued, reasons are provided or the ensuing discussion shows the impact of the citation, e.g., *S v Tcoeib*.

For all the reasons stated above in “Problems and Limits of Comparative Law”¹¹⁹⁹ the paths, which foreign citations follow seem to be contained in certain systems. The structural relations – the ECtHR the strongest, to a certain extent also the Commonwealth of Nations – play a significant role in who refers to whom. Habit appears to play a significant role in this process, the “usual ways” of doing things shine through the current *modus operandi*. That said, a steady shift is underway and the increase of paths beyond the beaten tracks are emerging and are sure to be growing.¹²⁰⁰

In piecing together the puzzle of how foreign citations can best be utilized in a judgment, recourse is first taken to recommendations made by Hungarian judge Imre Vörös,¹²⁰¹ who emphasized the need to analyse the legal and socio-economic background to determine the common core and then embark on placing the foreign example into the context of the decision.¹²⁰² In placing the citation into a judgment, there needs to be a justification as to why it is used and found to be helpful or appropriate or meaningful to the discussion.¹²⁰³ It is equally important that the thrust of the case, the context, from which the citation derives is provided, to have a better sense as to why it fits into the context of the discussion. In addition to a citation-rule-compliant reference, the citation as such should be marked accordingly. The process of weaving the foreign citation into the judgment can take various forms, if it is not just used as an inspiration from which further reasoning self-evidently “flows,” a judgment should seek to accommodate the citation in the subsequent discussion.

¹¹⁹⁹ See Chapter V, *above*.

¹²⁰⁰ See also: Markesinis.

¹²⁰¹ See Vörös, Contextuality and Universality: Constitutional Borrowings on the Global Stage – The Hungarian View, 651; see also Schulze, Justice Must be Done.

¹²⁰² *Ibid*, 659.

¹²⁰³ See also Practice Direction, *above*.

From the above, the guidance or checklist for utilizing foreign citations could be sketched as follows:

- Analyse the legal and socio-economic background
- Establish the comparability/similarity
- Justify the usage of a foreign case
- Provide the thrust of the case
- Provide a proper reference in accordance with citation rules
- Cite the content of the foreign material
- Weave the foreign material into the judgment

VIII. Conclusion

There is, with “parameters” a consensus “on the relevance of foreign sources”¹²⁰⁴ and utilizing foreign sources is “unobjectionable if used properly.”¹²⁰⁵ A variety of contemporary developments, albeit questionably but generally referred to under the heading of “globalization,” are a driving force behind a growing practice. The distinct second force, certainly connected thereto, is the growing application of human rights at the national level, a welcome leap to action, particularly since the rather recent downfall of Socialism in 1989.

There are multiple caveats and a string of challenges, not least differences in language, institutional set-ups, legal history and societal differences and nuances. Their impact on the “migration” to another system varies and it thus depends on the individual case how these differences play out. Undoubtedly the awareness of practitioners, here: judges, is helpful to avoid some of those problems. Instructions such as the Practice Direction provide helpful guidance for the necessary discussion on what is “proper” and adequate. Where such sensitivity or instruction is lacking, it seems to be taken care of in the ensuing process, see, e.g., the cases where foreign material is misunderstood and still has a role as a helpful tool.

There is an undeniable political undercurrent in the discussion over using and potentially abusing foreign material, particularly foreign citations. The objection to the practice is more a reflex than a rejection, the rash reaction more than the informed argument. A plethora of historic usages contradicts the cries of impossibility. Politics are also at play in the initial momentum to embrace foreign citations: India, South Africa, and Hungary are a few examples of courts seeking to increase their infant legitimacy by way of relying on the “elders.” The elders in turn are trying to find their response to grown up children, as “wise parents do not hesitate to learn from their children.”¹²⁰⁶

Thus, we are looking at a development that has everything to do with post-colonialist scramblings: the practice “no longer arises out of subordination,”¹²⁰⁷ the “interpretative

¹²⁰⁴ Teitel, 2590.

¹²⁰⁵ Saunders, Misuse, 64.

¹²⁰⁶ Judge Calabresi and Judge L’Heureux-Dubé.

¹²⁰⁷ Lollini, Legal Argumentation, 61.

solutions are actively sought”¹²⁰⁸ as a standard mode. Consequently, the elders are challenged to find a place, realizing that to a certain degree judicial craftsmanship is a competitive exercise, within which one needs to excel.¹²⁰⁹ There is, without doubt, a rearranging of chairs within which the more established courts will sooner or later have to readjust their seating arrangement. This does not and need not mean that “sameness” and “uniformity” are paving their way in a globe-spanning fashion. It merely means that practices that have been developed in more trying circumstances, such as back then with the early US Supreme Court, are now finding their way into the halls of establishment.¹²¹⁰

Manifold questions remain open, not least the one on the methodology of comparative law and its theories. Looking at the history of the field one is less surprised, given the ruptures and trauma that have impacted the field. In that vein one may also be more forgiving to the impression that many comparatists come across as having identity issues.¹²¹¹ That said, comparative engagement can be accommodated in the methods of interpretation, be it by applying open methods or by developing standard canons into a more interdisciplinary approach, including anthropology.¹²¹²

A certain level of aleatory is and will remain a feature of this practice, in an odd way it is part of its method. Inspiration is an intuitive exercise and trying to alter that takes destructive aim at its core. However, one need not overemphasize the inspirational nature of the practice, as that would mean underestimating the very obvious challenges¹²¹³ of the superstar amicus briefs.¹²¹⁴

¹²⁰⁸ Ibid.

¹²⁰⁹ See Frowein, 811.

¹²¹⁰ Compare on the issue of health services in developing countries: Nigel Crisp, *Turning the World Upside Down*.

¹²¹¹ Frankenberg, *Critical Comparisons*, 411.

¹²¹² Obviously there are many more disciplines in addition to anthropology.

¹²¹³ Cf Markesinis, 302.

¹²¹⁴ Compare Abrahamson, *above*.

Those can be met with an increased appreciation for their existence and with a conscious effort to provide the transparency and nuance that a prolific cherry picker deploys to find and adequately place a cherry that fits.¹²¹⁵

¹²¹⁵ See Judge Moseneke in: Bentele, *above*.

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Annex I: Abstract (English)

Traces of Inspiration - The Usage of Foreign Citations by Supreme Courts

A bi-product of comparative law is the usage of parts of legislation and legal constructs in foreign settings. Given that parts of legislation seem to travel and migrate at a certain frequency, it seems natural to ask whether the interpretation of said law follows the path. This applies particularly to comparative constitutional law, as the exchange of citations seems to have increased over the last few years, often attributed to globalization – understood as the increase of information availability and its exchange. Assuming that such references are made with some frequency, one of the many questions arising is: “how?” This thesis seeks to focus on how overt references are made and how they are built into the case under discussion.

Following a delineation of what comparative law is – and what not, the scope of comparative constitutionalism is explained. As the usage of foreign citation is perceived to be increasing, a brief review of historic cases shows that in fact this kind of utilization of foreign citations has a long tradition due also to the intricate web that surrounds the development and interpretation of law. Challenges around the interpretation of human and fundamental rights are at the heart of most foreign citation usages and thus the developments in this part of comparative constitutional law are explored further.

There are courts and judges, respectively, who take exception to the current excitement around utilizing foreign citations, among them representatives of the United States Supreme Court. The thesis reviews some of those objections along recent judgments of the Court. Furthermore, the skepticism attributed to the Austrian Constitutional Court is framed in its wider historic context and the assumption that judges there are risk-averse when it comes to utilizing foreign citations is probed.

A number of challenges and potential limitations surround the usage of comparative law and foreign citations more specifically. Among others, the confines of language, structures, legal culture, the methods of comparative law as well as the selection of potential cases is explored. Added thereto, the purpose of engaging in comparative techniques is explored, particularly around factors that may increase the inclination of judges to use foreign citations in terms of personal experience as well as around the need to increase legitimacy of a specific ruling or the institution at large.

The usage of foreign citation by way of rejection of ideas and conclusions is a surprisingly frequent practice in this field. It is duly noted in addition to a trend around structural forces such as obligations to explore foreign material, which is distinct and yet shares the challenge of tracing the foreign source to its origin. A number of foreign citations are traced in the final part of this thesis, showcasing some of the ways in which the original dicta appear, disappear and sometimes reappear. Some suggestions on how the quality of the path of citations could be further improved, round out the paper.

Annex II: Abstract (German)

Traces of Inspiration - The Usage of Foreign Citations by Supreme Courts

Ein Nebenprodukt der Rechtsvergleichung ist die Verwendung von Gesetzesteilen und rechtlichen Konstrukten in anderen Rechtsordnungen. Nachdem Teile von Gesetzen mit einiger Regelmäßigkeit zu reisen scheinen, ist es angebracht zu fragen, ob die Interpretationen dieser Gesetze mitwandern. Das trifft vor allem auch auf das vergleichende Verfassungsrecht zu, nachdem der Austausch von Rechtsprechung in den letzten Jahren bedingt durch die Globalisierung – verstanden als die Steigerung von Informationsmöglichkeiten und deren Austausch – gestiegen zu sein scheint. Basierend auf der Annahme, dass diese Art Querverweise mit einiger Regelmäßigkeit gemacht werden, stellt sich die Frage des „wie“? Diese Dissertation beleuchtet die Art und Weise wie solche Querverweise in andere Dicta eingebaut und diskutiert werden.

Der Abgrenzung von Rechtsvergleichung folgend, wird der Anwendungsbereich von vergleichendem Verfassungsrecht skizziert. Nachdem der Eindruck entsteht, dass die Verwendung von ausländischen Dicta zunimmt, wird kurz die historische Dimension des Einsatzes beleuchtet, die deutlich macht, dass auch auf Grund der diversen historischen Bezüge diese Praxis tatsächlich eine lange Tradition in der Entwicklung und Interpretation des Rechts hat. Die Herausforderungen in der Interpretation von Menschen- und Grundrechten stehen im Zentrum der meisten ausländischen Dicta, daher werden die Entwicklungen in diesem Bereich eingehender diskutiert.

Es gibt Gerichte und RichterInnen, die sich von der Praxis der Verwendung ausländischer Dicta klar distanzieren, unter ihnen auch RepräsentantInnen des US Supreme Court. Die Arbeit bespricht einige dieser Bedenken anhand Auszügen aus der jüngsten Rechtsprechung des Supreme Court. Weiters wird der, dem österreichischen Verfassungsgerichtshof zugeschriebene Skeptizismus in seinem weiteren historischen Umfeld skizziert und die vermutete Risikoaversion gegen ausländische Dicta wird in Frage gestellt.

Eine Reihe von Herausforderungen und potenziellen Grenzen umgeben den Einsatz von Rechtsvergleichung, insbesondere die Verwendung von ausländischen Dicta. Unter anderem sind das sprachliche Grenzen, strukturelle Beschränkungen, Rechtskultur, die Methoden von Rechtsvergleichung, sowie die Auswahl der potenziellen Dicta. Weiters wird der Zweck der Verwendung dieser Zitate beleuchtet, vor allem in Bezug auf Faktoren, die diese Tendenzen stärken – wie zB persönliche Erfahrungen – aber auch die Notwendigkeit, die Legitimität der Institution oder des Erkenntnis zu erhöhen.

Ausländische Dicta werden oft auch verwendet, um die darin enthaltenen Ideen und Schlüsse zu verwerfen, dies ist eine überraschend häufige Praxis in diesem Gebiet. Daneben werden auch die wachsenden strukturellen Zwänge, wie zB die Verpflichtung zur Verwendung von ausländischem Material, diskutiert. Wiewohl ein anderes Szenario, gibt es doch einiges an Gemeinsamkeiten in der Herausforderung, zur Originalquelle zu verbinden. Eine Reihe ausländischer Dicta werden im letzten Teil dieser Dissertation aufgespürt, um zu zeigen, wie die Originalquellen erscheinen, verschwinden und manchmal wiederaufscheinen. Ein paar Vorschläge zur Verbesserung der Spuren von Zitaten beschließen diese Arbeit.

Annex III: Curriculum Vitae

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Education

University of Notre Dame du Lac/ USA, Center for Civil & Human Rights
LL.M., International Human Rights, *Magna Cum Laude*, May 2004

University of Vienna/ Austria, Law School, Mag^a iur, March 2002

University of Sydney/ Australia, Law School, Exchange student, 1998

Work experience

humanrightsconsultant.at, since 2007

Human Rights Monitor, S.A.R. Hong Kong/ PR China, Intern, 2001

American Society of International Law, Washington, D.C./ USA, Intern, 2000

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