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On the Justiciability and Persuasiveness of Constitutional Comparison in Constitutional Adjudication

I. INTRODUCTION

In a world where "global constitutionalism" is not only an emerging politico-legal phenomenon, but is also academically accounted for, "comparative constitutionalism", "comparative constitutional law" or "constitutional comparison" are not far away.¹ *Prima facie*, one could even doubt whether there is any but a slight semantic difference between these terms,² apart from the fact, of course, that not all that is compared must have a global dimension.

The range of topics treated under the comparative umbrella is very broad. It encompasses almost all classical fields pertaining to constitutional law and theory. In the world of academics, the relevance of looking beyond national legal systems and even constitutions is now widely accepted³ and has in truth been anything but an unorthodox method in the theory of states⁴.

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- 1 See, e.g., Anne Peters, 'The Globalization of State Constitutions' in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP, Oxford 2007) 251, 252 ff; eadem, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot, Berlin 2001) 29 ff, 361 ff; Norman Dorsen and others, *Comparative Constitutionalism* (West Publishing, St Paul 2003); Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (Cambridge University Press, Cambridge 2007); Thomas Giegerich, 'The Is and the Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?' (2009) 10 *German Law Journal* 31, 60; Mark Tushnet, 'Comparative Constitutional Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford 2006) 1225 ff; Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (2nd edn Foundation Press, New York 2006). Aalt Willem Heringa and Philipp Kiiver, *Constitutions Compared* (Intersentia, Antwerpen/Oxford 2007), use the term "comparative constitutional law" in their subtitle.
 - 2 While "comparative constitutionalism" refers to a more abstract, common understanding on a general framework of constitutional principles, deriving from the analysis of "comparative constitutional law" (see Tushnet, 'Comparative Constitutional Law' 1230 ff), "constitutional comparison" (which is the term used here) has a much more methodological bias.
 - 3 Karl-Peter Sommermann, 'Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa' (1999) *DÖV* 1017, 1018 f; Peter Häberle, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (Duncker & Humblot, Berlin 1992) 108; Christian Starck, 'Rechtsvergleichung im öffentlichen Recht' (1997) *JZ* 1021; Theo Öhlinger, 'Vom Sinn und Nutzen der Verfassungsvergleichung' in Harald Eberhard, Konrad Lachmayer and Gerhard Thallinger (eds), *Reflexionen zum internationalen Verfassungsrecht* (Facultas Verlag, Wien 2005) 11, 13 ff.
 - 4 Perhaps *Aristotle* made the earliest attempt to examine a variety of "constitutions". But also in the Modern Age, historic or contemporary constitutional developments largely inspired theory.

There are different approaches to the semantics of "comparison/comparative" and "constitution", though. At first glance, what results from comparing constitutions does not appear as law, but rather as an extract that suggests the emergence of certain transnational (but still highly abstract) principles of constitutional law. While the simplest way of comparison is to compare one constitution with another, a much more complex and perhaps sometimes more useful⁵ kind of comparison is the examination of different constitutions in order to find common standards or principles that set the benchmark for the interpretation of the domestic constitution. Such a set of standards could, indeed, be applied as law. This is definitely the case when the European Court of Human Rights refers to the common constitutional heritage of Europe as a transnational source of law that inspires the Court in many of its decisions.⁶ Another example is, of course, the European Court of Justice that frequently bases its decisions on general principles of law, which are derived from the legal systems and constitutions of the member states and are applied as a transnational source of law.⁷

Another distinction concerns the meaning of "constitution". It might encompass not only a constitution in the written and formal sense (whether incorporated or not), but also any laws that relate to constitutional issues, moreover constitutional case law and constitutional doctrine. If the approach is not only textual, but also contextual, comparison may even involve the cultural ambiance in which the constitution is set.⁸

II. CONSTITUTIONAL COMPARISON IN PRACTICE – THE STATUS QUO

1. Constitutional Recognition

While most constitutions are reluctant to explicitly provide for the consideration of other constitutions, the South African Constitution 1996 still appears unrivalled in its openness towards foreign law.⁹ Section 39, paragraph 1 lit b and c provides

5 See Bernd Wieser, *Vergleichendes Verfassungsrecht* (Springer, Wien/New York 2005) 35.

6 See, e.g., *United Communist Party of Turkey and Others v. Turkey* (App no 19392/92) ECHR 30 January 1998; *Ždanoka v. Latvia* (App no 58278/00) ECHR 16 March 2006; *Soering v. The United Kingdom* (App no 14038/88) ECHR 7 July 1989; *Ilaşcu and Others v. Moldova and Russia* (App no 48787/99) ECHR 8 July 2004; *Mamatkulov and Askarov v. Turkey* (App no 46827/99) ECHR 4 February 2005; *Tyler v. The United Kingdom* (App no 5856/72) ECHR 25 April 1978; see also Anna Gamper, 'Verfassungsvergleichung und "gemeineuropäischer" Verfassungsstaat' (2008) 63 ZÖR 359, 363 ff.

7 See, with examples, Sommermann, (1999) DÖV, 1020; Hans-Jürgen Papier, 'Die Rezeption allgemeiner Rechtsgrundsätze aus den Rechtsordnungen der Mitgliedsstaaten durch den Gerichtshof der Europäischen Gemeinschaften' (2007) EuGRZ 133 ff.

8 This is stressed by Peter Häberle, *Europäische Verfassungslehre* (6th edn Nomos, Baden-Baden 2009) 10 ff; Sommermann, (1999) DÖV, 1022 f.

9 Ruth Bader Ginsburg, "'Gebührender Respekt vor den Meinungen der Menschheit": Der Wert einer vergleichenden Perspektive in der Verfassungsrechtsprechung' (2005) EuGRZ 341, 343, refers to "similar provisions" in the constitutions of Spain and India which could only partly be verified: Art. 10 para. 2 of the Spanish Constitution stipulates that provisions relating to the

that a court, tribunal, or forum, when interpreting the Bill of Rights, *must* consider international law and *may* consider foreign law. The difference in the treatment of international and foreign law is remarkable. While South African judicial bodies are bound to take heed of international law, they are only allowed – but not obligated – to consider foreign law, including foreign constitutions. Interestingly, the South African Interim Constitution of 1994 contained a slightly different provision in Section 35, wherein a court *shall* regard public international law applicable to the protection of the rights entrenched in the same chapter, and *may* regard comparable foreign case law.

On one hand, "international law", as it now reads, has a broader meaning than "public international law", whereas the consideration of "foreign law" was formerly restricted to "comparable case law". Probably the intention was to direct South African judges who dealt with human rights cases to the parallel case law of foreign courts, while the reference to "foreign law" merely was considered less helpful. Still, it will only be reasonable if references to foreign law are now generally admitted, for why should a court be allowed regard case law, but not to the law behind it? The former restriction to "comparable" case law, self-evident though it seems, reasonably narrowed the application of the comparative method.¹⁰

Another restriction relates to the scope of applicability of the comparative method, since the consideration of international and foreign law is limited to the purposes of the interpretation of the South African Bill of Rights. While human rights are of particular concern to international law so that a specific reference seems adequate in this context, there is surely no methodical requirement to restrict the consideration of foreign law to the interpretation of human rights only, provided that the method is admitted at all.¹¹

2. Horizontal Comparison: Constitutional Courts

Even though the vast majority of constitutions are not explicitly open toward the comparative method, constitutional comparison has become a method frequently applied in practice – namely in the horizontal adjudication of constitutional courts or supreme courts that are entitled to constitutional adjudication. Recently, there has been a lively discussion on whether courts should be allowed to use the comparative method, which, according to *Peter Häberle*¹² and many others¹³, is nowadays recognized as the "fifth method of

fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain (similarly, Art. 16 para. 2 of the Portuguese Constitution; Art. 10 para. 1 of the Romanian Constitution and Art. 13 para. 2 of the Ethiopian Constitution). While it is true that the consideration of international law is stipulated by these constitutions, the consideration of foreign law is not mentioned.

10 See below 24 f.

11 Likewise, for instance, the South African Constitution could have stipulated the consideration of foreign law with regard to the interpretation of South African federalism.

12 Häberle, *Rechtsvergleichung* 38; idem, 'Methoden und Prinzipien der Verfassungsinterpretation – Ein Problemerkatalog' (2000) 12 ERPL 867, 874 ff.

interpretation". The discussion is perhaps led most fervently in the United States, where the Supreme Court justices follow highly divergent approaches. Whereas Justice *Scalia* and others advocate an "independent" methodology that does not regard foreign law, Justices *Breyer* and *Bader Ginsburg* argue strongly for admitting legal comparison in court reasoning.¹⁴ The arguments carry weight on both sides. Surely, foreign law is not to be admitted as a primary source of law in a country where law must be ultimately based on the sovereignty of the people. According to those favoring the comparative method, however, the consideration of foreign law would make judgments more predictable and help them to be in accordance with a "least common denominator" of "occidental" constitutionalism, as "a useful tool in the legal arsenal"¹⁵.

If judges in the United States are still, although perhaps decreasingly¹⁶ reluctant to apply foreign law, this also expresses the self-sustaining character attributed to the U.S. constitution and constitutional culture.¹⁷ The argument of those advocating more openness of the U.S. Supreme Court towards foreign law, however, seems to be based on the view that the U.S. constitution and constitutional case law should not only be exported to other countries – which would result in some kind of constitutional hegemonialism –, but that "a decent respect to the opinions of mankind"¹⁸ requires that constitutional comparison needs to be reciprocal and oscillatory. This view is, perhaps, nowhere expressed more keenly than in Judge *Calabresi's* famous words: "At one time, America had a virtual monopoly on constitutional judicial review, and if a doctrine or approach

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- 13 Sommermann, (1999) DÖV, 1020; Winfried Brugger, 'Konkretisierung des Rechts und Auslegung der Gesetze' (1994) AÖR 1, 24 f; Franz Bydliniski, *Juristische Methodenlehre und Rechtsbegriff* (2nd edn Springer, Wien 1991) 461; Reiner Schulze, 'Vergleichende Gesetzesauslegung und Rechtsangleichung' (1997) ZfRV 183, 190 ff; Konrad Zweigert, 'Rechtsvergleichung als universale Interpretationsmethode' (1949/50) 15 RabelsZ 15 ff.
- 14 Sommermann, (1999) DÖV, 1026; Bader Ginsburg, (2005) EuGRZ, 341 ff; Stephen Breyer, *Active Liberty* (OUP, Oxford 2008) 154 ff; Tushnet, 'Comparative Constitutional Law' 1255; AEI Newsletter, 'Outsourcing American Law' (AEI conference in 2006) <<http://www.aei.org/publication24097>> accessed 14 September 2009; Federal News Service, 'Transcript of Discussion between Antonin Scalia and Stephen Breyer' (AU Washington College of Law in 2005) <<http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>> accessed 14 September 2009.
- 15 Breyer, *Liberty* 164.
- 16 Sommermann, (1999) DÖV, 1026; Bader Ginsburg, (2005) EuGRZ, 341 ff; Breyer, *Liberty* 158 f. One of the most well-known cases where the Supreme Court referred to the European Court of Human Rights is *Lawrence v. Texas*, 539 US 558 (2003), where the Court at least mentioned that to the extent the U.S. case (*Bowers*) "relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* has been rejected elsewhere". Other cases are mentioned by Ruth Bader Ginsburg, (2005) EuGRZ, 345 f; see also *Irvin v. Dowd*, 359 US 394 (1959), *Raines, Director, Office of Management and Budget, et al. v. Byrd et al.*, 521 US 811 (1997) and *Roper v. Simmons*, 543 US 551 (2005).
- 17 The same may be said with regard to the ambivalent consideration of international law by the Supreme Court (see Andreas Th. Müller, 'The U.S. Supreme Court and International Law – A Liaison dangereuse? Reflections on *Medellín v. Texas*' in Gudrun Grabher and Anna Gamper (eds), *Legal Narratives: European Perspectives on U.S. Law in Cultural Context* (Springer, Vienna/New York 2009) 123 ff.
- 18 See the preamble of the Declaration of Independence, 1776.

was not tried out here, there was no place else to look. That situation no longer holds. Since World War II, many countries have adopted forms of judicial review, which – though different from ours in many particulars – unmistakably draw their origin and inspiration from American constitutional theory and practice. [...] These countries are our 'constitutional offspring' and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.¹⁹ In a sense, of course, nearly all modern constitutional states could be seen as U.S. "constitutional offspring", since constitutionalism, understood as a historic epoch,²⁰ is deeply rooted in the United States. However, as Calabresi mentions the constitutional courts of Germany and Italy – "of some cognate countries", as he calls them –, the term "constitutional offspring" is misleading; the German and Italian constitutional courts differ from the American model of judicial review²¹ under several essential aspects. They have to be clearly separated from those countries in the world that more or less "copied" the U.S. Constitution after World War II.

From a more general view, constitutional courts tend to be more open towards foreign law in ex-colonies, in Commonwealth countries such as Canada, New Zealand, Australia, South Africa or India,²² and in those states that are near to the United States, either geographically or constitutionally.²³ The tendency of courts to admit foreign constitutional law into their scrutiny largely depends on

19 United States Court of Appeals, *United States v. Then*, 56 F.3d 464 (2nd Cir. 1995) (Calabresi, G., concurring).

20 The ambiguous meaning of constitutionalism is discussed by Dieter Wyduckel, 'Verfassung und Konstitutionalisierung – Zur Reichweite des Verfassungsbegriffs im Konstitutionalisierungsprozess' in FS Friedrich E. Schnapp (Duncker & Humblot, Berlin 2008) 892, 916 f. According to Breyer, *Liberty* 165 the concept of jurisprudence, "after all, comes to America by way of Europe. It finds its origin in Greek political life".

21 The influence of the Supreme Court on the German *Bundesverfassungsgericht* is analyzed by Marcel Kau, *United States Supreme Court und Bundesverfassungsgericht* (Springer, Berlin/Heidelberg/New York 2007). The different models of constitutional review are discussed by Heinz Schäffer, 'Verfassungsgericht und Gesetzgebung' in FS Friedrich Koja (Springer, Wien/New York 1998) 101, 103 f.

22 A particularly open approach seems to be taken by New Zealand courts that particularly cite Canadian, but also U.S., European and South African authority when it comes to the interpretation of the New Zealand Bill of Rights Act (cf. James Allan, Grant Huscroft and Nessa Lynch, 'The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?' (2007) 11 *Otago Law Review* 433 ff). As to the influence of the Canadian Supreme Court on other jurisdictions, see Tania Groppi, 'A User-Friendly Court: The Influence of Supreme Court of Canada Decisions Since 1982 on Court Decisions in Other Liberal Democracies' (2007) 36 *Supreme Court Law Review* 1 ff.

23 In terms of quantity, one should also be aware that the range of functions exercised by constitutional courts varies extraordinarily. It may well be that comparative arguments are used much more frequently with regard to certain themes (e.g. human rights), especially where the same international law is applied effectively (Constance Grewe, 'Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofes für Menschenrechte' [2001] 61 *ZaöRV* 459, 471), or with regard to certain functions (e.g. scrutiny of laws, regulations or administrative rulings), whilst they are neglected in other areas (e.g. financial claims; see, however, VfSlg 16.587/2002).

the constitutional culture and traditions of the country.²⁴ If the constitution itself can be affiliated with an older "mother constitution" or a constitutional tradition that was shaped elsewhere, it will be only reasonable to have a look at the inspiring constitution.²⁵ In other cases, however, the willingness to consider foreign law will depend on more technical factors, such as, for example, the required qualification of judges, their age, or the improvement of electronic databases that facilitates research in foreign law via the internet or international co-operation between constitutional courts.²⁶ If judges are selected mostly from among constitutional scholars and if the constitutional doctrine of that country itself accepts the comparative method, this will certainly influence the constitutional case law. Conversely, judges who follow the "self-sustaining" approach in their quality as academics are unlikely to apply legal comparison in their case law. Seemingly, the more positivistic the judge's attitude is, the less openness towards foreign constitutional law – which does not belong to the positive law of a country unless expressly provided for – one may expect. An example is the Austrian *Verfassungsgerichtshof* that clearly belongs to those courts that rarely apply the comparative method.²⁷ Yet, if it does so increasingly, this is particularly due to European influences – be it through the application of the ECHR in Strasbourg²⁸ or generally the supremacy of EU law –,²⁹ even though "European" interpretation of law is not always compatible with classical views of legal positivism.³⁰

24 Häberle, *Rechtsvergleichung* 27 ff.

25 See, with European examples, Sommermann, (1999) DÖV, 1024 ff.

26 Sommermann, (1999) DÖV, 1029. It is noteworthy that the Council of Europe's Venice Commission decided in 1992 to set up a documentation centre to foster a mutual exchange of information between the courts. The Bulletin on Constitutional Case-Law and the database CODICES of the Commission particularly enhance the transconstitutional dialogue. The establishment of the Joint Council on Constitutional Justice in 2002 institutionalised this cooperation between the constitutional courts and the Venice Commission.

27 Gamper, (2008) 63 ZÖR, 372 ff; Wieser, *Verfassungsrecht* 36.

28 Theo Öhlinger, 'Die rechtliche Bedeutung der Entscheidungen internationaler Menschenrechtsschutzinstanzen für die Tätigkeit der Gesetzgebung, Verwaltung und Rechtsprechung' in Eckart Klein (ed) *Gewaltenteilung und Menschenrechte* (Berliner Wissenschafts-Verlag, Berlin 2006) 196, 204 f.

29 The attitude of the Austrian *Verfassungsgerichtshof* is highly commended: Cf. Gil Carlos Rodríguez Iglesias, "'Verfassungsgerichte als Gemeinschaftsgerichte?'" in FS Ludwig Adamovich (Verlag Österreich, Wien 2002) 681, 692; see Heinz Schäffer, 'Österreich und die Europäische Union – Erfahrungen und Leistungen des österreichischen Verfassungsgerichtshofes' (2005) 60 ZÖR 345, 374; idem, 'Die Grundrechte im Spannungsverhältnis von nationaler und europäischer Perspektive' (2007) 62 ZÖR 1, 4; Zuzanna Chojnacka, 'Zur Kooperation von EuGH und nationalem Verfassungsgericht' (2004) 59 ZÖR 415, 429; Richard Novak, 'Der Verfassungsgerichtshof im Dialog mit dem Europäischen Gerichtshof' in FS Ludwig Adamovich (Verlag Österreich, Wien 2002) 539 ff.

30 Heinz Schäffer, 'Die Grundrechte im Spannungsverhältnis von nationaler und europäischer Perspektive' (2007) 62 ZÖR 1, 5 ff; Michael Potacs, *Auslegung im öffentlichen Recht* (Nomos, Baden-Baden 1994) 47 ff, 58 ff, 159 ff, 210 ff; Wolfram Karl and Eduard C. Schöpfer, 'Österreichische Rechtsprechung zur Europäischen Menschenrechtskonvention im Jahr 2006' (2008) 63 ZÖR 641, 641 ff; Christoph Grabenwarter, 'Die Auslegung der EMRK im Spannungsverhältnis zwischen Straßburg und Wien' in FS Machacek/Matscher (nvw, Vienna/Graz 2008) 129.

There may be indirect channels, moreover, where courts are bound to consider foreign law, namely through the applicability of international or supranational law. For example, a constitutional court may deal with a case that requires a certain interpretation of the ECHR where it resorts to a previous decision of the European Court of Human Rights that, in its turn, argued with the constitutional heritage of Europe.³¹

3. Vertical Comparison: ECHR and ECJ

A different attitude can be found in the context of the two European "supreme courts": namely the European Court of Human Rights and the European Court of Justice. Both courts frequently need to rely on what could be called a "least common denominator" of the European constitutional heritage, especially when it comes to the consideration of the "general principles of law".³² Their approach to comparison, however, is not that of a national constitutional court, but due to their own super- and supranational status and therefore of a vertical nature. The comparative method is made particularly explicit in Art. 6 EU Treaty, which refers to fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Still, however, the comparative method that is applied by both European courts needs some improvement, even though and perhaps exactly because they work practically, and not academically. Since the consideration of European national constitutions may influence the decision, the methodology behind it is pivotal. Nonetheless, they rarely attempt to perform a full-fledged comparison, but rather restrict themselves to *pars pro toto*-quotations, namely examples of those national constitutions that they deem to be most important.³³ Other cases³⁴ make mention of "common constitutional principles", "underlying values of the Convention," or the "constitutional heritage of Europe" without referring to any explicit examples at all. Both types of references clearly do not satisfy the demands that legal comparison raises. Especially in an organisation where 47 or 27 states respectively are assembled, the rich culture of legal and constitutional traditions should be heeded much more. If, however, the comparison between 47 or 27 states surpasses the courts' capacities, it should at least be made transparent why certain constitutions are considered to be representative for certain legal traditions and selected above others.

31 See the cases mentioned in note 6; further, *Russian Conservative Party of Entrepreneurs and Others v. Russia* (App nos 55066/00 and 55638/00) ECHR 11 January 2007; *Odièvre v. France* (App no 42326/98) ECHR 13 February 2003; see also Gamper, (2008) 63 ZÖR, 365 ff.

32 Carsten Buck, *Über die Auslegungsmethoden des Gerichtshofs der Europäischen Gemeinschaft* (Peter Lang, Frankfurt am Main 1997) 195 f; Sommermann, (1999) DÖV, 1020; Papier, (2007) EuGRZ 133 ff; Gamper, (2008) 63 ZÖR, 365 ff; Giuseppe De Vergottini, 'Gemeinsame Verfassungsüberlieferungen und europäische Verfassung' in FS Christian Starck (Mohr Siebeck, Tübingen 2007) 661, 663 ff; Wieser, *Verfassungsrecht* 37.

33 Sommermann, (1999) DÖV, 1027 f; Papier, (2007) EuGRZ 133 ff.

34 See, e.g., the cases mentioned in notes 6 and 31.

Apart from finding a "least common denominator" among the European constitutions, both European courts sometimes refer to the constitutional adjudication of non-EU countries. This is particularly done with regard to the U.S. Supreme Court, whose judgments, if at all, are regularly mentioned in a confirming manner. Nevertheless, the number of "foreign" quotations is low and mostly limited to dissenting opinions of ECHR judges or opinions of the EU Advocate Generals, which lessens the importance of comparison with regard to the decision itself.

III. TOWARD A METHODOLOGY OF CONSTITUTIONAL COMPARISON: AN ATTEMPT TO RATIONALIZE ITS USE IN CONSTITUTIONAL ADJUDICATION

1. Key Approaches: An Empiric Survey

a. General Remarks

To elaborate a general methodology of constitutional comparison by constitutional courts, an empiric survey of the various approaches that constitutional courts may take with regard to constitutional comparison is essential. As will be shown, these approaches may highly differ from each other, which is mostly due to the diverging constitutional habitats and cultures.³⁵

b. The Object comparandi

For the purposes of constitutional comparison, the object *comparandi* may be one single foreign constitution or several foreign constitutions or a "least common denominator" to be deduced from the comparison of several constitutions respectively. The mere reference to a foreign constitution as a text, however, will hardly be sufficient since, in a constitutional case, a purely textual analysis will rarely satisfy the interpretive needs of a court. The object *comparandi* should therefore not just be restricted to the constitutional text, but also include constitutional case law,³⁶ parliamentary materials, important laws that are not

35 Much of the insight underlying this chapter is owing to my report to the International Association of Constitutional Law's interest group on the "Use of Foreign Precedents by Constitutional Judges", led by Prof. Tania Groppi and Prof. Marie-Claire Ponthoreau. Although the project group's research work is, as yet, not complete, some general conclusions of a preliminary nature could be drawn from the single reports on Canada, Australia, Brazil, Israel, South Africa, Namibia (as countries whose constitutional courts consider foreign constitutional case law frequently) as well as on Japan, United States, Austria, Belgium, India, Taiwan and Colombia (as countries whose constitutional courts consider foreign constitutional case law rarely); see for further information the interest group's webpage 'DIPEC' <<http://www.unisi.it/dipec/en/interestgroup.php>> accessed 14 September 2009.

36 See also Wieser, *Verfassungsrecht* 34. The vast relevance of constitutional case law is also stressed by the scientific target of the aforementioned project group that restricts its work to the examination of cases where foreign constitutional *case law* was considered.

formally ranked as constitutional or the constitutional doctrine of a country. According to a wider understanding of contextualism, even the historic and cultural ambiance of the foreign constitution may have to be considered, since the foreign constitution might otherwise not be understandable.³⁷ Accordingly, the term "foreign constitutional law", as used in this paper, follows a wide understanding. From a purely positivistic viewpoint, however, the textual and contextual approach to foreign law are equally dubious; foreign law is not considered to be relevant unless this were stipulated by the constitution. As a consequence, foreign law – although it is the applicable law of another country – would be seen as irrelevant as e.g. in references to (domestic or foreign) theories and doctrines, unless they could be based on the positive law.

Sometimes, the object *comparandi* remains obscure when references are made to general constitutional principles or dogmata without being underpinned by theoretical thoughts or by an explicit comparison between constitutions. However, it may be guessed that the recognition of a "principle" or "dogma" is in truth based on empiric research of a comparative nature.³⁸

c. The Subject *comparandi*

The subject *comparandi* may differ as to whether the court just mentions the reference as one made by the parties during the procedure or whether the court itself refers to foreign constitutional law. Moreover, there may be differences between possible interim decisions and final decisions. If, for example, a *votum separatum* is admitted, a comparative argument may be found in the decision itself and/or in the dissenting/concurring opinion, on which the significance of comparison depends.

d. The Purpose *comparandi*

According to the variety of possible purposes *comparandi*, courts may choose between several options. A court may admit the consideration of foreign constitutional law (in whichever direction) or it may explicitly deny the relevance of foreign constitutional law altogether. Again, there are several possibilities for a court to consider foreign constitutional law: first, a similar foreign constitution could be referred to *a fortiori*, with the consequence that the case would be

37 Häberle, *Rechtsvergleichung* 27 ff. This is also the view of the South African Constitutional Court that stresses: "[The consideration of foreign constitutions] also illustrates that the various conventions and national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality." (Case No CCT 15/95, *Brink v. Kitshoff* NO [1996]).

38 Sommermann, (1999) DÖV, 1017 ff; Wieser, *Verfassungsrecht* 44 ff; Häberle, *Rechtsvergleichung* 36 ff; Anna Gamper, *Staat und Verfassung* (Facultas Verlag, Wien 2007) 23 f.

decided similarly, too.³⁹ Second, a court could refer to a foreign constitution that, for whatever reason, differed from the domestic constitution, stressing that despite certain differences foreign constitutional law should be followed.⁴⁰ Third, the court could argue *e contrario*, namely to consider foreign constitutional law, but to decide contrary to the foreign constitutional law, exactly because the situation was different. Fourth, a court could enigmatically refer to foreign constitutional law *obiter*, without explaining why the reference was significant.

e. "Hidden" Comparison

Where a constitutional principle or "dogma" is alluded to in a judgment, one may often conclude that the court applies a comparative method without mentioning it. The main reason for doing so seems to be that courts do not primarily perceive themselves as fora of academic discourse and are reluctant to engage in lengthy examinations that would meet the demanding standards of constitutional comparison.

With regard to the case law of the Austrian Constitutional Court, the most prominent example of a "hidden" constitutional comparison is the so far most extensive statement on the enigmatic "total revision" of the Austrian Federal Constitution.⁴¹ In that case, the Court, on deciding the question whether the abolition of *Land* citizenship was a total revision of the Federal Constitution, held that the abolition of fundamental constitutional provisions, "that could be found in all other federal constitutions," constituted a total revision. The Court neither explained which constitutions ought to be regarded as "federal" nor mentioned any more specific provisions. It may be assumed that the Court found that *Land* citizenship was no essential element "in all other federal constitutions," but no explicit reasons were given for it.⁴² Strangely enough, however, the Court emphasized at the same time that "the nature of the Austrian federal state could not be identified by applying a range of different theories on federalism, but only by the positivistic interpretation of the federal constitutional provisions." A truly positivistic approach, oriented towards domestic constitutional law, would have excluded the application of comparative standards, though. From that point of view, there does not seem to be much difference between the application of a theoretical standard – the elaboration of which, especially with regard to federalism, often has a strongly empiric (comparative) character – and the application of a comparative standard.

39 See below 25.

40 See below 25.

41 VfSlg 2455/1952.

42 Whilst Ronald L. Watts, *Comparing Federal Systems* (3rd edn McGill-Queen's University Press, Montreal & Kingston/London/Ithaca 2008) 9 and Peter Pernthaler and Karl Weber, *Landesbürgerschaft und Bundesstaat* (Braumüller, Wien 1983) 36 ff stress the theoretical significance of state citizenship for federalism, Kincaid's empiric survey shows that not all federal states have provided for state citizenship; see John Kincaid and G. Alan Tarr, *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's University Press, Montreal & Kingston/London/Ithaca 2005) 433 f.

This example shows very clearly what the weaknesses of implicit comparison are: decisions that are based on arguments not properly accounted for cannot evade appearing highly irrational. They are neither foreseeable nor reproducible. Given such conditions, *Breyer's* argument⁴³ for an enhanced practicality of decision-making through comparison – basing domestic decisions on the experience of other jurisdictions, including foreign decisions – seems to be less convincing. In many cases, the parties may neither be aware of the comparative argument nor follow the reasons of the decision which would thus appear to be arbitrary. While it is not unusual that the legal reasoning behind judgments generally lacks the legal persuasiveness that the parties could wish for, the situation is surely worse in case arguments have *both* a foreign and an implicit nature.

Implicit references to foreign constitutional law, moreover, do anything but facilitate a thorough evaluation of foreign influences on a constitutional court's case law. Thus, it is particularly difficult for scholars who use electronic search engines and keywords to assess the quality and quantity of comparative cases.⁴⁴

2. The Constitutional Law-Maker as the arbiter methodicus?

Without doubt, the best way to regulate the application of constitutional comparison by constitutional courts is the explicit constitutional or at any rate legal entrenchment of rules of interpretation. The South African Constitution is surely a prototype insofar as it explicitly provides for the consideration of foreign law. Accordingly, it is clear that South African courts are allowed to consider foreign law. It is also clear, however, that they need not do so.

Still, I would not regard this provision as an ideal model to be exported to other constitutions. First, the consideration of foreign law is restricted to the interpretation of the South African Bill of Rights. Although it is certainly up to the constitutional lawmaker to decide if at all and to what extent the comparative method should be applicable, I would argue that the comparative method, if at all, should be rather admitted on a general basis than restricted to a certain field of constitutional law. While it is true, of course, that over time constitutional courts have very often developed their own rules of interpretation in the context of a specific constitutional field, it can be observed at the same time that many of these rules of interpretation constitute nothing but specific forms of more general rules of interpretation or that they themselves, even though they had originally been developed in a specific constitutional context, are increasingly applied on a general basis. Taking an Austrian example, the so-called "theory of petrification" (*Versteinerungstheorie*) is applied in the particular context of interpreting the distribution of powers between the federation and the *Länder*.⁴⁵

43 Breyer, *Liberty* 164 f.

44 See Wieser, *Verfassungsrecht* 36. This is also one of the preliminary results of the project mentioned in note 35.

45 Bernd-Christian Funk, *Das System der bundesstaatlichen Kompetenzverteilung im Lichte der Verfassungsrechtsprechung* (Braumüller, Wien 1980) 67 f, 69 ff; Heinz Mayer, *B-VG* (4th edn Manz, Wien 2007) 29; Robert Walter, Heinz Mayer and Gabriele Kucsko-Stadlmayer, *Bundes-*

Still, however, it is just a subspecies of historic interpretation. Converse examples are the principles of reasonability or proportionality, which were developed in the context of certain fundamental rights, but elsewhere, too, are recognized widely today.⁴⁶

The constitutional lawmaker's decision to explicitly provide for the consideration of foreign constitutional law should, in my opinion, be guided by a general commitment to admit this method into the canon of interpretation maxims. Even though human rights – as was the case in the South African Constitution – may be particularly prone to be considered as a "transnational" field of constitutional law⁴⁷, there is no apparent reason why the same should not be true for other "transnational" (and in particular "transeuropean") fields, at least in the context of what may be called the "occidental" constitutional tradition: one thinks of principles such as representative democracy, the rule of law, the separation of powers, or federalism and decentralization.

Second, I do not think that an authorization such as "*may* consider foreign law" is very helpful either for the courts or the parties concerned. Regarding predictability, it is very difficult to anticipate how a court may decide if it is up to the court to say whether the comparative method should be applied or not. Even for the judges themselves it might be difficult to assess whether they should exercise it or not – especially so in systems where no rule of *stare decisis* binds the courts to precedents. Although courts might develop their own maxims with regard to the application of constitutional comparison, e.g. to the effect that the comparative method should only be admitted "if appropriate" or "if proportional," this would not necessarily improve the situation for the concerned parties, since it would again very much depend on what the court would consider as "appropriate" or "proportional."

An alternative could be to stipulate the use of comparative law in the sense of "*must* consider foreign law." Clearly, however, the unconditional wording of such a provision would degenerate the law of the land to a quasi-colonial status, even though the stipulation were made by the constitutional law-maker and not imposed from abroad. Strictly speaking, even the courts' authorization (not obligation) to consider foreign law, as it is provided by the South African constitution, would be incompatible with the rule of (democratically legitimate) law if it were understood in a way that would allow courts to consider foreign law *instead* of domestic law. A contextual understanding of Section 39 paragraph 3 of the South African Constitution shows, however, that the purposes of interpretation are far from violating the domestic constitution or relativizing its standards in favor of foreign law: Section 39 paragraph 2 stipulates that, "when interpreting any legislation, and when developing the common law or customary

verfassungsrecht (10th edn Manz, Wien 2007) 133, 296. Most recently, see VfSlg 18320/2007, VfSlg 18140/2007, VfSlg 18032/2006, VfSlg 17941/2006, VfSlg 17942/2006, VfSlg 18140/2007.

46 Theo Öhlinger, 'Constitutional Review: The Austrian Experience as seen from a Comparative Perspective' (1998) 53 ZÖR 421, 434 ff.

47 This is because many states ratified the same international conventions on human rights, and also perhaps because human rights are today regarded as "the" core constitutional theme (which becomes manifest e.g. when human rights are enlisted at the beginning of constitutions, which is increasingly the case).

law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights", which means that the consideration of foreign law must always be in accordance with the general principles underlying the Bill of Rights.⁴⁸

Foreign constitutional law should, therefore, only be considered as an *ultima ratio*, being admitted merely as a subsidiary method, i.e. if no clear solution could be found otherwise, and only if the suggested solution would be compatible with the domestic constitution.⁴⁹ Given these two conditions, however, courts should be bound (and not just entitled) to consider foreign law. This would, on one hand, safeguard the supremacy of the law of the land.⁵⁰ On the other hand it would both allow the use of the comparative method and make its use foreseeable for the parties.

The extent to which a constitutional lawmaker wants to bind a reviewing court depends on the country's legal traditions. Not only with regard to the comparative method could it be useful to have a constitution that provides for its own interpretation and sets forth its own constitutional methodology. In Austria, for instance, the Constitutional Court has for a long time been criticized for using the "theory of petrification" instead of a more teleological interpretation of competences, which could be easily avoided by stipulating a more teleological interpretation in the Federal Constitution.⁵¹ But even in common law countries statutory law that binds the courts' interpretation – not only by using legal definitions, but as a general rule – is not an exceptional case.⁵²

The explicit admission of the comparative method would not mean, however, that foreign law would be just as applicable as domestic law. As outlined above, the explicit obligation to consider foreign law, as provided by a constitution, must be restricted both to interpretive purposes and subsidiary cases. It must neither amend nor supplement domestic law. Only where the application of domestic law is doubtful insofar as it could be interpreted in different directions (both of which would be compatible with the domestic constitution), foreign law ought to come into consideration. On that basis, foreign law would not supersede domestic law, but would help find a solution that is compatible with the domestic constitution.

48 This is also the view taken by the South African Constitutional Court (cf. e.g. Case No CCT 86/06, *S v. Shaik and Others* [2007]).

49 See also Wieser, *Verfassungsrecht* 34 f.

50 Some constitutions explicitly stress their own supremacy: Section 52 of the Canadian Constitution Act, 1982, stipulates that the Constitution of Canada is the supreme law of Canada, and that any law that is inconsistent with the provisions of the Constitution is of no force or effect. Art. VI of the US Constitution stipulates that the US Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby.

51 The majority of constitutions do not envisage rules on their own interpretation, which may be generally deplorable; see *Grewe*, (2001) 61 *ZaöRV*, 459.

52 See, e.g., in the United Kingdom Section 2 and 3 Human Rights Act, 1998, Section 101 Scotland Act, 1998, Section 83 Northern Ireland Act, 1998, and Section 6 New Zealand Bill of Rights Act, 1990.

3. Methodical Premises for a Judge-made Justiciability of Foreign Constitutional Law

a. General Considerations

Even though there are different ways to provide for the consideration of foreign law explicitly by the constitutional lawmaker, such an entrenchment surely is to be preferred to all other (implicit) channels to admit the consideration of foreign law. From this viewpoint, Section 39 of the South African Constitution is indeed a milestone in the development of a methodology of constitutional interpretation, even though certain imperfections are visible.

It is not to be expected, however, that a majority of constitutions will follow, let alone refine the South African model – at least not in the near future. In the absence of an explicit constitutional empowerment to consider foreign law, it will therefore be still up to the courts to develop their own methods for the treatment of foreign law, as they are the "supreme interpreters of the constitution".⁵³

As mentioned above,⁵⁴ the consideration of foreign law may turn out very differently depending on the competences of constitutional courts, their general role and position as accorded by the constitution, the legal tradition of a country and the self-assurance of a court when it comes to the interpretation of norms. Nevertheless, I would argue that some general principles in the treatment of foreign law should be observed by all constitutional courts that are based on a democratic constitution governed by the rule of law, the separation of powers and the respect for fundamental rights. Naturally, these principles closely resemble what has been postulated already with regard to an explicit consideration of foreign law. In a legal tradition that recognizes popular sovereignty as the source of all law, courts will need to pay due respect to the democratic legitimacy of the law applied by them, which forbids their consideration of foreign law in any other way than as a subsidiary method of interpretation.

Moreover, it would certainly be advisable if the courts' references to foreign law were more transparent. Foreign law should only be referred to explicitly, since implicit references, if they influence the judgment, are incompatible with the rule of law and the fairness, transparency, and rationality that ought to derive from it. When it comes to comparative arguments, courts ought to point out very clearly whether they refer to several foreign constitutions or to just one of them and, in the latter case, why exactly this one constitution is selected. This should be particularly heeded considering the experience which the case-law of the two European "supreme courts" shows.⁵⁵ Finally, courts should reveal in plain words what the effect of their consideration of foreign constitutional law is. In particular, they should avoid quoting foreign law *obiter*, since in such a case it remains wholly unclear whether the reference was of any interpretive power at all and thus influenced the judgment.

53 As stipulated explicitly by, e.g., Art. 95 of the Constitution of Andorra. Still, an "authentic" interpretation by the constitutional law-maker would go beyond any constitutional court's interpretation.

54 See above 13 ff.

55 See above 15 f.

b. The Interpretive Use of Foreign Constitutional Law

If a court decides to consider foreign law, the initial for consideration is the selection of foreign countries and constitutions. Irrespective of whether the consideration of foreign constitutional law is restricted to just one constitution or several constitutions, it should be made plausible in any case on which criterion the selection was based. Primarily, one would think that only those constitutions that belonged to the same legal tradition as the domestic constitution should be taken into consideration. The same goes for constitutions that, even though they belong to another legal tradition, share at least a common characteristic with the domestic constitution that is relevant to the case. Finally, even constitutions that do not share a common characteristic with the domestic constitution could be considered under specific circumstances, as will be shown below.⁵⁶

Although one would generally presume that courts only venture to mention foreign constitutional law if they strongly advocate its interpretive applicability at the same time, an empiric survey shows that courts are not always inclined to find foreign law persuasive, even if they admit the argument as such.⁵⁷ For instance, this may happen when foreign law is referred to by one of the parties. As mentioned before, courts may respond to the argument insofar as they deal with it in content (which means that they do not formally refuse the very suggestion of the argument), even though they do not endorse the argument. Also, of course, courts could be willing to endorse it.

If one distinguishes between these two main approaches, namely to endorse a solution provided by the consideration of constitutional foreign law or not, some reflection is needed as to what should be the legal indicator for a court to choose between both approaches. When it comes to the interpretive consideration of foreign constitutional law, different legal solutions are possible, according to different methods of interpretation. Foreign law is considered insofar as it may help to endorse a certain legal solution. This suggested solution is compared to the other possible solutions. Insofar, a number of different solutions (two at least, or more of them) is brought into a comparative context out of which one solution is chosen – either by endorsing the "foreign solution" or not.

As soon as it comes to comparison, the principle of equality comes into play. Here, however, this principle is not to be understood in its individual shape as provided by a national constitution, but as a general legal principle that is inherent in all "occidental" constitutions, apart from being entrenched in international and supranational law.⁵⁸

56 See below 25.

57 According to my own interim report on the Austrian *Verfassungsgerichtshof* mentioned in note 35, between 1 January 1980 and 29 January 2009 only 42 decisions could be found, where foreign constitutional law or case law was explicitly mentioned (with specific regard to the influence of the German *Bundesverfassungsgericht* see Michael Holoubek, 'Wechselwirkungen zwischen österreichischer und deutscher Verfassungsrechtsprechung' in Detlef Merten [ed], *Verfassungsgerichtsbarkeit in Deutschland und Österreich* [Duncker & Humblot, Berlin 2008] 85 ff). In 17 decisions, the *Verfassungsgerichtshof* did not follow the "comparative" argument. These proportions seem to be true for the case law of a number of other constitutional courts.

58 Reinhold Zippelius, *Allgemeine Staatslehre* (15th edn Verlag C. H. Beck, München 2007) 269 ff; Gamper, *Staat* 252 ff.

There is general agreement that this principle does not entail the absolutely equal legal treatment of all factualities compared, but rather asks for distinction if this would be reasonable and rational.⁵⁹ The reasonability and rationality of equal or unequal treatment respectively depend on the factualities that are compared. If it results from comparison that the factualities are basically equal or similar, it will be reasonable and rational for the lawmaker to treat them equally. If the factualities are found dissimilar, it will be reasonable and rational to regulate them differently.

Whilst these are the legal consequences that arise from the comparison of factualities, comparison, applied as a method where foreign constitutional law is considered by a constitutional court, goes one step further. Here, a comparison is not made between factualities, but encompasses a variety of possible legal solutions. This is the case, for instance, if the meaning of a domestic constitutional provision is unclear or if it is doubtful whether an ordinary law is in accordance with the domestic constitution⁶⁰ so that a foreign constitutional case is consulted where a similar law was examined.

Depending on the case, however, constitutional comparison may extend to factualities, too. For instance, a foreign case where someone was violated in her fundamental rights could be considered as to the circumstances leading to the violation, in order to examine whether the consideration of a foreign legal solution is suitable.

In all cases, however, the courts would have to examine whether the foreign legal solution (and, possibly, the circumstances leading to it) was equal or at least similar to the domestic law and case,⁶¹ so that the legal consequence should be the same. Similarity would mean that, even though there might be marginal differences, both constitutions would share all constitutional characteristics that were of relevance to the solution of the pending case.⁶² If the courts found

59 Dorsen and others, *Comparison* 617 ff; Thomas Fleiner and Lidija R. Basta Fleiner, *Allgemeine Staatslehre* (3rd edn Springer, Berlin 2004) 173 ff (= *Constitutional Democracy in a Multicultural and Globalised World* [Springer, Berlin/Heidelberg 2009] 170 ff); Georg Jellinek, *Allgemeine Staatslehre* (3rd edn Springer, Berlin 1929) 723 ff; Roman Herzog, *Allgemeine Staatslehre* (Athenäum, Frankfurt am Main 1971) 378 ff; Peter Perenthaler, *Allgemeine Staatslehre und Verfassungslehre* (Springer, Wien/New York 1996) 72.

60 If there is a rule that ordinary laws are *in dubio* to be interpreted in accordance with the constitution, such as in Austria, constitutional comparison could still be helpful to interpret the constitution, if the relevant constitutional provision were unclear; see, critically, Ulrike Lembke, *Einheit aus Erkenntnis?* (Duncker & Humblot, Berlin 2009).

61 I avoid the term "comparable" here, since a comparison with foreign law must logically be made without anticipating the result. For instance, the comparison between a domestic and a foreign constitution could show that both were very different ("incomparable"), so that the foreign legal solution could not be adopted. Still, the foreign law undergoes a comparison (and is "comparable" to that extent), as to allow the conclusion that it is "incomparable".

62 See, paradigmatically, the South African Constitutional Court that finds "*English and European jurisprudence [...] instructive at least to the extent that it makes plain that the legislation here under consideration has a counterpart in another open democracy. Yet the formulation of the rights to fairness in criminal and civil procedure as entrenched in the European Convention on Human Rights is different to the formulation of the rights in our own Bill of Rights. Although the provisions of the English legislation are similar to those of our legislation, the constitutional framework is different; and for this reason, I do not think that the interpretation by the English*

that such a kind of equality or similarity existed, it would surely be advisable for them to endorse the foreign solution.

If, however, dissimilarities prevailed over similarities, constitutional courts would again have various options: the logical conclusion in accordance with the principle of equality would be that courts abstained from endorsing the foreign solution. Nevertheless, a court could still adopt the foreign solution *a fortiori*, stressing that it would be only decent if a solution was adopted that was *even* supported by foreign constitutional law. However, this argument should be handled with care. As argued before, a court should consider foreign law only as an *ultima ratio*. In countries with a written constitution it follows from the hierarchy of norms that all laws have to be interpreted in accordance with the constitution and the single constitutional provisions themselves in accordance with the more general constitutional principles. *In extremis*, the adoption of a foreign legal solution, given e.g. that the foreign constitution was less democratic and liberal than the domestic constitution, could be detrimental to the democratic and liberal character of the domestic constitution. If there are strong dissimilarities, therefore, a foreign legal solution should not be endorsed.⁶³ The main exception that I see here, however, would be an argument *a minori ad maius*, where e.g. the foreign constitutional court had developed a rights-friendly solution, even though the foreign constitution was normally less favorable towards human rights than the domestic constitution, so that the domestic court could risk endorsing the foreign solution, since it was compatible with the domestic constitution.

One should be aware, however, that a court's reluctance to endorse a foreign legal solution due to great dissimilarities does not derogate the significance of the comparative method. It may also be helpful to a constitutional court to find that a certain legal solution is suggested by a certain constitutional habitat – and if such a habitat is missing, the legal solution should be different, too.⁶⁴

c. The Analogous Use of Foreign Constitutional Law

A specific problem might emerge from a situation where an applicable domestic norm is not just unclear, but totally absent. Whilst in the first case the wording of that norm as well as its context would have to be interpreted according to various methods, including, as a last resort, constitutional comparison, the court faces a non-interpretable constitutional lacuna in the latter case. In this latter context, therefore, an interpretation that resorts to foreign constitutional law is not possible, since there is no applicable norm that could be interpreted. It

courts of their legislation is directly applicable to the proper interpretation of our legislation in the light of the spirit, purport and objects of our Bill of Rights." (Case No CCT 86/06, *S v. Shaik and Others* [2007]).

63 Wieser, *Verfassungsrecht* 36.

64 The South African Constitutional Court has warned that, since "other jurisdictions may have legal systems which may be different from ours", "it may be dangerous to rely on ostensibly analogous material from other jurisdiction. This means we have to tread warily." (Case AR791/05, *Pillay v. KwaZulu-Natal MEC of Education* [2006]).

is admitted, however, that there may be grey zones where an extensive contextual or teleological interpretation and analogy converge.⁶⁵

Foreign constitutional law would thus not be used for interpretive purposes, but for analogy.⁶⁶ The difference is significant insofar as the consideration of foreign law, understood as an interpretive *subsidiuum* when it comes to the choice between various solutions under the umbrella of domestic law, does not interfere with the principle that the applicable law must have a democratic legitimacy and therefore be of a domestic nature, whereas an analogy suggests a legal solution that would not be obtainable from interpretation only. In other words, constitutional courts will still apply domestic law, even if they interpret it according to foreign constitutional law, whilst they would apply foreign constitutional law as a replacement for (lacking) domestic law in the case of analogy.

The question whether courts may resort to an analogy has to be discussed from two different angles: on the one hand, it is generally disputable if constitutional courts should use this method, even where an analogy would relate to national law only.⁶⁷ In a constitutional context, analogies surely have a more precarious nature, as there is no superior normative category that could be used as a benchmark. If a constitutional court generally abstains from using analogies at constitutional level, the court ought to abstain from using analogies also with regard to foreign constitutional law. It would be highly irrational for a court not to use this method in a purely national context, whilst it would be deemed as legitimate when it comes to foreign law.

On the other hand, an analogy would entail the application (not only consideration) of foreign law in the absence of domestic law. Should the end justify the means? Surely, there are cases where the analogous application of foreign law would decide a case to the satisfaction of at least one party. Still, however, the general consequence of such a view would be that any kind of norm, whether binding or not, whether democratically legitimate or not, whether of a legal nature or not, could be applied by a court simply because it led to a "wanted" solution. The analogous application of foreign constitutional law in the absence of domestic law, plausible and persuasive though it might be as to the result, cannot therefore be admitted as an acceptable method – not even in cases where the constitutions were similar and where the application of foreign law was apparently consistent with the general character of the domestic constitution. It would be short-sighted indeed if the absence of a domestic norm was simply interpreted as the silent approval of a foreign legal solution.

Moreover, the non-applicability of foreign law through analogy does not hinder a constitutional court to decide a case. At worst, the court will find that a certain constitutional norm is lacking and that therefore nothing could be deduced

65 Rudolf Bernhardt, 'Anmerkungen zur Rechtsfortbildung und Rechtsschöpfung durch internationale Gerichte' in FS Karl Zemanek (Duncker & Humblot, Berlin 1994) 11, 14.

66 Potacs, *Auslegung* 179 ff; Robert Alexy, *Theorie der juristischen Argumentation* (2nd edn Suhrkamp, Frankfurt am Main 1991) 290, 343 ff; Bydliński, *Methodenlehre* 428 ff.

67 Various approaches are discussed by Bernhardt, 'Anmerkungen' 13 f; see also Guy Beaucamp, 'Zum Analogieverbot im öffentlichen Recht' (2009) AÖR 83.

from it, even though this might be detrimental to the interests of one of the parties. Nonetheless, such a rule is normally neither stipulated explicitly by constitutions nor by the constitutional courts' adjudication. One might find such a rule in a certain ambiance, e.g. under Art. 53 ECHR according to which an individual should benefit from the most favorable of concurring human right guarantees. Another party-friendly rule may derive from the obligation to interpret ordinary law in accordance with the constitution, provided that this constitution is of a democratic and liberal nature.⁶⁸ But this does not entail an analogous application of foreign constitutional law in the full absence of domestic law which, according to my opinion, would indeed go beyond the legitimacy of judges to further develop a constitution through interpretation.⁶⁹

IV. CONCLUDING REMARKS

Under the aegis of globalization, internationalization and transnationalization of law in general, comparative constitutional law, having been outshone by comparative private law for a long time,⁷⁰ has not only become a prosperous academic field, but also entered the arena of constitutional adjudication. This is particularly so in the European context, where both national courts (or some of them) and the two European "supreme courts" have co-developed a relatively open attitude towards the consideration of the "European family" of constitutions. But also other constitutional courts that adjudicate cases in non-European countries more or less cautiously approve of the comparative method, although they widely differ in their functions, quantity of cases and methodical approaches. In the United States there has been a long-standing debate among the Supreme Court's justices how international law and foreign law should be integrated in the adjudication of domestic cases. Nevertheless, courts that are reluctant to apply the comparative method should not be stereotyped as narrowly-minded or hostile towards foreign constitutions. A major difficulty for them to handle constitutional comparison is that many constitutions do not explicitly empower them to do so. Even the South African Constitution – that many consider as exemplary with regard to the comparative method mentioned therein – does not entrench it in a way that would be perfectly compatible with the predictability of law.

Constitutions should therefore seek to envisage constitutional comparison in both a subsidiary and a predictable method of interpretation that would be much preferable to leaving the crucial question – justiciability of foreign constitutional law or not – undecided. Still, however, even the explicit constitutional entrenchment

68 Potacs, *Auslegung* 165 and 176 f.

69 Christian Starck, 'Auslegung und Fortbildung der Verfassung durch das Verfassungsgericht' in Werner Heun and Christian Starck (eds), *Verfassungsgerichtsbarkeit im Rechtsvergleich* (Nomos, Baden-Baden 2008) 15 ff; Starck, 'Auslegung' 215 ff; Josef Isensee, 'Vom Ethos des Interpretieren' in FS Günther Winkler (Springer, Wien 1997) 367, 378 f.

70 Sommermann, (1999) DÖV, 1017; Gamper, *Die Regionen mit Gesetzgebungshoheit* (Peter Lang, Frankfurt am Main 2004) 4 ff.

of constitutional comparison could not disburden the courts from developing more subtle techniques in the treatment of foreign constitutional law. Courts should thus restrict themselves to a careful and methodically sound handling of constitutional comparison: persuasiveness alone would not be sufficient. The emergence of global constitutionalism, welcome though it is with regard to safeguarding human dignity through the establishment of equally high standards of democracy and "unalienable rights"⁷¹ in particular, would indeed go wrong if some constitutions, in Orwellian terms, turned out to be "more equal than others" or if the rule of law would be endangered by highly unpredictable judgments.

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71 John Locke, *Two Treatises of Government* (Awnsham and John Churchill, London 1698) Book II, Chapter 9.