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Constitutional Reasoning as Legitimacy of Constitutional Comparison

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A. Legitimacy of Constitutional Comparison and Constitutional Theory

I. The Great Debate

For ten years, the legitimacy of constitutional comparison in courts has been intensely debated. The case law of the U.S. Supreme Court[1] led to an intense discussion on constitutional comparison and reached its peak with the Great Debate between Justice Scalia and Justice Breyer.[2] Justice Breyer argued in favor of constitutional comparison while Justice Scalia refused the comparative approach. Justice Scalia stated:

> [Y]ou are talking about using foreign law to determine the content of American constitutional law—to be sure that we're on the right track, that we have the same moral and legal framework as the rest of the world. But we don't have the same moral and legal framework as the rest of the world, and never have. If you told the framers of the Constitution that we're to be just like Europe, they would have been appalled. If you read the Federalist Papers, they are full of statements that make very clear the framers didn't have a whole lot of respect for many of the rules in European countries. Madison, for example, speaks contemptuously of the countries of continental Europe, ''who are afraid to let their people bear arms.'[3]

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[1] *See generally* Lawrence v. Texas, 539 U.S. 558 (2003); Roper v. Simmons, 543 U.S. 551 (2005).

[2] *See generally* Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. OF CONST. L. 519 (2005), *available at* http://icon.oxfordjournals.org/content/3/4/519.extract.

[3] *Id.* at 521.

Justice Breyer replied with the following:

> [W]hen I refer to foreign law in cases involving a constitutional issue; I realize full well that the decisions of foreign courts do not bind American courts. Of course they do not. But those cases sometimes involve a human being working as a judge concerned with a legal problem, often similar to problems that arise here, which problem involves the application of a legal text, often similar to the text of our own Constitution, seeking to protect certain basic human rights, often similar to the rights that our own Constitution seeks to protect.[4]

This debate on legitimacy of constitutional comparison circles around the legality of the comparison, the argumentative rationality of foreign judgments, the lack of authority of foreign judgments, the democratic limits of the constitutional comparison, and the role of the judge as interpreter of the constitution.[5] The traditional concept of state and constitutional theory is an unquestioned assumption of this debate.

Cheryl Saunders warns of overstating this debate as a particular U.S. perspective on the topic:[6]

> Recent debate on judicial engagement with foreign law reveals […] broad challenges to the practice. One, which disputes its legitimacy, can be met by the manner in which foreign experience is used. Despite the vigour with which this question has been canvassed in the United States, it has met with

[4] *Id.* at 521.

[5] *See* Gábor Halmai, *The Use of Foreign Law in Constitutional Interpretation*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1328, 1330 (Michel Rosenfeld & András Sajó eds., 2012). *See generally* VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN THE TRANSNATIONAL ERA (2010); Christoph Bezemek, *Dangerous Dicta? Verfassungsvergleichung in der Rechtsprechung des US Supreme Court*, 18 J. FÜR RECHTSPOLITIK 207 (2010); Iris Eisenberger, *Wer fürchtet sich vor einem Verfassungsrechtsvergleich? Gedanken zur Rechtsvergleichung in der Judikatur des US Supreme Court*, 18 J. FÜR RECHTSPOLITIK 216 (2010).

[6] *See* Cheryl Saunders, *Judicial Engagement with Comparative Law*, *in* COMPARATIVE CONSTITUTIONAL LAW 571, 590 (Tom Ginsburg & Rosalind Dixon eds., 2011).

> bemusement elsewhere. It seems unlikely that it can be sustained in the longer term.[7]

In addition, Saunders gives her opinion on the particular preconditions in U.S. constitutional interpretation:

> Those who would resolve this problem by relying on the meaning of the Constitution at the time of promulgation in accordance with a theory of originalism are less likely to accept the relevance of foreign experience after that date for the purposes of constitutional interpretation. Even on this basis, however, an original understanding may show that the Constitution was intended to evolve over time in a way to which foreign experience may be relevant or simply that foreign experience was intended to be taken into account in the course of constitutional interpretation. And, in any event, originalism is only one of a number of interpretive theories. Others, typically, allow for adaptation and change over time, in varying degrees and offer no objection in principle to engagement with foreign law.[8]

The consideration of the Great Debate on the legitimacy of constitutional comparison shall serve as a starting point. It reflects the typical questions and answers in the discussion on legitimacy of constitutional comparison. This paper, however, offers another approach. This paper will develop a pluralistic perspective of constitutions and comparisons that will lead to a new perspective of the topic. Legitimacy of constitutional comparison, which is used by constitutional courts, relates to constitutional reasoning.

II. From Legality to Legitimacy

The paper shifts the view from questions of legality to questions of legitimacy of constitutional comparison as constitutional reasoning. The legality of constitutional comparison depends on the requirements set by national constitutional systems in terms of constitutional law. Case law, which opens the domestic constitutional system up to comparative constitutional knowledge, has remained the exception and even so has been

[7] *Id.*

[8] *Id.* at 586.

vague and limited in scope.[9] Comparative constitutional knowledge is—except for instances of constitution-making—mostly introduced into the domestic constitutional system as part of the latitude for constitutional reasoning practiced by constitutional judges.[10] It is thanks to constitutional systems increasingly opening up to international law that comparative constitutional knowledge has begun to acquire legal relevance. International organizations pool comparative constitutional knowledge, which then affects judicial decisions on an international scale.[11] Thus, owing to the increased relevance of international decisions for national constitutional law, a framework for constitutional law is emerging on which the legality of comparative constitutional knowledge can be based.

While the legal relevance of international constitutional networks becomes increasingly apparent, questions as to the legitimacy of constitutional comparison are still conceived in terms of the nation-state. The legitimacy of international constitutional networks, however, presupposes a constitutional understanding that transcends nation-states not only from a legal but also from a theoretical perspective. By categorically separating constitutions and demarcating them against external influences, a closed constitutional system is created that isolates itself from other constitutional systems that are understood as (democratically) illegitimate systems. The narrative of legitimacy of comparative constitutional knowledge begins at the conceptual border, where the legitimacy of international constitutional networks is no longer rejected in terms of the nation-state, but opens up to a pluralistic perspective of constitutions, constitutional law and constitutionalism.

III. A Pluralist Perspective

In the traditional understanding of the constitution as a unique, unifying, and unitary concept of a society,[12] constitutional comparison remains legitimized by the non-authoritative consideration of foreign judgments to improve rationality of constitutional reasoning.[13] In fact, the relevance of the constitutional comparison is downplayed for the

[9] With regard to the debate on § 39, para. 3 of the South African Constitution, see Anna Gamper, REGELN DER VERFASSUNGSINTERPRETATION 7–28 (2012).

[10] *See generally* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 1 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

[11] *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65 (2004); Geir Ulfstein, *The International Judiciary*, *in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 126 (2009).

[12] *See* MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 209 (2010).

[13] *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1309 (1999).

sake of legitimacy.[14] This does not change the substantive consideration and influence of foreign constitutional thinking and the transfer and implementation of foreign constitutional knowledge by national (constitutional) courts. This paper argues in contrast to this traditional approach in favor of an open-minded, pluralistic understanding of constitutions that do not represent an isolated, autistic, self-contained concept, and of a pluralistic understanding of comparison that raises the claim of a more rational use of comparison. While the traditional understanding of legitimacy of constitutional comparison sees its result in the rationality of constitutional reasoning, the pluralistic approach demands rationality of constitutional reasoning as precondition of the legitimacy of constitutional comparison.

This article claims a rethinking of the concept of constitutional theory. If we understand the concept of a constitution from a pluralistic perspective, the constitution will shift from an internal to an external point of view. Pluralistic constitutions enable diversity.[15] The plurality of constitutions does not focus on state constitutions but opens up to the idea of constitutions in the transnational sphere.[16] Constitutional pluralism focuses on the interaction and interdependences between these forms of constitutions.

From the perspective of societal constitutionalism,[17] the constitutions of private organizations, transnational corporations and non-governmental organizations are also included in the fragmented landscape of constitutions in a globalized world. Thinking plural means to conceptualize a state as societies, cultures, and peoples, and not as one society, one culture, and the people. Constitutions do not unify people within a single constitutional identity anymore, but give individuals the possibility to participate in different constitutional networks or regimes.

This pluralistic understanding of the political concept of constitutional law enables a new legitimacy of constitutional comparison. Constitutions cannot be understood as separate units anymore but as parts or "knots"[18] of a global network of constitutions which interconnects humans, laws, cultures, and societies beyond legal, territorial, cultural, and political borders. In this perspective, an exchange of constitutional ideas or constitutional

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[14] *See* Saunders, *supra* note 6, at 585: "The straightforward answer to this objection . . . is that it overstates the way in which foreign law is used. National judges are not obliged to engage with foreign law. When they do so they are accountable for its use in the ordinary way, which includes published reasons for decision."

[15] *See* MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 21 (2010).

[16] *See generally* Neil Walker, *The Idea of Constitutional Pluralism,* 65 MOD. L. REV. 317 (2002).

[17] *See* GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 74 (2012).

[18] *See* Alexandra Kemmerer, *The Normative Knot 2.0: Metaphorological Explorations in the Net of Networks*, 10 GERMAN L.J. 439, 456 (2009).

knowledge is legitimate and necessary to participate in the different constitutional networks.

Constitutional reasoning by supreme or constitutional courts is an important contribution to the global exchange of constitutional knowledge. Besides constitution-making, judicial networks are the pioneers of constitutional reasoning in constitutional pluralism. Pluralism does not mean harmonization or cultural assimilation. On the contrary, pluralism implies "energetic engagement with diversity," "encounter of commitments," "dialogue," and "active seeking of understanding across lines of difference".[19] The role of the judge is not only focusing on the interpretation of the constitution but also in engaging in the transnational network of constitutions.[20] Constitutional reasoning not only contributes to the national dialogue between the constitutional or supreme courts and the legislator,[21] but also to the international constitutional communication on constitutional ideas in a global constitutional knowledge network. Reflection of constitutional reasoning in constitutional comparison has to be improved. The quality of the pluralistic exchange of constitutional knowledge as constitutional reasoning will become the new legitimacy of constitutional comparison.

The following article focuses on these questions of constitutional and comparative theory. The re-conceptualization of constitutional law from a pluralistic perspective will be the central topic in part B. Part C will focus on societal pluralism as a precondition to a new understanding of constitutional theory. Furthermore, it shows how constitutional concepts are already changing as result of a globalizing constitutional thinking. These considerations (parts B and C) lead to a pluralistic legitimacy of constitutional comparison as constitutional communication in an international constitutional network. Thus, it is possible to address global challenges to constitutions and develop strategies to deal with these challenges, as explained in part D. Finally, the article presents pluralistic comparison as a method of constitutional comparison that overcomes the binary codes of comparison—identity or difference—and enables a new self-understanding of constitutional reasoning by constitutional courts in constitutional comparison through participation in the global dialogue on constitutional knowledge. This approach results in the insight that considered constitutional reasoning gives the relevant legitimacy to constitutional comparison, as explained in part E.

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[19] See the religion-based concept of pluralism by Diana Eck. Diana Eck, *What is Pluralism?*, THE PLURALISM PROJECT, http://pluralism.org/pages/pluralism/what_is_pluralism (last visited June 26, 2013). See generally from the perspective of political theory, WILLIAM E. CONNOLLY, PLURALISM (2005).

[20] *See* JACKSON, *supra* note 5, at 71, 103.

[21] *See* Margit Cohn, *Domestic Sovereignty: Hierarchies, Dialogues and Networks*, *in* SOVEREIGNTY IN QUESTION (Richard Rawlings, Peter Leyland & Alison Young eds., forthcoming).

B. From the Plurality of Constitutions to Constitutional Pluralism

I. Introduction

Traditional constitutional theory relates the concept of constitutional law to nation-states. Postmodern constitutional approaches open the concept of constitutions up to the transnational, international, and even private spheres. This part supports the postmodern idea of a broader understanding of constitutional law beyond the nation-state. The plurality of constitutions, which can be identified in this way, does not isolate the different constitutions from each other, but shows that these constitutions are interlinked. These links lead to constitutional networks, regime collisions, and constitutional pluralism.

II. The Plurality of Constitutions

Constitutional theory is deeply rooted in the post-Westphalian concept of the nation-state.[22] Although the theoretical concepts of states and constitutions differ significantly among countries, constitutional law is understood as the basic treaty of a society that constitutes itself as a state. In many cases constitutional law refers to a hierarchical element (supreme law) and to certain substantial values, like democracy, rule of law, and civil liberties. In this perspective, the plurality of constitutions only exists in the variance of national constitutions that are distinguished from each other in a territorial perspective. The state understood as defined territory, constituting one state power by one people, establishes one constitution as legitimizing foundation and as statute limiting state power.[23] A plurality of constitutions in the same territory would challenge the legitimacy of the state constitution as well as the possibility of restricting governmental power.

The plurality of constitutions, however, always existed in federal states as federal and state constitutions.[24] Various concepts of constitutional theory reconciled federalism with the singularity of the constitution of the nation-state.[25] Subnational constitutions were understood as a part of the overall constitutional concept of the nation-state.[26] If there is no possibility to bring all subnational constitutions together at the level of the federal

[22] *See* LOUGHLIN, *supra* note 12.

[23] *See* ANDRÁS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM 7 (1999).

[24] *See* Robert Schütze, *Federalism as Constitutional Pluralism*: 'Letter from America,' *in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 185, 185 (Matej Avbelj & Jan Komárek eds., 2012).

[25] *See* DIETER GRIMM, SOUVERÄNITÄT: HERKUNFT UND ZUKUNFT EINES SCHLÜSSELBEGRIFFS 54 (2009).

[26] *See* THOMAS FLEINER & LIDIJA BASTA FLEINER, CONSTITUTIONAL DEMOCRACY IN A MULTICULTURAL AND GLOBALISED WORLD 559 (2009).

constitution, a federal constitution would not exist, only a confederal treaty between different states.

The plurality of constitutions, which is the starting point of this paper, opens up the understanding of constitutional law beyond the nation-state. International organizations and entities also fulfill the formal and substantive criteria of constitutional law.[27]

The discussion on post-national constitutional law was most intense regarding the European Union (EU).[28] The European approach towards a constitutional treaty came close to national standards of a federalist constitutional concept. Nevertheless, the EU does not fulfill the last step of a full-fletched federal state, the democratic sovereignty. The EU constitution remains in a concept of cooperative federalism.[29] But the nation-state concept of constitutional understanding was transcended. Although the constitutional treaty was not realized, the actual EU Treaty of Lisbon can be understood as constitutional law. The EU's treaties are conceptualized as supreme law within the hierarchy of legal acts in the EU.[30] The particular way of amending the EU's treaties fosters a formal constitutional understanding of them. From a substantial perspective, the EU treaties address human rights, rule of law, and democracy. Although the implementation of EU law still depends—to an important extent—on the member states, the way democracy is conceptualized does not exactly adopt the national way of parliamentary sovereignty. Nevertheless, the EU deals with these constitutional questions from a conceptual and a legal perspective.[31] Thus, the EU treaties fulfill the criteria of constitutional law from a legal perspective.

The debate on constitutional law beyond the state did not end but started with the EU. The constitutionalization of international law[32] further opens up the understanding of constitutional law and dissolves the direct bond between constitutional law and the nation-state. International organizations and international treaty regimes do not fulfill the same standard of constitutional intensity as the EU from a legal and a theoretical perspective. Nevertheless, state power is further transferred to the international level and the relevance of international law does not stop at the borders and duties of the nation-

[27] The question of legitimacy of such entities in a political understanding beyond the state will be discussed later. *See infra* Part C.III.

[28] *See* ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 37 (2012).

[29] *See* ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW 241 (2009).

[30] *See* SCHÜTZE, *supra* note 28, at 60.

[31] *See* Schütze, *supra* note 24.

[32] *See generally* JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009).

states.[33] Individuals can address international courts or tribunals and are subjects of these tribunals.[34] International judicial institutions are substituting national legislation.[35] Moreover, international organizations and international law are increasingly influencing national constitutions. The manifold dimensions of human rights, rule of law, and democracy do not depend on isolated decisions of national constitutional actors, but also on international legal developments.[36]

The decisions of international courts and global administrative acts on international law intensify a constitutional understanding of international treaties.[37] From a legal perspective, constitutional law is not an exclusive concept of nation-states anymore, but a plausible perspective with regard to international organization and other international legal orders. The analysis of constitutional law within a nation-state makes it necessary to consider international legal developments as well as international law to solve its challenges.

The legal developments of the recent decades show that not only nation-states and international organizations relate to constitutional dimension, but also that private corporations have gained more and more power that primarily belonged to the state.[38] Private actors are not only part of global governance but they decide and influence constitutional decisions of the state and international organizations.[39] Moreover, private regimes constitute new spaces of constitutional power themselves, independent from state territories. All these developments lead to the creation of functional differentiated societies. The internet as a social project organized by ICANN is an example. Constitutions as reference points of certain challenges of societies are not exclusively state-organized. The legal pluralism movement already perceived the non-exclusiveness of state law. The

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[33] *See* Anne Peters, *Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse*, 65 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 3, 13 (2010); THOMAS KLEINLEIN, KONSTITUTIONALISIERUNG IM VÖLKERRECHT: KONSTRUKTION UND ELEMENTE EINER IDEALISTISCHEN VÖLKERRECHTSLEHRE 517 (2012).

[34] *See* Anne Peters, *Membership in the Global Constitutional Community*, *in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 153, 157 (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009).

[35] *See generally* Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GERMAN L.J. 979 (2011).

[36] *See generally* Erika de Wet, *The International Constitutional Order,* 55 INT'L & COMP. L.Q. 51 (2006).

[37] *See* Anne Peters, *Das Gründungsdokument internationaler Organisationen als Verfassungsvertrag,* 68 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 1 (2013).

[38] Globalization and the rise of global-acting transnational corporations furthermore led to a culmination of state power in the private sphere.

[39] *See* GRALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW 108 (2010).

globalized version of legal pluralism, global legal pluralism,[40] includes these hybrid forms of constitution developments within a broad but appropriate understanding of constitutional law and the constitution.[41]

In conclusion, the plurality of constitutions does not only refer to the 200 constitutions of the nation-states around the world, but to the plurality of understandings of constitutions and constitutional law. The path from the national constitution to constitutional fragments[42] of global, hybrid constitutional regimes is long. Within this process of opening up the understanding of constitutions and constitutional law, it is important not to overlook the still existing relevance of national constitutions. Nevertheless, national constitutions cannot be understood as exclusive anymore.

This broader understanding of constitutions does not make the term and concept of constitutional law unclear. On the contrary, it creates a precise meaning of the role and concept of constitutions nowadays. Teubner reformulates the concept of constitution in this regard: "[A] constitution establishes a distinct legal authority which for its part structures a *societal* process (and not merely a political process, as is the case with nation-state constitutions) and is legitimized by it."[43] Moreover, he develops a "quality test" for constitutional norms with regard to constitutional functions (constitutive rules or limitative rules), constitutional arenas (comparable to the arenas of organized, political processes and the spontaneous process of public opinion of state constitutions), constitutional processes (closely connected to their social context) and constitutional structures (superiority of constitutional rules and judicial review).[44]

III. Constitutional Pluralism

Constitutional pluralism does not only refer to the plurality of constitutions and constitutional understandings, but also to the revision of the political thinking about constitutions and implicates a metaconstitutional dialogue:

> Post-state constitutional phenomena may be necessary institutional incidents of the post-Westphalian order, but they lack the ideological niche carved out by their more venerable state

[40] *See generally* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

[41] *See* TEUBNER, *supra* note 17.

[42] *See id.* at 51.

[43] *Id.* at 74.

[44] *See id.*

> counterparts. Their legitimacy is much more precarious, and this is a double-edged sword. On the one hand, it may indeed encourage a strident fundamentalism, a refusal of dialogue with other sites and processes or with internal challenges to their authority, a striving for metaconstitutional roots merely to entrench their difference and self-righteous superiority. On the other hand, the assertion of metaconstitutional authority and the demand for metaconstitutional justification which that necessarily invites from both external and internal audiences may be genuinely educational and transformative. It may free up debate, encouraging greater resort to the ample tool-kit of state-constitutionalism, more active cross-fertilization of ideas between sites—including state sites themselves as their previous authority is challenged and they are increasingly drawn into the process of metaconstitutional reflection—and a more thoughtful engagement with the 'problems of translation' which that invites.[45]

The plurality of constitutions creates new forms of cooperation and interlinking of constitutional orders. Constitutions are not isolated in their substantial and procedural concepts anymore. The constitutional interactions between the different constitutional orders also generate influence, irritation, and interruption. Constitutional pluralism focuses on these interrelations and interactions between the constitutions. The single constitution can only be understood in its role, position, and function within the constitutional network and not as a unique and isolated entity. Moreover, the idea of pluralism as a normative concept refers to certain forms and values of interaction.

With regard to religious pluralism, Diana Eck formulates these standards of pluralism, understood as general characteristics of pluralism as a normative concept:

> First, pluralism is not diversity alone, but the energetic engagement with diversity. Diversity can and has meant the creation of religious ghettoes with little traffic between or among them. Today, religious diversity is a given, but pluralism is not a given; it is an achievement. Mere diversity without real encounter and relationship will yield increasing tensions in our

[45] Walker, *supra* note 16, at 317, 358.

> societies. Second, pluralism is not just tolerance, but the active seeking of understanding across lines of difference. Tolerance is a necessary public virtue, but it does not require Christians and Muslims, Hindus, Jews, and ardent secularists to know anything about one another. Tolerance is too thin a foundation for a world of religious difference and proximity. It does nothing to remove our ignorance of one another, and leaves in place the stereotype, the half-truth, the fears that underlie old patterns of division and violence. In the world in which we live today, our ignorance of one another will be increasingly costly. Third, pluralism is not relativism, but the encounter of commitments. The new paradigm of pluralism does not require us to leave our identities and our commitments behind, for pluralism is the encounter of commitments. It means holding our deepest differences, even our religious differences, not in isolation, but in relationship to one another. Fourth, pluralism is based on dialogue. The language of pluralism is that of dialogue and encounter, give and take, criticism and self-criticism. Dialogue means both speaking and listening, and that process reveals both common understandings and real differences. Dialogue does not mean everyone at the 'table' will agree with one another. Pluralism involves the commitment to being at the table— with one's commitments.[46]

These ideas of pluralism can also be found in the political theory of William E. Connolly:

> A pluralist, by comparison, is one who prizes cultural diversity along several dimensions and is ready to join others in militant action, when necessary, to support pluralism against counterdrives to unitarianism. A pluralist is unlikely to define culture through its concentric dimension alone, the definition of culture that allows both relativism and universalism in their simple form to be. Pluralism, of the sort to be

[46] Eck, *supra* note 19.

> supported here at least, denies sufficiency of a concentric image of culture to territorial politics.[47]

"Tolerance of negotiation, mutual adjustment, reciprocal folding in, and relational modesty are, up to a point, cardinal virtues of deep pluralism."[48]

Two virtues in a world of deep pluralism are necessary in Connolly's conception of a pluralist notion of democracy:

> The first is agonistic respect among multiple groups and individuals. This respect is necessary, even when . . .these groups or individuals passionately disagree; [t]he second . . . is critical responsiveness: the willingness to listen carefully to other, particularly those who have not yet achieved sufficient recognition in the prevailing political and social setting.[49]

Finally, Nico Krisch re-formulates the idea of pluralism in the constitutional context. He identifies "adaption", "contestation," and "checks and balances" as pluralist virtues.[50]

> Pluralism promises to relax such ties, to allow for adaptation to new circumstances in a more rapid and less formalized way: by leaving the relationships between legal sub-orders undetermined, it keeps them open to political redefinition over time. . . . [51] If the argument of adaptation is based on an optimistic view of the social environment and its trajectory, that from contestation starts from a more pessimistic one. It assumes that constitutional frameworks are typically elite products, expressions of power and social hegemony, and that the element of disruption and openness in a pluralist order may provide greater contestatory space for weaker actors. . . . [52] The most

[47] CONNOLLY, *supra* note 19, at 41.

[48] *Id.* at 67.

[49] Roland Bleiker, *Visualizing Post-National Democracy*, *in* THE NEW PLURALISM. WILLIAM CONNOLLY AND THE CONTEMPORARY GLOBAL CONDITION 121, 130 (David Campell & Morton Schoolman eds., 2008)

[50] NICO KRISCH, BEYOND CONSTITUTIONALISM. THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 78 (2010).

[51] *Id.* at 79.

[52] *Id.* at 81.

> common argument for a pluralist order stems from an analogy with checks and balances in domestic constitutions. This analogy is grounded in the difficulty of justifying the supremacy of any level of postnational governance over the others.[53]

Krisch then explains that all these pluralist virtues are not sufficient to ground the pluralist concept normatively. He furthermore introduces a concept of public autonomy:

> The resulting structure of the postnational order is likely to be complex and fluid, constantly subject to readjustment and challenge. Different polities compete for recognition, and different institutions seek to link with them (though necessarily in exclusive ways) to ground their standing. . . . We have to respect this, if we are to take seriously the idea of individuals as self-legislating equals in the definition of the political framework.[54]

Krisch contrasts constitutionalism and pluralism.[55] He keeps the traditional meaning of constitution and constitutionalism and introduces pluralism as an alternative and new concept for postnational law. Neil Walker, in contrast, merges the ideas of constitutionalism and pluralism into the concept of constitutional pluralism.[56] An important precondition to an approach of constitutional pluralism is the re-thinking of the constitutional concept as described above. But once the concept of constitution and constitutional law is opened to post-national developments, the concept of constitutional law can be united with the concept of pluralism.

In conclusion, constitutional pluralism can be understood as the interaction between the plurality of constitutions considering the normative approach of engagement between the different constitutional orders in this international network of constitutions. The concept of engagement does not refer to an idealistic deliberative dialogue between equals, but rather takes the relevance of power between the different constitutional frameworks into account. The introduction of such a concept of constitutional pluralism as a benchmark for constitutional analysis moreover demands a normative foundation of constitutional pluralism in constitutional theory.

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[53] *Id.* at 85.

[54] *Id.* at 103.

[55] *Id.* at 40, 67, 103.

[56] *See* Walker, *supra* note 16.

C. Pluralism as Foundation of Constitutional Theory

I. Introduction

Constitutional law is the legal expression of the political concept of a constitution. In its traditional understanding, it builds upon the unifying idea of constitutions as one sovereignty, one identity, and one authority.[57] In terms of state theory, it refers to one people, one territory, and one government.[58] Finally, in its democratic version constitutional law refers to the people as the one *pouvoir constituant*, the parliamentary sovereignty, and the one and only legitimacy of constitutional law by its citizens.[59] The constitutional concept also includes the idea of limited government[60] and the rule of law as well as civil liberties and the effective legal protection of these liberties by independent courts.[61]

This understanding of constitutional pluralism beyond the state does not fit in this state-related concept. Thus, constitutional pluralism needs a new, a different foundation of constitutional theory, which considers the dimension of plurality. Societies do not constitute themselves only within one constitution but within many.[62] Sovereignty is not dedicated to one state but negotiated between different constitutional orders. Societies do not build just on one identity but give the individual the possibility to identify with different groups and organizations. The people are not a fixed entity anymore but a variable. Territories do not provide exclusive constitutions but enable a variety of constitutions within the same territory. Rethinking democracy includes the conceptualization of new ways of participation, representation, and self-determination of individuals. The democratic legitimacy still exists within the state but it is not an exclusionary concept any more. Legitimacy becomes an open concept to different actors, and it needs to develop new ways of participation beyond the traditional parliamentary representation. Finally, pluralism as a foundation of the constitutional theory, demands a dialogic engagement between the different constitutions to deal with conflicts and collisions. Pluralism promotes adjustment and delimitation as well.

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[57] *See* MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 72 (2003); LOUGHLIN, *supra* note 12, at 184; GRIMM, *supra* note *25*, at 35.

[58] *See* LOUGHLIN, *supra* note 12, at 191.

[59] *See* GRIMM, *supra* note 25, at 35.

[60] *See* SAJÓ, *supra* note 23.

[61] *Id.* at 205, 225, 245.

[62] *See* Teubner, *supra* note 17, at 88.

II. The Limits of the Traditional Constitutional Concept

The traditional approach of political theory regarding constitutional law refers to a certain concept of state-related sovereignty.[63] The concept is based on the idea of singularity and exclusiveness. The nation-state constitutes a self-contained concept of power and legitimacy with regard to certain people living in a certain territory. The constitution of society seems to be comprehensive as well as the authority that the state exercises. This Ptolemaic system with the state in its center explains in a perfect and logically coherent way the constitutional world. However, the constitutional world has changed into constitutional galaxies. The change from the old to the new constitutional paradigm can be observed in many examples. The theoretical reflection of the constitutional change has to start with the three core elements of state theory: People, state territory and state power.

1. The People

The People never built a homogenous group from an ethnic perspective.[64] The concept of national identity did not create a homogenous group but was constitutionally conceptualized as such. [65] Minority groups always existed, and humans, who did not accept national identity as their own, were ignored or understood as anarchists, criminals, or terrorists. Nowadays, globalization has led to a much more flexible understanding of living and working. Moreover, global social injustices caused huge migration flows. The state-based concept of citizenship tries to manage the relative stability of living concepts. Citizenship still builds on national identity, ignoring a much more complex way of emotional socialization of individuals.[66] The EU freedom of movement led to another model of union citizenship that complements national citizenship. Still, the problems of the international dimensions of migration and integration are still solved with the old concepts of national identity and nation citizenship. The constitutional exclusion of so-called illegal migrants clearly shows the narrow limits of national-constitutional approaches to migration. The right to vote is related to citizenship, giving the false impression that an emotional relation forms national identity or constitutional patriotism and is a precondition for a democratic participation in a society one lives in.

[63] *See* Loughlin references, *supra* note 57.

[64] *See* ROSENFELD, *supra* note 15.

[65] *See* FELIX HANSCHMANN, DER BEGRIFF DER HOMOGENITÄT IN DER VERFASSUNGSLEHRE UND EUROPARECHTSWISSENSCHAFT (2008).

[66] *See* ROSENFELD, *supra* note 15 at 211.

2. The Territory

The national borders of a state limit the territorial space of the state and the constitutional authority in a traditional understanding. Contemporary constitutional theory already opens jurisdiction up with regard to its own citizens in other countries and to other cases as long as there is any relation between the relevant case and the country concerned.[67] Universal concepts of jurisdiction with regard to crimes against humanity transfer the concept to global issues. The relevance of national borders gives, on the one hand, the false impression that the effect of constitutional decisions are only national. On the other hand, it ignores the transnational and cross-border dimension of various constitutional questions. The internet is the best example for the multi-dimensional complexity of societal problems. The increasing cooperation between the states in the field of international law—or even private law—shows the necessity for solutions besides and beyond state territories. Extra-territorial approaches like special economic zones or military zones illustrate again the limits of territorial approaches.

3. The Power

State power is grounded in the idea of Leviathans that society transfers its power to the state, which will guarantee security and safety to the people. The authority of the state was neither absolute nor exclusive unlike the claim of the modern narrative. The concept always depended on external and internal security, which the state can only grant to a certain extent. State authority always accepted zones of independence within the state like the churches or local autonomies. The colonial constellation imposed by Western countries always created imperialistic forms of co-existence of different powers on the same territory,[68] often ignoring that regional and local authority were administrating the country. Nowadays, state power is transferred from the state not only to traditional sub-state units, but also to a complex multitude of international regimes that can be public or private.[69] The state participates in the web of multiple players, that share the former myth of sovereignty of the state: The claim for absolute authority.[70] Multinational corporations,

[67] But see contrary developments in the case law of the U.S. Supreme Court, e.g., Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010); Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013).

[68] *See generally* Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375 (2008); John Griffiths, *What is Legal Pluralism?* 24 J. LEGAL PLURALISM 1 (1986), *available at* http://keur.eldoc.ub.rug.nl/FILES/wetenschappers/2/11886/11886.pdf.

[69] *See* TEUBNER, *supra* note 17, at 51.

[70] "Totality is no longer a relevant quality of constitutions, if ever it was." Anne Peters, *The Constitutionaliation of International Organisations*, *in* EUROPE'S CONSTITUTIONAL MOSAIC 253, 285 (Neil Walker, Jo Shaw & Stephen Tierney eds., 2011).

private NGOs, state-organized INGOs, international organizations or networks are prominent examples of international entities that exercise power transnationally.

The concepts of people, territory, and state power are not overcome and will still exist as national constitutional concepts in the future. They are—and this is the important difference—not exclusive concepts that claim priority and plausibility. On the contrary, the rethinking of traditional understandings of state and constitution opens up for a plurality of other theoretical concepts for the conceptualization and legitimation of constitutions and constitutional law.

Constitutional concepts beyond the nation-state include and transform traditional approaches of national constitutions. First of all, constitutional law itself cannot be understood as an exclusive concept of constituting society. Societies are not only unified under the national identity of the state, but form various groups that are organized only to a certain extent in an identity-based approach.[71] Individuals are not limited to a concept of one personal identity. On the contrary, individuals are organizing their social environment with regard to the personal interests without considering state limits or limits to split and share their identities. Different organizations constitute different parts of identities, which happens virtually through internet and other forms of postmodern communication or in other cross-border manners. There is not one society per state, but many societies which are not bound or restricted by borders.

This opening up of the theoretical foundation of the constitutional concept itself enables new approaches to concrete constitutional concepts. The core values of constitutionalism, which are human rights, rule of law, and democracy, are in the focus of this analysis. These values are already changing with regard to the overall transformation of constitutional law into an international constitutional network. Human rights, rule of law, and democracy, as principal values of constitutionalism, best exemplify the challenges of a trans-national network of constitutions. Just as civil rights are conceived in a denationalized way as human rights, "Rechtsstaat" can be understood as a "rule of law"[72] within, as well as beyond, the borders of the constitutional state. Federal structures can be interpreted as a multi-layered system and democratic structures of legitimacy can be rethought in terms of governance concepts.

4. Human Rights

[71] *See generally* Hans Lindahl, *Recognition as Domination: Constitutionalism, Reciprocity and the Problem of Singularity*, *in* EUROPE'S CONSTITUTIONAL MOSAIC 205 (Neil Walker, Jo Shaw & Stephen Tierney eds., 2011).

[72] *See* Armin von Bogdandy, *Grundprinzipien*, *in* EUROPÄISCHES VERFASSUNGSRECHT 13, 36 (Armin von Bogdandy & Jürgen Bast eds., 2d ed., 2009).

The human rights development started as a nation-based concept of civil liberties. Only the citizens of a state were protected and not the foreigners which were living in the same country. The rise of international human rights protection, especially after World War II, changed this approach. The protections of citizens were too narrow, so a more general, more international, and more pluralistic approach, represented by the two U.N. covenants on human rights (civil and political rights as well as economic, social, and cultural rights), was established. International human rights protection now offers a complex network of international constitutionalism, which combines national protection with regional and international treaties. The human rights development is also related to the development of international courts, directly affecting the individual.[73] Transnational judicial dialogues or their critical version, "juristocracy,"[74] are linked—at least partly—to human rights developments. The concepts of human rights show most convincingly the overcoming of national constitutional concepts. This analysis does not overlook that many nation-states still refer to civil liberties regarding the protection of human rights and that a lot of states still do not grant effective protection of civil liberties. It refers to the broader conceptual approach which supplements the traditional nation-state approach to civil liberties.

5. Rule of Law

The other important concept regarding constitutionalism refers to the rule of law.[75] The nation-state-based concept of the rule of law is most explicitly represented by the German concept of "*Rechtsstaat.*"[76] *Rechtsstaat* already includes the state terminologically in the concept of rule of law. The German concept of *Rechtsstaat* especially relates to the principle of legality, which again refers to the acts of parliament. The rule of law—in the common law perspective—focuses much more on the independence of the judiciary. The opening of the *Rechtsstaat*—or rule of law—concept beyond the state starts with the consideration of legal pluralism. Legal pluralism represents the existence of different legal orders at the same time in the same territory regarding the same people in overlapping structures. [77] The international rule of law[78] refers to the very same idea not concerning local or regional law but instead international law. The Global Administrative Law approach

[73] *See* Peters, *supra* note 34, at 153, 167.

[74] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 211 (2007).

[75] *See generally* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 1 (2004); TOM BINGHAM, THE RULE OF LAW 1 (2011).

[76] *See generally* KATHARINA SOBOTA, DAS PRINZIP RECHTSSTAAT (1997).

[77] *See* Tamanaha, *supra* note 68; Griffiths, *supra* note 68.

[78] *See generally* Simon Chesterman, *An International Rule of Law?,* 56 AM. J. COMP. L. 331 (2008).

follows this idea of addressing international law from an administrative perspective.[79] The constitutional dimension on the international level remains the same.

6. Democracy

Finally, democracy represents the core element of constitutionalism. In its nation-state approach, democracy developed alongside parliamentarianism. The election of a representative body and of core administrative authorities, like the president of a state, fundamentally guarantees national democracy. Transnational forms of democracy can try to re-build the national concept of democracy, like the EU did with the establishment of the European parliament. The limits of the possibilities of such a transfer are quite obvious. The supranational concept of the EU already had to develop new forms of democratic concepts beyond the nation-state.[80] The involvement of national parliaments, as well as the legitimacy of member states' governments, contributes to the democratic concept of the EU. Moreover, transparency and discursive deliberation are important elements of transnational democratic concept.[81] International organizations and networks developed further elements of democratic structures beyond the state. Only from a nation-state understanding of democracy can the developments of global governance be understood as post-democratic.[82] Nevertheless, international structures of democracy have to fulfill new standards of self-determination, participation, and representation. There is currently an intensive debate over how to develop new democratic forms in network societies.[83]

In conclusion, the limits of nation-based concepts of constitutionalism and constitutional law become evident in international constitutional networks.[84] Different approaches, analyzing the developments of law and globalization, deny or refuse constitutional law as a concept for international legal networks. They generally ignore the constitutional dimension of the ongoing developments. Global administrative law and post-constitutional approaches interpret constitutional law only within its nation-state understanding and refuse the relevance of the concept for the international developments.[85]

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[79] *See generally* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp [hereinafter Global Administrative Law].

[80] *See* SCHÜTZE, *supra* note 28, at 62, 74.

[81] *See* Bogdandy, *supra* note 72, at 66.

[82] *See* Alexander Somek, *Über kosmopolitische Selbstbestimmung*, 50 DER STAAT 329, 330, 348 (2011).

[83] *See* TEUBNER, *supra* note 17, at 114.

[84] *See* Peters, *supra* note 70, at 253.

[85] *See* Alexander Somek, *Postconstitutional Treaty*, 8 GERMAN L.J. 1121, 1126 (2007); Global Administrative Law, *supra* note 79. *See generally* Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global*

The approach followed by this paper is to the contrary: The concept of constitutional law is open to the international and private dimension. International constitutional networks involve nation-state concepts of constitutional law and constitutionalism. However, these concepts are not exclusive any more but are instead supplemented by the international dimension of constitutional networks and their interrelations. [86] The transgression of state territories as constitutional borders, the enlargement of the people as constitutional addressees, and the overcoming of state power as constitutional authority enable the development of a constitutional concept beyond the state. The core values of constitutionalism are already in transformation: Human rights instead of civil liberties, international rule of law instead of nation-state-focused "*Rechtsstaat*," and cosmopolitan self-determination instead of national parliamentarianism.

III. Pluralizing the Constitutional Concept

If we understand constitutional law as an international network, the focus of constitutional theory does not only lie on the constitutional orders alone but primarily on the interrelation between the different constitutional orders. This element of constitutional communication between different constitutional orders or regimes is the center of an approach towards international constitutional networks. At this point, the concept of pluralism becomes relevant. Pluralism deals with the interrelation between differences. If pluralism is combined with the idea of international constitutional networks, the constitutional communication between different constitutional orders is structured in certain ways.

Pluralism as a foundation of constitutional theory demands a dialogic engagement between the different constitutions to deal with conflicts and collisions. Pluralism does not prefer an idealistic, deliberative approach, but a realistic engagement between the different constitutional orders. But constitutional law as law refers to certain ways of communication between different systems and modes. Legal communication is a formal and structured one, but it does not have to lead to consensus and it does not ignore the relevance of power.

Pluralism promotes adjustment and delimitation; it enables communication to be based on mutual tolerance and the respect and acceptance of different values and concepts from different countries. Constitutional pluralism creates an interrelation between the different constitutional orders as a communicative design. Various forms of communicative interrelations of constitutional orders can be developed and identified. Textual references,

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Administrative Law in the International Legal Order, 17 EUR. J. INT'L L. 1 (2006), *available at* http://www.ejil.org/pdfs/17/1/64.pdf.

[86] *See especially* JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, *supra* note 32.

judicial dialogues, constitutional comparison, organizational interrelations, collisions of norms, overlapping regulations, conflicting values, migration of constitutional ideas, and international constitution-making procedures are all forms of constitutional communication between the different constitutional orders within international constitutional networks.

Constitutional pluralism promotes adjustment between the different constitutional orders as well as the delimitation between these orders. As a structural approach between nation-state constitutions, international constitutional orders, and private constitutional regimes, it creates a new way of thinking. Different forms of constitutions or constitutional fragments[87] are interrelated. The equality of constitutions in the international constitutional network only exists in the way that they are identified as constitutions. The network itself is structured by the different forms of communicative interrelation between the different constitutional orders, which includes hierarchical and heterarchical interrelations as well as non-formal interrelations. Further studies on pluralism as constitutional concept will have to focus on the network structure of constitutional orders, constitutional communication, and the way constitutional concepts are communicated through the networks.

D. Legitimacy of Constitutional Comparison Through Pluralism

I. Introduction

Constitutional pluralism and the pluralistic concept of constitutional theory establish the foundation of a new legitimacy of constitutional comparison. Constitutional comparison, thus, is part of constitutional communication as the necessary adaption and delimitation between the different constitutions. The exchange of constitutional knowledge enables the navigation of the particular constitution in the international networks of constitutions. Finally, it gives the relevant constitutional actors, like constitutional courts, an intercultural and inter-constitutional possibility to address global challenges to constitutional law.

II. Constitutional Comparison

Getting back to the Great Debate, the question of legitimacy of constitutional comparison can be approached in a totally different way. Constitutional comparison cannot be understood as the illegitimate cross-border migration of constitutional ideas anymore. If constitutional law is not limited and isolated within the territory of the state, constitutional comparison contributes to the interaction of different constitutions in international constitutional networks. In other words, the interaction of constitutions presupposes constitutional comparison. If constitutional comparison is understood—in its traditional

[87] *See* TEUBNER, *supra* note 17, at 51.

understanding[88]—as an analysis of similarities or differences between constitutions, the interaction between different constitutions requires consideration and reaction to the similarities and differences of the relevant constitutions. Constitutional comparison is a tool and a method of the interaction of constitutions in constitutional pluralism. Without constitutional comparison, the interrelation between constitutions could not be realized because comparing constitutions means creating relations between different constitutions. Constitutional comparison expresses constitutional communication.

Within the different institutional settings, the role of (constitutional) courts with regard to constitutional comparison is an important one. Although the relevance of other actors shall not be underestimated, the focus within this paper lies on courts, especially constitutional and supreme courts. The understanding of courts also requires considering the new understanding of constitutional law in international constitutional networks. Constitutional courts—in this context—are not only understood as national constitutional courts. International and transnational courts are also involved in this analysis of courts in constitutional comparison. This also includes private forms of international arbitral jurisdiction. A new understanding of constitutions[89] leads to a new understanding of constitutional courts.

Constitutional courts are part of the core constitutional players and an important influence on the overall constitutional constellation. In the last 20 years, the role of constitutional courts is on the rise in most constitutional orders.[90] Moreover, constitutional courts are promoting the ideas of constitutionalism. This crucial function of constitutional courts affects the external relations of constitutional orders.[91] Constitutional courts are also participating in international constitutional networks. Even more, constitutional courts are not only participating in constitutional communication but are creating new interrelations between constitutions.[92] Their legitimacy on using constitutional comparison does not refer to their internal structure of the particular constitutional order but to the external participation in international constitutional networks.

Resistance or engagement[93] as an alternative can only steer the intensity of the court involvement in the international constitutional network, but cannot prohibit the

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[88] *See, e.g.*, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 5 (2008).

[89] *See infra* Part B.

[90] *See* HIRSCHL, *supra* note 74.

[91] *See* Vlad Perju, *Constitutional Transplants, Borrowing and Migrations*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304, 1324 (Michel Rosenfeld & András Sajó eds., 2012).

[92] *See* Halmai, *supra* note 5, at 1346.

[93] *See* JACKSON, *supra* note 5, at 17, 71.

fundamental change of the role of constitutions in an international approach towards constitutionalism and constitutional law. The question of legitimacy of constitutional comparison precedes the decision of the court regarding its position to resist or engage in constitutional communication in the international constitutional network. The legitimacy of constitutional comparison is the result of the pluralistic understanding of constitutional law and constitutional theory.

Thus, how can we address the questions of democracy as discussed by the justices of the U.S. Supreme Court? Constitutional comparison does not endanger the constitutional relevance of the people. On the contrary, the concept of constitutional democracy must open up to international constitutional networks to the extent it is part of these networks. As mentioned above, the people, as a relevant group of constitutional legitimacy, have to be supplemented in an international constitutional network. It is neither a nation-state alone nor the citizens of a nation-state who are isolated when deciding in a closed constitutional order with regard to their "own" constitutional questions anymore. It is, on the contrary, the legitimate position of the constitutional or supreme court to consider constitutional developments of other constitutional regimes, as they are all taking part in a broader international constitutional network.

It is, however, the constitutional court that has to discuss the court decision within its own constitutional order with the people who live there (not only the people who have the particular status as citizens). Moreover, the constitutional court is not the only constitutional player in a constitutional order. Thus, an inter-institutional constitutional dialogue between parliament, government and court will lead to feedback and (positive and negative) reactions to the court decision considering certain constitutional comparisons. These are important internal implications of constitutional court decisions, though they are not changing the legitimacy of constitutional comparison in a pluralistic understanding of constitutions.

This understanding of constitutions and constitutional law affects the understanding of constitutional comparison itself. In the traditional understanding of constitutions, constitutional comparison focuses on the comparison of nation-state constitutions and it might include sub-state constitutions in a federal perspective. The last few years show that the relevance of international law is on the rise in constitutional comparison.[94] In the above-presented understanding, international law is not only an important factor for the comparison of national constitutions, but also (partly) constitutional law itself. Constitutional comparison includes international constitutions too. Consequently,

[94] *See* Wen-Chen Chang & Jiunn-Rong Yeh, *Internationalization of Constitutional Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1165, 1166 (Michel Rosenfeld & András Sajó eds., 2012).

comparative international law[95] can—as long as it relates to international constitutional law—be understood as constitutional comparison.

Moreover, the integration of societal constitutionalism and constitutional fragments, as Teubner proposes, furthers the possibilities of constitutional comparison. Private company law, contract law, international law, and national public law will meet on a new level of constitutional comparison. The differences and particularities of the different forms of constitutional law have to be considered. Structural differences do not exist because they can be all understood—at least to a certain extent—as constitutional law in the above-presented understanding of constitutional law.

III. Addressing Global Challenges

Various problems for individuals, societies, and cultures are not territorially bound. Cross-border challenges are, as mentioned above, multiple; environmental effects of pollution or environmental incidents, like serious incidents at nuclear power plants, are affecting global food industries. The decisions of global agricultural corporations to use genetically modified seeds changed the farming industry in many countries. The possibility of using prenatal diagnosis (e.g. gender selection) in certain countries will lead to travels of prospective parents from countries, where such tests are forbidden; cheap surgery in India cause medical tourism. The rise of epidemics have global effects for the hundreds of millions travelers every day.[96] Migration of people affects labor markets, human trafficking, and sexual exploitation. Financial decisions are reflected globally through stock exchanges worldwide. Elections in Greece might change global financial markets. Internet consumer protests influence business strategies of global corporations. Internet, media, and global communications system enable information and data transfer in seconds.

Constitutional law claims to deal with fundamental questions of societies. Constitutional activities from parliaments, administrative bodies, (international) boards, and executive boards of TNCs deal with such constitutional questions. The possibilities of the particular constitutional actors depend on their territorial and social relevance. A national parliament has options other than an international court or an organization like ICANN. However, within their constitutional frameworks, constitutional actors cannot ignore the impact of

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[95] *See generally* Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT'L L. 385 (2011); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57 (2011).

[96] *See generally* David Fidler, *The Globalization of Public Health: Emerging Infectious Diseases and International Relations*, 5 IND. J. GLOBAL LEGAL STUD. 11 (1997), *available at* http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1107&context=ijgls; Obijiofor Aginam, *Between Isolationism and Mutual Vulnerability: A South-North Perspective on Global Governance of Epidemics in an Age of Globalization*, 77 TEMP. L. REV. 297, 305 (2004), *available at* http://www.temple.edu/lawschool/iilpp/Docs/Aginam,%20Final%20to%20Publisher,%2011-23-04.pdf.

other constitutional orders on their own constitutional order and cannot ignore the effect of their constitutional decision in the international constitutional networks.

Constitutional comparison enables the particular constitutional actors to consider and react to the transnational component of its decisions. This is not an argument for a functionalist approach to constitutional comparison, but instead for the involvement of constitutional comparison, independent from the methodological point of view. It is always possible to acknowledge for a constitutional actor that the social problems are different in different societies and that the cultural perspective is not the same.[97] The aim of constitutional comparison does not has to be the development of best practices but the consideration of other constitutional knowledge and the acknowledgement that the own constitutional decision will affect other constitutional orders too. This approach does not pretend that similarities have to be found or differences have to be overstated.

Constitutional actors cannot ignore that global challenges are influencing their constitutional framework. The acknowledgement of global challenges by constitutional courts goes along with their acceptance of being part of an international constitutional network. The involvement in this international constitutional network finally presupposes constitutional comparison. In other words, constitutional comparison enables constitutional actors to address global challenges to constitutional law and to participate in an international constitutional network.

E. Pluralistic Constitutional Comparison

I. Introduction

A pluralistic approach to constitutional comparison identifies comparison as a communicative process. This pluralistic approach to constitutional comparison demands a more intensive personal interaction between constitutional lawyers from different constitutional orders. If pluralistic comparison is part of constitutional reasoning, it has to fulfill the criteria of pluralism, which includes "dialogue" and "engagement". Pluralistic comparison neither favors universalistic nor expressivistic approaches to constitutional comparison. The relevant question is not "similarities or difference,"[98] but the willingness to engage in an intercultural and inter-constitutional dialogue.[99] If constitutional reasoning

[97] See Günther Frankenberg, *Comparing Constitutions – Toward a Layered Na*rrative, 4 INT'L J. OF CONST. L. 439 (2006).

[98] *See generally* Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 383 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[99] *See* Susanne Baer, *Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz*, 64 HEIDELBERG J. INT'L L. 735, 735 (2004), *available at* http://www.zaoerv.de/64_2004/64_2004_3_a_735_758.pdf.

involves (pluralistic) comparison, these new criteria are relevant to the constitutional reasoning of constitutional courts.

II. Comparison as Dialogue

The plurality of constitutional law was the starting point of this journey of pluralism. It led to constitutional pluralism, which described the interrelations between the different constitutional orders. This pluralistic understanding of constitutional law legitimizes the use of constitutional comparison for the reasoning of the constitutional courts. Constitutional reasoning is also understood as constitutional communication between the different constitutional orders. The journey of pluralism finally finds its destination in the pluralistic dimension of comparison. If we understand constitutional comparison as a tool and method of constitutional communication in the international constitutional network, the way constitutional comparison is exercised also implies a pluralistic approach.

Traditional debate on constitutional comparison focuses on the way similarities or differences are conceptualized. Tushnet summarizes the traditional methods of constitutional comparison in the following categories: Universalism, functionalism, contextualism, and expressivism.[100] All the different methods refer to the same binary code of traditional constitutional comparison: "identity/difference". The different approaches, however, do not differ that much. A comparative approach always includes similarities and differences, considers contextual information, deals with universalistic ideas, and takes country-specific particularities into account. All the different approaches will be relevant in the constitutional reasoning of constitutional courts.

The pluralistic approach does not focus on the "identity/difference" code, but on how constitutional comparison engages in the inter-constitutional dialogue between the different constitutional orders. To take pluralism seriously, comparison has to develop a dialogical approach. The way constitutional knowledge is acquired from other constitutional orders does not only need the transfer of written constitutional information, but also the personal interaction between the comparativist and constitutional lawyers, who are internal participants of the referenced constitutional order, which shall serve for the comparison.

A pluralistic comparison focuses on dialogue to acquire the relevant constitutional knowledge. The reading of constitutional information is still a precondition of constitutional comparison, but does not give the necessary contextual information. Constitutional knowledge presupposes an internal perspective of the relevant constitutional order. The gathering of constitutional knowledge needs an exchange of constitutional knowledge with constitutional experts of the relevant constitutional order.

[100] *See* TUSHNET, *supra* note 88.

Thus, constitutional comparison, in a pluralistic approach, will focus on the personal interaction between the persons with the relevant constitutional knowledge. A serious pluralistic comparison focuses on the dialogic engagement between the different constitutional orders. This dialogic approach enables the comparativist to develop its comparison. The pluralistic and dialogic approach frames the application of certain methods of traditional constitutional comparison.

III. Pluralistic Comparison as Constitutional Reasoning

The legitimacy of constitutional comparison as constitutional reasoning by constitutional courts is based on a pluralistic understanding of constitutions, constitutional law, and constitutionalism. Such a pluralistic understanding of constitutional comparison also demands a pluralistic approach towards comparison. The legitimacy of constitutional comparison needs not only the legitimacy of the international constitutional network, but it is also necessary that the method of constitutional comparison fulfill the criteria of a dialogic procedure, which is made transparent, public, and comprehensible.

While the questions of legitimacy in the traditional discussion focus on democracy in a nation-based understanding of constitutional law, the pluralistic approach shifts the legitimacy dimension from democracy to the rationality and transparency of the dialogic procedure of constitutional comparison. The plausibility of constitutional comparison depends on the way constitutional comparison is exercised. This procedural method becomes the relevant element of legitimacy of constitutional comparison.

The use of comparative knowledge by constitutional courts is generally legitimate from the perspective of constitutional pluralism. The question of legitimacy can be reduced to rationality and reasoning of the constitutional court. The courts have to reflect the relevance and importance of the comparative knowledge with regard to the particular case and prove their way of dialogic examination of comparative constitutional knowledge

This pluralistic element of constitutional comparison is often lacking in the argumentation of the constitutional courts while using constitutional comparison as element of constitutional reasoning. The question of legitimacy is thus a question of constitutional reasoning.

Constitutional reasoning by constitutional courts in the context of constitutional comparison has to fulfill certain criteria to be accepted as legitimate:

First, the constitutional court has to disclose the purpose of the constitutional comparison in the particular case. The international constitutional networks give good reasons for referring to international or transnational constitutional knowledge. However, the constitutional court has to concretize the particular reason for referring to constitutional knowledge from other constitutional orders. The legitimacy of constitutional comparison

starts with a clear purpose, which can serve as central theme of constitutional comparison in the constitutional reasoning of the court.

Second, the constitutional court has to explain the way constitutional knowledge was acquired by the court. The gathering of constitutional information has to be disclosed. Only if the concept and strategies of constitutional information gathering are transparent, the value of the gathered information can be critically assessed by the (academic) public. It definitely makes a difference if the acquired constitutional knowledge does not adequately reflect the understanding of the experts from the relevant constitutional order. The illustration of the dialogical effort done by the constitutional court is an important part to prove that the gathering of constitutional information refers to the adequate constitutional knowledge of the relevant system.

Third, the constitutional court has to argue how the constitutional knowledge of the other constitutional order is relevant in a comparative manner in the concrete case. The application of the gathered comparative knowledge from other constitutional orders has to be in line with the purpose of the constitutional comparison, which was presented in the first step.

Only if all three steps of constitutional reasoning are fulfilled, constitutional comparison can be understood as a legitimate application of constitutional knowledge from other constitutional orders. The need of formalizing constitutional comparison becomes clear. The legitimacy of the constitutional comparison by the constitutional courts depends on the way of constitutional reasoning, the way constitutional knowledge is applied properly.

Constitutional reasoning by constitutional courts is of particular importance. The methodological approach and the rationality of the reasoning are crucial parts of the legitimacy of constitutional courts decisions. The use of comparative knowledge by constitutional courts has to fulfill specific standards. The focus with regard to legitimacy of constitutional comparison lies on the democratic perspective, but shifts—from a pluralistic perspective—to the constitutional reasoning of the courts. Thus, constitutional courts shall consider more of the relevance of constitutional reasoning with regard to constitutional comparison. It would strengthen their legitimacy with regard to the use of comparative constitutional knowledge as constitutional communication in international constitutional networks.