

ROLE AND IMPACT OF CONSTITUTIONAL COURTS IN A COMPARATIVE PERSPECTIVE

by

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A. Introduction

Before anything else let me express my deep gratitude for the great honour and pleasure of being invited to speak to this illustrious forum. The founder of the well-known "Walter Hallstein Institute", *Prof. I. Pernice*, has succeeded in bringing together a small but almost "world community" of legal experts on constitutional law. One of the central, legitimising topics of the "constitutional state" at its current level of development as a model is constitutional jurisdiction. At the same time the "constitutional state" as a model is legitimised among other things by constitutional jurisdiction. The question is: What could the "genius loci" of Berlin add to our topic? Would it not have been more appropriate to have chosen Washington (since the year 1803), Vienna (since 1920), Rome (since 1946), Lisbon (1976) or Madrid (1978)? Would not also Luxembourg (since 1953), or, preceding it, Strasbourg (since 1951) and, since the "annus mirabilis" of 1989, also Warsaw, Budapest or Kiev appear to be worth being named at least as much as Berlin? – not to mention, exceptionally, our proud Karlsruhe (proud for good reasons). The names of these cities reflect certain stages in the historic development of constitutional jurisdiction. Switzerland should likewise be included in our list – Switzerland, a "small Europe", to use the words of the German author T. Mann. The Swiss Federal Court is located in Lausanne, not in the federal capital Bern – is this not an extension to the territorial level of the principle of the separation of powers? Other place names one could cite in this connection are Pretoria, Lima and also Bosnia-Herzegovina (1996).

What worries me is the small amount of time I have for my report, which will be given in the "Swabian English" language. I also have concerns regarding the structure of this report: No doubt foreign participants expect a German speaker (author) to start with a chapter on his scientific methods, as such things are regarded as "typically German" in the history of science. I will not disappoint you here because this is imperative for the topic.

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B. *Possibilities of and Limits to Comparative Constitutional Law (methodical issues)*

I. The historical perspective – in time and space

The comparative method is well known to have a classical tradition in both *civil* and *criminal law*. It is associated with some great names in Germany and Italy, such as *G. Radbruch*, *M. Rheinstein*, who lived in the US after 1933, then *K. Zweigert* and *H. Dölle*, and in criminal law *H.H. Jescheck*. In Germany a self-obsessed but simultaneously imperial nation state obstructed the blossoming of the comparative method in constitutional law. Well known works include those of *G. de Vergottini* in Italy, *G. de Pelayo* in Spain, and *C. Grewe* in France.

There was of course the very early classic text by none other than *R. von Jhering*, who fought to overcome the limitations of the "Landesrecht" (state law). The final breakthrough for the comparative method in constitutional law was the "annus mirabilis 1989" (if the term "finally" can and should exist in science at all). Before that date, back in 1982/83, there were the concepts of "comparative constitutionalism as comparing cultures", and in particular "comparison of fundamental rights as a cultural comparison". In May 1989, at an international seminar of the Spanish Senate held in Madrid, I put forward the hypothesis that comparative law (in the hands of the judge) should be the "fifth" method of interpretation completing the classical four methods of *Savigny* (1840). At the time this hypothesis was received with great interest by the late *L. Favoreu*. In my view there is no such thing as a *numerus clausus* for the sources of law (for instance "general principles of law")! The development of constitutional law (*Rechtsfortbildung*) is one of the basic tasks of constitutional courts, one they perform collectively on the basis of cooperation.

II. Elaboration of the topic in detail

Comparison of any legal topic and, in particular, a topic of constitutional law such as constitutional courts and jurisdiction, has to refer to the *trias* of texts, theories and practice (especially that of the courts). We therefore have to analyse written constitutions, unwritten judicial traditions, scholarly writings, and the practice of states and particularly their courts: What do they tell us and give us regarding our topic? We have to focus on several dimensions - including comparing the dissimilar, i.e. no levelling off but instead openness for variety and plurality, and also for possible "functional equivalents". Using a law-in-context approach, what a text means can often be understood from its context. The catchword I proposed for this in 2001 was: "interpreting on inspiration from the context" („Auslegen durch Hinzudenken“). In other words: No (legal) text without a context, and no (legal) text without interpretation! *R. Smend* gave us the following hypothesis in 1951: "If two Basic Laws (*Grundgesetze*) say the same, their meaning is not the same!" This opens up the

horizon for the approach based on cultural sciences. Texts, theories and practice become accessible only if seen from the viewpoint of the cultural "humus" from which they emerged, i.e. from their background ("Hintergrund") or and foundation ("Untergrund"). In France the term "republic" has a very specific (e.g. secular) meaning and content. Regarding Germany's Basic Law, it is because of the cultural context from which it emerged that, alongside protection of fundamental rights and the rule of law ("Rechtsstaat"), it also gives us – as its essence - a Federal Constitutional Court. In Anglo-Saxon countries it is because of their respective cultural contexts that judges hold a strong position (also in society), reflected by forms of address such as "your honour". Furthermore, different methods of scholarship in different countries likewise belong to the cultural context which forms their "style", their language in terms of judicial thinking: The French Conseil d'Etat and the Conseil Constitutionnel in Paris, committed as they are to Cartesian method, argue in a very concise and precise manner which often appears to be very "formal". Decisions by German constitutional courts often appear to the foreign observer like scholarly monographs. Italy loves and succeeds with forensic rhetoric, at least since the times of Cicero, to whom we owe the origin of the word "culture". So, bearing all this in mind, we have to work on a comparative basis "in space and time" („Raum und Zeit“) – the words "in space" meaning comparison between cultures as of now, while "in time" here refers to constitutional history and the history of law. But of course, no individual contemporary scholar can succeed in embracing both dimensions as well as *Aristotle* or *Montesquieu*.

C. "The Constitutional Court"

I. The broad and open approach

We have to describe the term "constitutional court", which is the topic I have been entrusted with, not only for this event today. I opt for a broad approach to the scope of this term which includes "high courts" such as the Supreme Court in Mexico and Brazil. This is because, and only so far as, they perform functions of a constitutional court (without rivalry from a separate constitutional court), and because they are focused on a constitution and work by interpreting it – they thus have the "quality of a constitutional body" ("Verfassungsorganqualität"). Their distinctive feature is that they are subject to and bound by the constitution (Verfassungsbindung), or more specifically: They have to use rational working methods which should also be as transparent as possible, their competencies are defined by positive law for each type of proceedings, and exercised in accordance with the self-perception of the court. Furthermore, I would also propose using the term "constitutional court" to cover courts which are limited to "partial constitutions" (Teilverfassungen), both on the national and on the supranational level, such as "regional constitutional courts" like

the European Court of Human Rights in Strasbourg, the European Court of Justice in Luxembourg or the Panamerican Court of Human Rights in Costa Rica. Conventions of human rights are "partial constitutions" par excellence. The European constitutional law of the European Union is in my view a further-reaching, intensively expanding "partial constitution". At the same time, the 25 national constitutions of the EU Member States are themselves now no more than "Teilverfassungen". National constitutional judges won't like to hear this. This broad approach to the term "constitutional court" also has to be flexible in time. For instance, the French "Conseil Constitutionnel" grew step by step into the role of a real constitutional court, a role which it bestowed upon itself. To put it differently: The term "constitutional court" cannot be fully defined in terms of its structural elements, instead it is open (e. g. the International Criminal Court under the provisions of the Rome Statute). So what is the position of the ICJ in The Hague when considering the "constitutionalisation" of international law? The sixty-four thousand dollar question is: What is the difference between a constitutional court and an "international court" (for instance the EFTA court)?

II. Matters of status and the (s)election of judges

Though these two topics are not an obvious pair, they are both crucial to the concept of a "constitutional court". They are therefore being examined by one of the panels at this colloquium in Berlin. It was *G. Leibholz* who wrote the classical German text on the subject: his famous 1952 "status report" ("Statusbericht") published in: *Jahrbuch des öffentlichen Rechts*, vol. 6 (1957), pp. 109. The conditions and criteria for electing democratically legitimised candidates to the office of judge at a constitutional court form an important element for determining the character and function of that court. These include the - to my mind excellent - public hearings at the US Senate, but also the fortunate attribute of the Italian President to himself select one third of the members of the Corte in Rome (recent rulings by such great judges as *A. Baldassare* and *G. Zagrebelsky*). The election procedure for the judges at the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) should not be taken as a model. Their membership of or proximity to political parties is ever more decisive in a procedure which is strictly applied but remote from public opinion.

At some point one also wonders whether too many legal scholars are appointed to the Constitutional Court, leaving aside important practitioners with political experience such as former members of parliament. In Germany there is an urgent need to replace the governmental appointment of judges to the European Court of Justice by a procedure involving a parliamentary election committee.

III. "Constitutional procedural law"

Since 1976 I have suggested understanding constitutional procedural law as part of "substantive constitutional law" and as being separate from other rules of procedure. It is more than just an aspect of the "constitutional court": indeed, the rules of procedure are the court's "basic and house law". They are to be understood as broadly and profoundly as they are special and "autonomous". One example of its specificity is the dissenting vote, as explicitly codified by the Spanish Constitution of 1978, with its long and inspiring tradition at the US Supreme Court (a minority of judges today can become the majority of tomorrow). A telling example is the case of *Mrs. W. Rupp von Brünneck* and her dissenting vote on the protection of property rights for positions under public law: see BVerfGE vol. 32, p. 129 (pp. 141). Her dissenting vote was also an example for what I call the "constitution as public process" (see *Häberle* 1969). In a comparative perspective, awareness of the crucial role of constitutional procedural law is increasing worldwide. In Peru, a burgeoning science on constitutional procedural law is associated with the names of *G. Belaunde* and *C. Landa*, and there is a similar development in Mexico (Mr. *Ferrer MacGregor*). It is above all the "younger" nations which still have to build up and expand their constitutional jurisdiction which cannot overemphasize the importance of constitutional procedural law, including its refinement by case law, legal scholars, and "amicus curiae briefs". Brazil is a model here, not least thanks to *Gilmar Ferreira Mendes*. A "European constitutional procedural law" seems to remain the desiderate of legal scholars.

What can already be seen from these brief statements is how strongly all matters concerning the "comparative science of the constitutional jurisdiction" are inter-related. This is why it is time now to pass on to the *third part* of my report. It concerns the role and functions of constitutional courts in detail.

D. Role and Functions of Constitutional Courts in Detail – A Comparative Perspective

I. Variability and openness

The roles and functions of constitutional courts develop and change depending on where in space and time one stands. Roles and functions have to be understood through the prism of their historical background. Not even the abstract "model" of the constitutional state can permit or cause us to understand what exact role is played by a national or (supranational) "regional" constitutional court in "absolute" or objective terms. Some minimal "quantum" and a maximum or optimum of competencies and functions may exist, depending on the context of time and place. Just a few examples may illustrate how much our topic is related to such circumstances.

The State Court of Justice of the Republic of Weimar (1919) was a real constitutional court, albeit with only very limited competencies (for instance there was no admission of any individual constitutional complaint), though it was rather like a typical "State Court of Justice". The German Federal Constitutional Court (Bundesverfassungsgericht) very probably has the furthest-reaching competencies a constitutional court can have. Yet it is a constitutional court as much as the US Supreme Court. The admirable development of the French Conseil Constitutionnel has already been mentioned. Doubts may arise if courts are too specialized, as in the case of some Mexican courts which only have the power to scrutinise political elections. But such doubts should finally be rejected; we can indeed talk here of "special constitutional courts": the right to scrutinise elections is a core competency of the constitutional character and of great importance.

Special attention should be given to situations of great historical change ("revolutions") – as was the case in the eastern European reform states when they deposed their totalitarian systems in 1989 and in Latin America after various military regimes were ousted. I deeply respect the High Court of Argentina which ruled the "final point" law to be unconstitutional in 2005. Here, constitutional courts in a way had to fulfil the role of a constituent assembly, virtually having to "invent" or at least "develop" parts of the national constitutional law. The other constitutional bodies such as parliaments, other courts and public opinion were not yet able to interpret the constitution despite the fact that the principle of the "supremacy of the constitution" was enshrined in the documents.

Also required was some "constitutional teaching". In Hungary there was talk about the "invisible constitution" of the constitutional court. "Judicial activism" was needed. On the other hand, a system of half-direct democracy, such as in a culturally and politically stable country like Switzerland, can afford to be restrictive in terms of its substantive constitutional jurisprudence – as is the Federal Court (Bundesgericht). Yet the Swiss Federal Court developed over time some praetorian "unwritten fundamental rights" which were incorporated in the new federal constitution (neue Bundesverfassung) in 1999. To put it differently: Only a complete view that takes all state functions into consideration can tell us something about the role of constitutional jurisdiction in any given country.

The South African Constitutional Court might, in 1993 to 1996, have been in a situation comparable to that of the Eastern European countries: Creative constitutional jurisdiction was and is necessary here, especially in the difficult, long-term and pluralistic processes of nation-building and constitution-making. Also relevant here is the well-known fluctuation between "judicial activism" and "judicial restraint" on the part of the US Supreme Court. Knowing when a court should be more active and when it should show more restraint is a sixty-four thousand dollar question, a question that is ultimately answered by the "Volksgeist" or the "Weltgeist" (thus there is a piece of *Hegel* in Berlin!).

II. Functional diversity resulting from different theories on state and constitution

Let us go, for a short while, to the theoretical level where the questions "what is?" and "what should be?" converge. Constitutional courts are characterised by their *integrating function* with regard to the *national* constitutional state and its citizens and groups as well as within the framework of the European Union, which is deemed to be an association of states ("Staatenverbund") by the German Constitutional Court, or a "composed constitutional system" ("Verfassungsverbund", *I. Pernice*). Constitutional courts are themselves part of the *balance of power*, and at the same time they have to protect the principle of the separation of powers. While the ECJ worked out the principles of "institutional balance", the issue in a federal state, as stated by *K. Hesse*, is that of a "vertical separation of powers". *Protecting fundamental and minority rights* is another keyword. One could also think here of the transsexual cases solved by the German Federal Court (BVerfGE vol. 49, p. 286; vol. 60, p. 123; vol. 88, p. 47) or of the protection of minority languages (such as Ladinian) by the Corte in Rome. Very generally, one could also list protection of the individual against *abuse of power by the state* (in part also *abuse of power in society*) as being a function of constitutional courts. (The German BVerfG recently awarded specific protection for small parties.) In federal states, constitutional courts play an important role in conflicts between the federation or union and its component states such as the German Länder (historically, such disputes between the federation and the Länder represented significant phases in the development of constitutional jurisdiction in Germany ("Federal council" or "Bundesrat" of the Bismarck constitution of 1871, Art. 76). One could add that constitutional courts are also entrusted with protecting the principle of *pluralism* within the constitutional state. One example here could be the fortunate consolidation of a pluralistic media landscape through various TV decisions taken by the German BVerfG since vol. 12, p. 205 (recently BVerfGE vol. 73, p. 118; vol. 74, p. 297; vol. 90, p. 60; vol. 91, p. 125). The underlying concept here has frequently have been adopted in other European countries (be it by the national constituent assembly or by the constitutional courts, as in Rome). All of this would not occur without the refinement of the constitution by case law.

Finally, diverse perceptions of state and constitution play an important role. The "giants of Weimar" and some scholars studying since the Basic Law (Grundgesetz) was adopted have something to say on that subject: the constitution was deemed to be a "stimulus and a barrier" (Verfassung als Anregung und Schranke, *R. Smend*), a "limitation of power and warranty of free political life process" (Beschränkung von Macht und Gewährleistung eines freien politischen Lebensprozesses, *H. Ehmke*, 1953), and as a "norm and duty" (Norm und Aufgabe, *U. Scheuner*, 1963). With your permission I would also add: the "constitution as a legal basic order of the state" (Verfassung als rechtliche Grundordnung des Staates, *D. Schindler*, 1945) as applied in Switzerland and, finally, my concept of "constitution as a public process" (1969) and "constitution as culture" (1982).

Depending on its specific individual experience, each nation has its own "felt" and rationalised perception of state and constitution, and the perceptions differ fundamentally: The "constitutional patriotism" in Germany sees the Federal Constitutional Court as the "citizen's court" par excellence, thanks to the existence of the notion of constitutional complaint. "Karlsruhe" is from the citizen's viewpoint the court of final appeal. The perception in France is still that of a "monarchical Republic", even though the Conseil Constitutionnel has made substantial progress here. The point of reference is the sovereign Republic of France with all the consequences this has, even including the strict principle of separation of state and church. In Spain's "republican monarchy", the Tribunal Constitucional in Madrid, seated in the "Via Domenico Scarlatti", is growing into this important role.

The role of comparative law in the process of developing constitutional law by constitutional courts, especially where evident shortcomings of justice and public interest are to be overcome, varies from country to country. The constitutional court of Liechtenstein has recently (in 2003) referred to my doctrine of comparative law as a fifth method of interpretation. This is particularly adequate in this small state. The South African High Court (1996) is supposed to use comparative law as in constructing the Bill of Rights: Under Article 39 § 1 lit. b of its 1996 Constitution it "may consider foreign law". Art. VI of the Bosnian Constitution (1996) refers to the "general rule of public international law". In contrast, the US Supreme Court has a longstanding tradition of ignoring foreign legal systems. Yet, very recently (in 2005) it did refer to comparative law. In 2002, the great Chief Justice *Rehnquist*, referring to the death penalty for mentally handicapped persons, was still saying that opinions in other countries are simply irrelevant. The comparative research and analysis that a (national) court undertakes is generally done in the darkrooms of its scientific service and is not made public. The judges inform themselves to make a decision according to "their" national constitutional law. What is astonishing is the outstanding function that comparative law has in dissenting votes within German judgements. This can be understood as a sign of an increased need for legitimacy.

"Introverted interpretation of the constitution", at least in the "European Constitutional Community" of the EU, is no longer an option. The German BVerfG should finally dare take one more step and use its praetorian power to place the Convention for the Protection of Human Rights and Fundamental Freedoms firmly on the level of constitutional law, a level at which this Convention already stands in Austria or Switzerland (see the still very subtle BVerfGE vol. 111, p. 307 (p. 317), earlier: BVerfGE vol. 74, p. 102 (p. 128), p. 358 (p. 370)).

The functions of constitutional courts, from the assignment of competencies to the "limitation of power", from the protection of pluralism to societal integration and the "work on a basic consensus", may be subject to variations of importance in time. In my view there cannot be abstract verdicts which are independent of space and time. The political culture of each country has too strong an impact. Only one thing

can be certain: The constitutional judge should not work in the spirit of "decisionism" in the manner of 1930s Berlin. Using such an approach we could neither explain Switzerland nor build up Europe, even if a last "emotional element" may still be found in some decisions. This can only be remedied by rationalising and making public the "presuppositions and choice of methods" (Vorverständnis und Methodenwahl) as developed by *J. Esser*. – Esser seems to have been the most important scholar using the comparative method in German civil law in the last century. Let me also refer to the category of "portraits of judges" (in the *Jahrbuch des öffentlichen Rechts* since vol. 32 (1983)), which could help clarify some matters.

One last thing: The "public interest" ("Gemeinwohl" or "öffentliches Interesse") also determines many decisions of constitutional courts. I refer to what I have called "public interest" rulings ("Gemeinwohlsjudikatur"), which are explained in detail in many decisions of the German BVerfG. They include the "liberal" use of invoking the public interest, for example in BVerfGE vol. 98, p. 218 (pp. 242). We discover behind this jurisprudence the old relationship between "res publica", "salus publica", public freedom and the public, a relation which is characteristic of the work of constitutional courts: "law in – public – action".

III. Positive law: case groups and categories of constitutional courts' competencies

Back to positive law: One could identify the "essentials", i. e. typical competencies of national and (supranational) "regional" constitutional courts by comparing their competencies under positive law. This would include, for instance, the power of the courts to review statutes or administrative acts and to establish their constitutionality – as it exists almost everywhere. It would also include the less frequent abstract or preventive judicial review; federal disputes in federal states; regional disputes in regional states; the constitutional complaint of the individual; impeachment proceedings against judges or heads of state; the scrutiny of elections, a possible competence to protect local government according to Art. 92 paragraph 4 a of the German Basic Law (GG) or competence for (expert) opinions of the courts. The ECJ and the human rights courts in the US should also be taken into account here.

Finally, it would be important to develop rules of "prudent constitutional policies" in terms of the constitutional judiciary, for instance with the following questions: Should the dissenting vote/dissenting opinion, which is common in many countries, only be introduced in "stable democracies" and not in so-called developing countries? And also not in the emerging democracies of East European (for a contradiction to this see Ukraine and Croatia)? Even in "old" constitutional states there have been very intensive debates about the pros and cons of dissenting votes/dissenting opinions in constitutional jurisdiction. This applies for example to Italy, where the constitutional complaint is not known. The judges at the European Court of Human Rights are making extensive use of dissenting votes/dissenting opinions regardless

of the fact that the Convention was hard to build up and develop. So the dissenting vote is leading to appeasement (it has the function of a "valve"). A special dispute in Germany's constitutional politics is whether or not to approve the abstract "judicial review" or whether there should be a "free acceptance procedure" for constitutional complaints (Germany should stay with its current model, for which the argument can be made that the Federal Court is a citizen's court while the other approach succeeded in the US). The above, and the outlook and conclusion below, are merely keywords outlining the issues.

E. Outlook and Conclusion

As different as the actual forms of constitutional jurisdiction may be, comparison also shows up many common features. Constitutional jurisdiction is one highlight of the constitutional state as a model. It was invented in Europe by *Jellinek* and *Kelsen*, has been practiced in the US since 1803, it has supported by some historic developments and was even demanded by others (as after 1989). It has been established by many constituent assemblies. Constitutional judges, hand in hand with legal scholars, have implemented and further refined constitutional jurisdiction to make it a truly public "forum" which helps nations or (supranational) regional constitutional communities (like the EU) to stay together in their most "inner core", even if there are functional limits to its competence such as those posed by the "political question doctrine". Constitutional jurisdiction can serve to "work on the basic consensus" of a people or political community. But it can also fail in this respect, as was the case with the anti-crucifix decision of the BVerfGE vol. 93, p. 1. The constitutional court, the "protector of the constitution", as *Aristotle* put it, has many functions. But in the final analysis it is there for *all of us*, national citizens and Europeans or Americans, the constitution's watch-dog and protector. Out in the "open society of the constitution's interpreters", the constitutional court is neither the only nor the last instance, but it is an important one. But it has no competence for an "authentic interpretation of the constitution" (unlike in Art. 124 par. 1 constitution of Albania (1998): "final interpretation"; Art. 149 s. 2 constitution of Burundi (1992): "... the interpreter of the constitution").

Let me, finally, shed some light on "judge's virtues". There is a kind of "catalogue of virtues" for constitutional judges. Sometimes the requirements are written down (for example the norm of prejudice in Art. 115 par. 2 constitution of Benin (1990): "good morality and great decency". But very often they are not written down and are of a more ethical nature and difficult to grasp in legal terms. One example is the matter of self-restraint in certain regards. In my opinion a court Chief Justice should not speak openly about matters of constitutional politics, e. g. constitutional reform, even if this judge is or was a professor of law. This is exactly what happened

recently in Germany's "Karlsruhe". It should also not be admissible for judges to "ask" for a certain application – again as was done recently by Germany's two Chief Justices who approached the German government and suggested repeating an application against the right-wing extremist National Democratic Party.

In the multifaceted and subtle dialogue being conducted between legal scholarship and constitutional courts, this appears to be a necessary criticism, especially as it's coming from here, from Berlin!

Thank you very much.

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