Abstract

Comparative law holds the promise of improving knowledge. Looking at other legal systems enables a nuanced understanding of the rules of one's own country. While comparative law traditionally starts with a concrete issue, the purpose of this paper is to explore why concepts of justice often differ widely from country to country. The following article compares three major economic powerhouses: the United States, the People's Republic of China and the Federal Republic of Germany. It will discuss the differences between a liberal and a social market economy, as well as the role of the constitution in society. The outline concludes by looking at the question of when different concepts of justice might converge.

Keywords

Justice; comparative law; culture; history; geography; constitution; penalty level; liberal and social market economy; role of the courts; Party of the People's Republic of China; paternalism; freedom of contract; convergence theory.
1 Introduction

I first met Charl Francois Hugo just over 20 years ago in March 2001, when a delegation of various faculties of the University of Augsburg visited Rand Afrikaans University and Stellenbosch University. Since then we have met many times. In recent years, the relationship between the Universities of Augsburg and Johannesburg has grown into a close collaboration with a series of conference publications. The Augsburg Law School owes this in particular to Charl Hugo. He is an expert in comparative law and has been one of the people establishing bridges between Germany and South Africa.

1.1 Aristotle's concept of justice

According to Plato, justice is “to each his own” – in other words, that which corresponds to the person's nature and individual circumstances. Aristotle substantiated the concept of justice and differentiated between corrective justice and distributive justice. Corrective justice (iustitia commutativa) determines what is due to each through the principle of reciprocity. Another manifestation of corrective justice is found in the liberal market economy in the idea of equivalence, the do ut des principle which underlies the synallagmatic contract. Aristotle also referred to distributive justice (iustitia distributiva). Today, this idea is regularly reflected in a relationship of superiority and subordination. Distributive justice allows for corrective

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1 It resulted in a cooperation agreement between the University of Augsburg and the Rand Afrikaans University.

2 Hugo and Möllers Transnational Impacts on Law; Hugo and Möllers Legality and Limitation of Powers; Hugo and Möllers Legal Certainty and Fundamental Rights.

3 Without claiming completeness, the following are also mentioned: Johannes Christiaan De Wet, Derek van der Merwe, Jean C Sonnekus, Lethokwa George Mpedi and from Germany especially Michael Martinek, and Reinhard Zimmermann.

4 Greek τὸ τὰ αὑτοῦ πράττειν καὶ μὴ πολυπραγμονεῖν δικαιοσύνη ἐστί, see Plato Politeia IV 433a. Quite similar, about 900 years later, the Corpus Iuris Civilis repeated in the institution (I. 1,1, pr.): "Iustitia est constans et perpetua voluntas ius suum cuique tribuens" [Justice is the unchanging and lasting will to give each his own].

5 Aristoteles Nikomachische Ethik 4-9. On this Rüthers 2009 JZ 969, 970; Honsell "Einl zum BGB" mn 113b.

6 It is thus a further development of the figure of the talion, the retaliation of like with like. It is already found in §§ 196–201 of the Codex Hammurabi and in the Old Testament, Exodus 21,24; Leviticus 4,20: "An eye for an eye, a tooth for a tooth" and served to limit the damage.

7 Latin "I give so that you may give", for historical antecedents see, for example Paul D 19, 5, 5 pr.
interventions in education, training and the economic system. The following short overview references the three major economic centres of the US, the People’s Republic of China and the Federal Republic of Germany, and focusses on the relationship of private autonomy between liberalism and state paternalism (part 2) and the role of the constitution (part 3). This short overview will show why the concepts of justice in the various states differ considerably, and why convergence theory has only a narrow scope of application (part 4).

1.2 On comparative law – legal systems and their limits

There is widespread agreement that comparative law works in a problem-oriented way, i.e., functionally comparing how a factual problem is solved in another legal system. Comparison can be made between that which performs the same function in foreign law as in one’s own legal system. The theory of legal systems seeks to simplify comparative law by categorising several states into one legal style according to their historical development, legal style, legal institutions and sources of law, and thus into one legal system – such as Roman, German, Anglo-American, or Nordic. One looks for the same regulatory tasks under comparable social circumstances, and not for isolated characteristics of one or the other system. The function here becomes the moment of comparison, the tertium comparationis. It is obvious that the theory of legal systems provides only a rough tool for structuring comparative law. Legal systems can change over time, and states are often influenced by various legal systems. In this respect, we refer to hybrid or mixed legal systems, of which the Republic of South Africa provides a perfect example.

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8 Dreier 1996 Jus 580, 583. See in more detail 2.1.3 below.
10 On the advantages and disadvantages of such a doctrine of legal families see Zweigert and Kötz Introduction to Comparative Law 63-73; Pargendler 2012 Am J Comp L 1043; David, Jauffret-Spinosi and Goré Les grands systèmes de droit contemporains 348; Kischel Rechtsvergleichung § 4 mn 1-2.
11 De Cruz Comparative Law in a Changing World 236-239; Michaels “Functional Method of Comparative Law” 345, 351, 386-387.
12 Summarising the didactic value, Kischel Rechtsvergleichung § 4 mn 267.
14 On the dispute between the proponents of the English law, the role of De Wet in the framework of the purists oriented to the ius commune of the European continent, the Roman-Dutch roots, and the so-called pragmatists of the status quo see Zimmermann and Hugo 1992 Tijdschrift voor Rechtsgeschiedenis 157, 162-166. An intensive discussion of the various legal currents in South Africa must be reserved for a separate article.
1.3 Related disciplines, national specificities and diverging concepts of justice

Comparative law cannot just compare legal texts but must dig deeper, including looking at related disciplines. The roots of our present-day law can be traced back to antiquity. Legal history is therefore regarded as an important source for comparative law work. The study of social reality is the task of the sociology of law. Others speak of legal culture when examining the values society holds towards the law and legal institutions. The term is also used in a European context. Similarly, legal anthropology calls for identifying modes of thought in individual cultures that lead to commonalities or differences. Others analyse the psychology of a people. Finally, legal geography can help explain differences in comparative law.

In fact, the concept of "legal culture" is fuzzy and there are also concerns regarding the psychology of peoples – especially in Germany, against the
background of the National Socialist racial doctrine of the Third Reich.\textsuperscript{24} Without having to explore the debates and problems of related disciplines, it is therefore proposed to refer only to the "national context".\textsuperscript{25} However, this concept remains quite bland. Since resolving this issue is beyond the scope of this paper, references to the specifics of each nation will not be used inductively in the sense of compelling logical conclusions. Moreover, the above terms are not used in a methodologically rigorous manner in the respective context of the related discipline. Thus, the aim is not to prove compelling chains of causation but rather to show influences on law and to explain why certain concepts of justice shape different legal systems.\textsuperscript{26}

2 A liberal or paternalistic approach to law

2.1 Private autonomy and the role of the state in larger legal systems

2.1.1 Freedom of contract and individual responsibility in a liberal market economy

The legal differences between the common law and civil law in the field of contract law are considerable: There is no general principle of good faith under Anglo-American law.\textsuperscript{27} The offer is freely revocable until acceptance, and the parties are generally not protected under the common law where negotiations are broken off.\textsuperscript{28} In case of doubt, there are no pre-contractual duties of disclosure\textsuperscript{29} and in case of doubt the wording of the contract applies and not some hypothetical intent of the contracting parties.\textsuperscript{30} In

\textsuperscript{24} Larenz (Rechtsperson und subjektives Recht 1, 21) denied the Jews legal capacity by formulating: "Rechtsgenosse ist nur, wer Volksgenosse ist; Volksgenosse ist, wer deutschen Blutes ist. […] Wer außerhalb der Volksgemeinschaft steht, steht auch nicht im Recht, ist nicht Rechtsgenosse." ["Only those who are national comrades are comrades of the law, those who are of German blood are national comrades […] Whoever stands outside the national community is also not in the right, is not a legal comrade."].

\textsuperscript{25} Kischel Rechtsvergleichung § 4 mn 45-48.

\textsuperscript{26} See for instance Michaels "Legal Culture" under 3. Rabel Aufgabe und Notwendigkeit der Rechtsvergleichung 3; concisely summarising Stone 1950-1951 Tul L Rev 325, 332: "West must study the history, the politics, the economics, the cultural background in literature and the arts, the religions, beliefs and practices, the philosophies, if we are to reach sound conclusions as to what is and what is not in common."

\textsuperscript{27} But only single concepts like estoppel, duress, misrepresentation, mistake, see Kötz 2010 AnwBl 1, 4-5.

\textsuperscript{28} About the obligation of consideration as a condition for a contractual obligation, see Zweigert and Kötz Introduction to Comparative Law 357-358 as well as to exceptions.

\textsuperscript{29} Kötz European Contract Law 180 with further references.

\textsuperscript{30} On the "parol evidence rule" see Lord Denman, in Goss v Lord Nugent 1933 5 B & Ad 58; 110 ER 713, 716; Zweigert and Kötz Introduction to Comparative Law 406-407; restrictive however Kötz European Contract Law 104. For deviations from the "parol evidence rule" in South Africa see Lewis "Interpretation of Contracts" 195-198.
general, there are no claims for performance, but only for damages.\(^{31}\) A mistake is material only if the counterparty has provoked it,\(^ {32}\) and usually there is no check on the adequacy of the price.\(^ {33}\) In employment and tenancy law, the "hire and fire" principle applies – i.e. the right to terminate the employee’s or tenant's contract without good cause.\(^ {34}\) A strong data protection law, as in Europe, is alien to US law, where the consent model applies.\(^ {35}\)

2.1.2 The Civil Code of the People's Republic of China

Although the People's Republic of China remains a socialist state with a dominant Communist Party, it also has the largest market economy in the world, with 1.4 billion people. Since 1979, the People's Republic of China has opened its economic system and permitted market-economy structures.\(^ {36}\) In the meantime, considerable efforts have been made to codify Chinese civil law. This culminated in the new *Chinese Civil Code* (CC), which since 2021 has combined the individual laws into one Code with 1260 articles.\(^ {37}\) The current version of the *Chinese Civil Code* partly resembles the German and Japanese civil codes in terms of structure.\(^ {38}\) Materially, however, the rules are strongly influenced by Anglo-American law, which is not based on a substantive adequacy check, but instead focusses mainly on procedural fairness and seeking to prevent fraud and mistake.\(^ {39}\) Article 5 of the Code sets out the guiding principle of voluntariness as the dominant principle of civil law – namely private autonomy.\(^ {40}\) Thus, there is normally no price control. The parties are responsible for agreeing on the *essentialia negotii*, or the essential elements of the contract. The market economy is reminiscent of the Manchester

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31 Lord Hofmann, in *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* 1997 CLC 1114, 1117: "Specific performance is traditionally regarded in English law as an exceptional remedy."

32 See Zweigert and Kötz *Introduction to Comparative Law* 419-423 with further exceptions to "common mistake" and "equity".

33 The legal figure of "economic duress" occurs only exceptionally, see Kötz *European Contract Law* 113.


36 Han "Consumer Sales Law in People's Republic of China" 82.


38 The general part of the *Chinese Civil Code* is followed by six other books: property law, contract law, personal law, family law, inheritance law and tort law.

39 On this previously, Möllers 2021 *ZChinR* 169, 182.

40 Möllers "Principles in the Chinese Civil Code" 55, 67-70; Eberl-Borges *Einführung in das chinesische Recht* mn 335-341; Bu *Chinese Civil Code* ch 2 mn 16-17.
liberalism\(^{41}\) of early 19th century Britain. It is no coincidence that the attempt to maximise profits, the production of inferior goods and fraudulent behaviour are criticised.\(^{42}\) This goes hand in hand with the realisation that we can get by without strong protective measures in certain areas of life. There are still gaps in legal protection for the large group of migrant workers\(^{43}\) and, of course, for the large number of self-employed. Chinese law also offers little protection for tenants.\(^{44}\)

### 2.1.3 Protection offered under the German Civil Code of 1900, and the environmental social-market economy

There is a legendary quote from Otto von Gierke about the *German Civil Code* of 1900 that "a drop of socialist oil must seep into our private law".\(^{45}\) This is linked to the charge that the *Civil Code* was to primarily guarantee private autonomy as the freedom of citizens to make their own regulations for their own living conditions, thus reflecting the prevailing political and economic views of the late nineteenth century.

But is this view – which has prevailed up to the present day – correct?\(^{46}\) Doubts must be raised by even a cursory comparison with the most important rules of common law. In terms of content, it is noticeable that numerous provisions in the *Civil Code* of 1900 protect the citizen much more than the common law. Pursuant to section 242 of the *Civil Code*, performance must be in good faith. An offeror's declaration of intent is binding according to section 145 of the *Civil Code*, and not freely revocable, and sections 119 and 120 of the *Civil Code* allow for a more extensive challenge on the grounds of mistake as to content, declaration or inherent quality than under Anglo-American law. A contract may be interpreted according to the hypothetical intent of the parties, but in case of doubt the dispositive rules of the law can be applied.\(^{47}\) And in principle, the buyer can

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\(^{41}\) Manchester liberalism refers to the largely uncontrolled industrial development in Great Britain at the beginning of the 19th century.

\(^{42}\) Bu 2014 ZfRV 261, 273.

\(^{43}\) Vogelsang *Geschichte Chinas* 612; Bu *Einführung in das Recht Chinas* § 24 mn 3.

\(^{44}\) Bu *Einführung in das Recht Chinas* § 12 mn 102; Weidlich and Shen "Vertragliche Schuldverhältnisse" ch 3 mn 144-179. For US law, see fn 34 above.

\(^{45}\) von Gierke *Die soziale Aufgabe des Privatrechts* 13; von Gierke *Der Entwurf des Bürgerlichen Gesetzbuchs* 192.

\(^{46}\) Coing "Ein zum BGB" mn 33-34; Wieacker *Privatrechtsgeschichte der Neuzeit* 481: "Alles in allem hat der Gesetzgeber dem Privatrecht ersichtlich nicht eine eigentlich soziale Aufgabe zuerkannt." ["All in all, the legislature does not appear to have assigned to private law a task that is actually social."] Also see Repgen *Die soziale Aufgabe des Privatrechts*.

\(^{47}\) FCJ, Judgment of 29.4.1982, III ZR 154/80, 84 *BGHZ* 1, 7 – Anspruch auf Rücküberreichung [Claim for retransfer]; FCJ, Judgment of 1.2.1984, VII ZR 54/83, 90 *BGHZ* 69, 77 – Unwirksamkeit der Tagespreisklausel [Ineffectiveness of the daily price clause]; Möllers *Legal Methods* ch 6 mn 195.
also be sued for performance pursuant to section 433(1) sentence 1 of the Civil Code.

While under Anglo-American law the judges – trained in case law – decide in favour of the freedom of the parties where there is doubt, German lawyers think in terms of the system of codifications. While the outer system is concerned with unified concepts, the inner system is concerned with logical consistency and teleological coherence, and thus refers to a consistent system of value decisions. With its nearly 2400 paragraphs, the Civil Code contains a wealth of mandatory and discretionary legal rules. The discretion (ius dispositivum) refers to when the legislature proposes a rule that it considers to be in the interests of the parties but allows the parties to deviate from it. Mandatory legal provisions (ius cogens) have an even stronger effect; in this case, the legislature does not permit any deviation from the provisions to protect third-party interests or the common good. But if the system already provides paternalistic protection, the filling of gaps must also correspond to these values. This allows for the identification of gaps within any codification, such as the creation of culpa in contrahendo. The initiation of a contract may trigger legal obligations if the counterparty was entitled to rely on a statement. In some cases there are also pre-contractual duties of disclosure. Finally, codification also allows for filling omissions by incorporating higher-level law such as the Constitution and European law. Important gateways for protecting the weaker party can still be found today in the general clause of section 138 of the Civil Code on contracts that are contrary to public policy. Due to the special significance for the life planning of the individual, the courts also look at the conspicuous disproportion of consideration in the case of rental, real estate and loan agreements within the framework of the general clause of a contract contrary to public policy pursuant to section 138 of the Civil Code.

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48 Canaris Systemdenken und Systembegriff in der Jurisprudenz 45-46. For the outer and inner system in detail, see Möllers Legal Methods ch 4 mn 102-113.
49 von Jhering 1861 Jb f Dogmatik 1. On this, von Hein "Culpa in Contrahendo".
52 About the recognition of the right of personality, see FCC, Order of 14.2.1973, 1 BvR 112/65, 34 BVerfGE 269, 286-287 – Soraya as well as 3.1.3 below.
53 See Möllers Legal Methods ch 8 mn 36-41.
Moreover, throughout the twentieth and twenty-first centuries, legislatures and case law have developed the market economy into a social or environmental-social market economy. Consumer protection law is where the protection of the consumer exceptionally requires a correction of contractual freedom. For example, in the case of distance-buying contracts, the customer is granted the right to withdraw from the contract without having to provide a reason for doing so. Today, semi-mandatory law to the detriment of the company is often the consumer protection law that is based on European law – which is transposed into the Civil Code in each case. Consumers, tenants, travellers and employees also receive special protection from the legislature. This includes social tenancy law, which permits termination only in the case of the owner's own needs (section 573 of the Civil Code). The law also sets particularly high thresholds for the termination of employment without notice for cause pursuant to section 626(1) of the Civil Code. The German interpretation of distributive justice according to Aristotle leads to a strong state, protects the citizen in many circumstances, and thereby seeks to achieve justice.

### 2.2 Common Law and Civil Law as starting points for different concepts of justice

#### 2.2.1 Commercial trading and Anglo-American case law

Historically speaking, England has always been heavily influenced by London, and London by its trade with the colonies. As a seafaring nation, England was shaped by its travelling merchants: they understood the opportunities and risks that come with trading with people from foreign countries. These risks were sometimes managed with the help of the

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55 The representatives include Ludwig Ehrhard, Walter Eucken, Friedrich August von Hayek, Alfred Müller-Armack, Wilhelm Röpke.

56 Thus the writing of Fikentscher Die umweltsoziale Marktwirtschaft. The new German government has now established a Ministry for the Economy and Climate Protection for the first time.

57 Hübner Allgemeiner Teil des Bürgerlichen Gesetzbuches § 41 mn 1036; Wolf Larenz’s Allgemeiner Teil des Bürgerlichen Rechts § 42 mn 19.

58 Möllers Legal Methods ch 15 mn 32.


60 See fn 5 above.

61 Examples are basic income, child benefit or free education through schools and universities.
English crown, but often also privately. Thomas Hobbes summed this up by pointing out that it is the parties who can best determine the value of something. It is no coincidence that Adam Smith's concept of the "invisible hand" described the market as best regulating itself through supply and demand. This is based on the idea that the conflict of interests between the parties is optimally determined through the contract; we refer to the "guaranteed accuracy" of negotiation. Under Anglo-American law, the assumption is that individuals provide for themselves. Thus, the parties can protect themselves through appropriate clauses – and in case of doubt the judge does not have to intervene to correct the situation. To this day, this leads to extensive contracts with countless clauses, especially in the Mergers and Acquisitions sector. Even today, those courts are dominated by commercial disputes, while in Germany many legal actions concern consumer protection.

Judges making decisions under the common law do not have statutes – an indication of the intent of the legislature – to bind them. But the *stare decisis* rule makes previous case law binding. It is thus clearly the responsibility of the legislature and not the courts to protect weaker parties such as consumers and employees with new rules. Whereas the continental European lawyer thinks in terms of codification and is bound by those rules, the Anglo-American lawyer thinks in terms of the cases because of the lack of legislation. Without having to consider the values of a law, the judge has

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63 Hobbes *Leviathan* pt I ch 15 p 75: "The value of all things contracted for, is measured by the appetite of the contractors: and therefore the just value is that which they be contented to give."
64 Smith *Wealth of Nations* book IV ch II, 181: "[...] he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention".
65 Schmidt-Rimpler 1941 AcP 130, 149-156; Schmidt-Rimpler "Zum Vertragsproblem" 3, 5-6; Lieb 1978 AcP 196, 206.
66 The idea of personal responsibility can be found in the beautiful saying of the US actress Katharine Hepburn: "If you need a helping hand, you can find one at the end of your right arm." In the matter as well, Kötz "Der Einfluß des Common Law auf die internationale Vertragspraxis" 771, 776.
67 To this day, this leads to extensive contracts with countless contractual clauses, especially in the Mergers and Acquisitions sector.
68 Critically Kötz "Der Einfluß des Common Law auf die internationale Vertragspraxis" 771, 773-776.
69 Thus, the assessment of Kötz 2010 AnwBl 1, 5.
70 *Stare decisis et non quieta movere* [To stand by decisions and not disturb the undissturbed].
71 Cross and Harris *Precedent in English Law* 3-7, 24-27; Radin 1933 *Colum L Rev* 199.
much greater freedom to decide on the basis of practical, political and ethical considerations.\textsuperscript{72}

2.2.2 The planning of the People's Party and the principle of concentration of power

It is not just the \textit{Chinese Civil Code} that follows the mixed system, but the entire legal system of the People's Republic of China. As a result, the People's Republic of China is a \textit{mixtum compositum} of market economy and the socialist planned economy of the People's Party. This liberal approach is more in line with \textit{ex-post} control with a deterrent effect. The market is given free rein. For a long time the concentration processes of Alibaba and Tencent were observed, and it is only in recent years that steps have been taken to counteract them.\textsuperscript{73} This includes, for example, an extensive range of sanctions – including punitive damages\textsuperscript{74} or the death penalty.\textsuperscript{75} The market economy and globalisation do not necessarily lead to democracy.\textsuperscript{76} Instead the Chinese explain their modernisation as a consistent return to the core values of their own culture.\textsuperscript{77}

The Party and the President run the country. Politically, there is less of an interlocking of powers in the sense of a control of powers and more of a concentration of powers.\textsuperscript{78} There are legal disputes in People's Republic of China, but the courts do not interpret laws - they apply them. In the ideal case, the correct law should be decided from the top down. To ensure uniform application, the highest institutions may interpret the laws: the Standing Committee of the National People's Congress (NPCSC) through legislative interpretation, the State Council through administrative interpretation, and the Supreme People's Court (SPC) through judicial interpretation.\textsuperscript{79} In recent years, judicial interpretation – i.e. the

\textsuperscript{72} See for instance Radbruch \textit{Der Geist des englischen Rechts} 11; Coing \textit{Juristische Methodenlehre} 24; Fikentscher \textit{Methoden des Rechts} 258. See the quote from the Supreme Court judge Holmes Jr.: “The life of the law has not been logic: it has been experience.” (Holmes Jr \textit{Common Law} 1).

\textsuperscript{73} Anon \textit{FAZ} 29; Gusbeth 2021 https://www.handelsblatt.com/politik/international/angst-um-politische-stabilitaet-wie-china-die-marktmacht-seiner-tech-konzerne-brechen-will/-27393294.html.


\textsuperscript{75} Herrmann “Gedanken zur Todesstrafe in Japan” 401.

\textsuperscript{76} Baron and Yin-Baron \textit{Die Chinesen} 411.

\textsuperscript{77} Baron and Yin-Baron \textit{Die Chinesen} 409.

\textsuperscript{78} Pißler 2016 \textit{RabelsZ} 372, 392-393; Kischel \textit{Rechtsvergleichung} § 9 mn 67 as well as fn 79-81 below.

\textsuperscript{79} Thus, the notion of Ahl 2007 \textit{ZChinR} 251; one may also speak of "explanations" or "interpretations" Pißler 2016 \textit{RabelsZ} 372.
interpretation or explanation by the SPC – has been particularly relevant.\textsuperscript{80} It remains to be seen whether the combination of a market economy and a planned economy will be successful in the long run.\textsuperscript{81}

2.2.3 The protective sovereign

Under enlightened absolutism, legalism gave the ruler the opportunity to extensively enforce its will on judges. The absolute monarch tried to bind the judges as much as possible with precise laws. During the Enlightenment the rational belief in an absolute law meant that the \textit{General Prussian Land Law (Allgemeines Preußisches Landrecht)} of 1794 had 17000 paragraphs, which were intended to regulate every conceivable aspect of life. In matters relative to the \textit{General Prussian Land Law}, King Friedrich Wilhelm II forbade the judge "to allow himself the slightest arbitrary deviation under the pretext of an interpretation to be derived from the purpose and intention of the law, while avoiding Our highest disfavour and severe punishment". Instead, judges had to submit doubts about the interpretation of the law to a law commission and "request its evaluation".\textsuperscript{82} In Europe the sovereign makes rules to protect citizens, with the aim of regulating the most important living conditions in an overall codification. This bound not only the judges but also the ruler, and protected citizens from arbitrariness.\textsuperscript{83} This led to the development of the principles of the rule of law – such as the reservation of statutory powers and the primacy of the law, the right to be heard, and the principle of legality with its \textit{nullum crimen sine lege} principle.

3 The role of the constitution

3.1 The concept of the constitution under major legal systems

3.1.1 The American state: protection from, and not by, the state

Using the ideas of Locke,\textsuperscript{84} Rousseau\textsuperscript{85} and Montesquieu,\textsuperscript{86} the fathers of the \textit{US Constitution} developed an elaborate system of checks and balances

\begin{itemize}
\item \textsuperscript{80} Pißler 2016 \textit{RabelsZ} 372, 374-376. This is reminiscent of the legal application technique during the \textit{General Prussian Land Law} period (fn 82).
\item \textsuperscript{81} Note Fikentscher (\textit{Demokratie} 20), who also considers these approaches to be incompatible with Confucian ideas of unity.
\item \textsuperscript{82} Patent for publication of the new general land law for the Prussian States of 5.2.1794 p XXI, which precedes the \textit{General Prussian Land Law}. About the procedure see §§ 46, 47, 50 introduction \textit{General Prussian Land Law}.
\item \textsuperscript{83} For an overview see Greco Roxin's \textit{Strafrecht Allgemeiner Teil} § 5 mn 12-17.
\item \textsuperscript{84} Locke \textit{Two Treatises of Government} book II ch II, XII-XIV.
\item \textsuperscript{85} Rousseau \textit{Du Contrat Social Ou Principes Du Droit Politique} ch VI: Du pacte Social.
\item \textsuperscript{86} Montesquieu \textit{De l'esprit des lois} book 11 ch 6.
\end{itemize}
between the branches of government. The US Constitution provides an identity and is revered almost as if it were sacred. It is considered to be immutable, and so far, it has been subject to only a few amendments. As the US Constitution vividly states, "Congress shall make no law [...]". Fundamental rights are defined primarily as defensive rights. Thus, in the past, freedoms were interpreted very broadly in order to prevent legislation at the expense of the citizen. In the famous case of Lochner v New York, the Supreme Court prohibited New York City from limiting the working hours of bakeries to 60 hours per week, because this would interfere with the freedom of contract of the parties. Around 200 further laws were subsequently declared unconstitutional. Since the 1930s, however, the Supreme Court has reversed its position and largely refrains from judicial review in the area of economic legislation. Under the Constitution every citizen still has the right to carry a weapon. With abortion, it is the mother's right to privacy and thus the right to abortion that is protected, and not the unborn life. Recently the Supreme Court recognised marriage between same-sex couples. The arguments are not based on duties to protect, but on the violation of freedoms or equality rights. In the US, and also in the United Kingdom (the UK), citizens take on much greater responsibility than in Germany for their own health insurance, old-age provision or educational opportunities. The state is much leaner than in Germany, but the tax burden is also lower. As a result, self-determination and protection from – rather than by – the state is a dominant feature of US law.

87 The Fathers of the US Constitution Alexander Hamilton, James Madison und John Jay published their ideas in a series of newspaper articles, the so-called federalist papers. Hamilton and Madison explicitly referred to Montesquieu, see Hamilton, Madison and Jay Federalist Papers No 9 und 47.
88 For example, Amendment I, Amendment IV, s 1 sentence 2 US Constitution.
89 Judge Posner in Jackson v City of Joliet 1983 715 F2d 1200, 1203 (7th Cir): "the Constitution is a charter of negative rather than positive liberties."; DeShaney v Winnebago County Department of Social Services 1989 489 US 189, 190.
91 Brugger Einführung in das öffentliche Recht der USA 109.
92 See West Coast Hotel Co v Parrish 1937 300 US 379, 400; Williamson v Lee Optical of Oklahoma 1955 348 US 483, 487; Brugger Einführung in das öffentliche Recht der USA 110-111.
94 Amendment 14 s 1 of the US Constitution; Roe v Wade 1973 410 US 113, 162-165 – abortion. In detail, Brugger Einführung in das öffentliche Recht der USA 110-111. However, conservative states such as Mississippi or Texas have enacted laws that make abortion significantly more difficult. The Supreme Court is examining whether this is legal in Dobbs v Jackson Women’s Health Organization. For Germany see fn 110 below.
95 Obergefell v Hodges 2015 135 SCI 2584, 2602 – Same-sex partnership as marriage.
96 See Amendment 14 s 1 of the US Constitution and Brown v Board of Education 1954 347 US 483, 495 – Racial equality.
A second feature should also be noted. The *US Constitution* forbids cruel and unusual punishment but the Supreme Court has held that it is constitutional for some states, such as Texas, to continue to have and carry out the death penalty. Felony convictions can result in prison sentences of more than 100 years. In US civil law, "punitive damages" are a form of damages in which the compensation awarded in a civil action exceeds (by far) the actual damage suffered. Awarding higher levels of damages may be found as early as in the Bible and in Roman law, and was then further developed in England. In Alabama the buyer of a BMW whose vehicle diminished in value by $4,000 because of repaired paint damage was awarded $2 million in damages by the Alabama appeal court. The Supreme Court upheld a violation of due process under the 14th Amendment because the ratio of punitive damages was grossly excessive at 1:500.

### 3.1.2 The role of the Party in the People’s Republic of China

Whereas in the US, Germany, France and other countries, the constitution and its fundamental rights are central to the state and form part of the national identity, in the People’s Republic of China this applies above all to the Party and its founding of the state. Notably, while article 1 of the *Chinese Constitution* emphasises the democratic dictatorship of the people, led by the working class and based on the alliance of workers and peasants, it also highlights that under the Chinese socialist system, the Communist Party

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97 See Amendment 8 of the *US Constitution*.

98 However, the underlying act must be intentional; a robbery resulting in death, for example, is not sufficient. *Enmund v Florida* 1982 458 US 782. Restrictions also apply to mentally retarded as well as juvenile offenders, see *Atkins v Virginia* 2002 536 US 304, 316 fn 21 – Death penalty for mentally disabled; *Roper v Simmons* 2005 543 US 551, 561, 575-578 – Death penalty for juvenile offenders.

99 For example, Bernhard L Madoff was sentenced to 150 years in prison for investment fraud in 2009, [Henriques 2009](https://www.nytimes.com/2009/06/30/business/30madoff.html).

100 Exodus 21,37: four- or fivefold compensation. The so-called *actiones mixtae* (mixed actions for damages and private criminal action) allowed for the criminal action in Roman law; for example, the twofold or fourfold damages for theft; see *Codex Justinian* Inst 4, 6, 16-19. On this, for instance, *Levy Privatstrafe und Schadensersatz* 135-151.

101 *Huckle v Money* 1763 2 Wils KB 205; 95 ER 768.

102 Thus, the argumentation of the plaintiff, see *BMW of North America, Inc v Ira Gore, Jr* 1996 517 US 559, 564.

leads China.\textsuperscript{104} There are no fundamental rights, only programme rules.\textsuperscript{105} Consequently, there are no corresponding legal concepts for interpreting the constitution. In politics, the People's Congress – guided by the Party – sets ambitious five-year plans. It is often emphasised that China loves systematic thinking and is therefore oriented toward the codifications of Western Europe. This corresponds to the planning, forward-looking thinking of the sovereign who sets the rule – here the People's Party is the sovereign. For example, the Chinese state has secured important raw materials in Africa and Asia under its "Silk Road" project.\textsuperscript{106}

3.1.3 The German Basic Law (Grundgesetz) and its extensive interpretation by the Federal Constitutional Court

The Federal Constitutional Court (FCC, Bundesverfassungsgericht) in Germany is based on the US Supreme Court.\textsuperscript{107} Constitutional complaints give citizens a strong right to have acts of state power controlled. But unlike the US Supreme Court, the Federal Constitutional Court has interpreted the Basic Law in an increasingly extensive manner. The decision in the Lüth case was ground-breaking in its revolutionary development of fundamental rights as an objective set of values with the obligation to interpret them in conformity with the Constitution.\textsuperscript{108} The Regional Court, which classified a call for a boycott as unlawful and contrary to public policy under section 826 of the German Civil Code, therefore also had to take account of freedom of expression under Article 5 of the German Basic Law.\textsuperscript{109} According to the German approach, fundamental rights can also be seen as duties of protection that the state has to fulfil with respect to its citizens. The doctrine of a duty to protect was developed by the Federal Constitutional Court in the first decision on abortion (Schwangerschaftsabbruch I). The Court protected the unborn life against a time threshold set by the state (and also

\textsuperscript{104} "Leadership by the Communist Party of China is the defining feature of socialism with Chinese characteristics. It is prohibited for any organization or individual to damage the socialist system."

\textsuperscript{105} Kroymann and Xu "Grundlagen" ch 1 mn 46; Möllers "Principles in the Chinese Civil Code" 55, 79-80 with further references.

\textsuperscript{106} Baron and Yin-Baron Die Chinesen 387-396.

\textsuperscript{107} Zinn "Schriftlicher Bericht über den Abschnitt" 47: "Wenn dem Obersten Gerichtshof der USA […] die Eigenschaft eines Hüters und Wahrers der amerikanischen Bundesverfassung zukommt […] muss das gleiche vom Bundesverfassungsgericht gelten" ["If the U.S. Supreme Court […] has the capacity of a guardian and a protector of the U.S. Federal Constitution […] the same must apply to the Federal Constitutional Court"]; also see Wilms 1999 NJW 1527; Kau United States Supreme Court und Bundesverfassungsgericht.

\textsuperscript{108} FCC, Judgment of 15.1.1958, 1 BvR 400/51, 7 BVerfGE 198, 204-207 – Lüth. Also see s 8 para 2 Constitution of the Republic of South Africa, 1996.

\textsuperscript{109} FCC, Judgment of 15.1.1958, 1 BvR 400/51, 7 BVerfGE 198, 206-207 – Lüth.
against the rights of the mother). Thus, the state must not only respect freedoms but also protect them. Fundamental rights thus lead to imperatives for action on the part of the state. With the objective dimension of fundamental rights as a value system, the third-party effect and duty-to-protect doctrine, the Federal Constitutional Court ultimately subjects all legislation to its scrutiny.

Other special features stand out: article 1 of the German Basic Law obliges all state authorities to respect human dignity. It references the preamble to the Universal Declaration of Human Rights of 1948. This article cannot be amended, as the guarantee of article 79(3) of the Basic Law makes clear. It is now also included in article 1 of the Charter of Fundamental Rights of the European Union. The prohibition of torture is found, for example, in Article 5 of the Universal Declaration of Human Rights, Article 3 of the European Convention on Human Rights and, with identical wording, in Article 4 of the Charter of Fundamental Rights of the European Union. The death penalty is prohibited in Germany (article 102 of the Basic Law) and in Europe. The Federal Constitutional Court, against the clear wording and the intent of the legislature, teleologically reduced the life sentence for murder pursuant to section 211 of the German Criminal Code in favour of the perpetrator. The right to human dignity demands that a murderer sentenced to life imprisonment must have the chance to return to freedom after serving a prescribed term of imprisonment. Article 49(3) of the Charter of Fundamental Rights now also requires that the sentence is proportionate to the offence. The principle of proportionality is particularly striking as it has a decisive influence in the consideration of fundamental rights. This is based on the consideration that state action may interfere with fundamental rights.

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111 Rüfner "Grundrechtsadressaten" § 197 mn 119.
112 Preamble art 1 of the Universal Declaration of Human Rights (1948) (UDHR): "All human beings are born free and equal in dignity and rights."; on this in detail, Rensmann Wertordnung und Verfassung 27-32.
113 Human dignity and an eternity clause are also found in s 1 lit a) as well as s 37 para 5 Constitution of the Republic of South Africa, 1996. On the influence of the German Basic Law on the South African Constitution, see Markesinis Comparative Law in the Courtroom and Classroom 120-125.
116 FCC, Judgment of 21.6.1977, 1 BvL 14/76, 45 BVerfGE 187, 258 – Lebenslange Freiheitsstrafe [Life sentence]. The legislator has reacted with the §§ 57a, 57b German Criminal Code.
only to the extent that this is essential, because such interference – as an exception to the guaranteed freedoms – always requires justification. This is anchored in European law, in Article 52 of the Charter of Fundamental Rights. This means, for example, that in Germany punitive damages are legally questionable because punishment is the goal of criminal law, not civil law. Foreign judgments can therefore contradict the public policy provision (ordre public) of article 6 of the Introductory Act to the German Civil Code, and in this respect cannot be recognised in Germany.

3.2 Comparative law explanations for different concepts of justice

3.2.1 Freedoms and prevention as dominant values in US society

Historically in the UK the nobility wrested important rights from the king in the Magna Carta Libertatum of 1215. Parliament and the courts have thereafter always had a strong position in relation to the monarchy. After the arrival of the Mayflower in 1620 in North America, many people emigrated from Europe to the United States in order to practice their religion freely. The basis of religious peace in the Holy Roman Empire of the German Nation was the Peace of Augsburg. According to this, the sovereign was allowed to decide the faith in the territory; but subjects who did not want to convert were allowed to leave the country. In terms of political power, the Germans left their states to end their allegiance to their feudal lord and gain freedom. Immigrants to the Americas displaced local indigenous peoples but did not encounter an existing form of rule. They were able to

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117 Alexy Theorie der Grundrechte 100-104; von Arnauld 2000 JZ 276, 279; Schlink "Der Grundsatz der Verhältnismäßigkeit" 445, 448.
119 National Archives Date unknown https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/.
120 On the ius emigrandi, see § 24 of the Imperial Recess of the Imperial Diet of Augsburg, 25 September 1555: "[…] an andere Orte ziehen und sich nieder thun wolten, denen soll solcher Ab- und Zuzug, auch Verkauffung ihrer Haab und Güter gegen zimlichen, billichen Abtrag der Leibeigenschaft und Nachsteuer, […] zugelassen und bewilligt." ["[…] move to other places and settle down, they shall be allowed and granted such removal and influx, as well as the sale of their goods and chattels in exchange for a considerable, cheap erosion of serfdom and after-tax […]"].
121 On this, fns 135-136 below.
122 On this, Sautter Geschichte der Vereinigten Staaten von Amerika 263-269. On the distinction between "settled" and "conquered colonies", Zweigert and Kötz Introduction to Comparative Law 220.
fill the vacuum with the ideas of Locke, Rousseau and Montesquieu, and give themselves a democratic constitution. According to this constitution, everything was generally allowed, so that in many areas the state waived the requirement for prior consent before acting. Even today, freedom remains the dominant attitude to the life of immigrants to the US. But freedom is only one side of the coin. In order to avoid excesses, state authority must sanction misconduct ex post – i.e., in retrospect – all the more strongly. While the proportionality of punishment limited the arbitrariness of the sovereign, in the US citizens with equal rights voluntarily drew up a constitution to protect themselves against anarchy. When a jury decides in a constitutionally guaranteed process, the will of the people is thus expressed in the judgment of the court. Punitive damages are intended to punish reprehensible behaviour and discourage its repetition. From an economic point of view, too, the goal of liability law must be to establish rules that control behaviour in such a way that violations of legal rights are avoided, or compensated for, in such a way that an increase in the welfare of society as a whole is achieved. To act as a deterrent, the deep pocket doctrine requires higher damages against legal persons. In addition, there are other special features of US procedural law: the American rule requires each party to bear its own costs, even if it prevails. This is intended to improve access to courts. This in turn leads to the lawyer usually receiving a contingency fee of 30-40% of the amount in dispute. These costs are taken into account in the amount of the claim for damages.

3.2.2 The 3000-year-old Chinese Empire

The People's Republic of China was founded after the Second World War and is therefore similar in age to the Federal Republic of Germany. Despite the turbulence of China's long history, power in China had already been concentrated at the Emperor's court for several millennia at the time of the founding of the People's Republic. Culturally, China was much more homogeneous than the various European peoples. There are also natural borders to the state, with the China Sea to the east, and with the northwest being protected by the Great Wall of China from the fourteenth century.

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123 See Preamble US Constitution: "[...] and secure the blessings of liberty to ourselves and our posterity". It is no coincidence that the motto "liberty" is found on the US dollar and the quarter.

124 On Legalism see fn 83 above; on Magna Carta Libertatum, see fn 119.

125 The jury is a body of civil and criminal procedure composed of randomly selected US citizens that decides disputed questions of fact (jury trial), while the judge answers only questions of law. The right to a jury trial derives from Amendments 5-7 of the US Constitution. See Hay US-Amerikanisches Recht mn 198-199, 724-728.


127 See previously Mataja Das Recht des Schadensersatzes vom Standpunkte der Nationalökonomie 19-45; Wagner Kötz's Deliktsrecht ch 4 mn 7.

onwards. The Chinese People’s Party thus not only ties in with the founding of the state in 1949 but also invokes China’s 3000-year-old history.\textsuperscript{129} The schools teach about the different dynasties of the emperors and Confucius Institutes can be found everywhere.\textsuperscript{130} This long, uninterrupted unity of political power distinguishes China quite significantly from Europe, and also from the US. The Communist Party, which was founded in Shanghai in 1921, uses the long tradition of the emperors as a basis for legitimacy, and the state president enacts the traditional role of the emperor. The extent of power is further increased when presidents such as the founder of the state, Máo Zédōng, or the current president, Xí Jīnpíng, lead the country for an unspecified period of time.

3.2.3 The Holy Roman Empire of the German Nation, and the two World Wars in the twentieth century

Germany, on the other hand, has a more difficult history. Instead of looking back several thousand years, for many the history of Germany begins only with the founding of the Federal Republic of Germany on 23 May 1949. This is understandable because the National Socialist period – with the extermination of Jews through the Holocaust and the perversion of state institutions such as the Gestapo and Waffen-SS – is one of the darkest periods of German history. The designation of the Constitution as a system of values can be understood as a resolute departure from the value relativism of the Weimar period.\textsuperscript{131} The German Basic Law with its system of values is therefore part of the German identity.\textsuperscript{132} The Constitution has recently been celebrated and the Federal Constitutional Court continues to be one of the most popular state institutions.\textsuperscript{133}

The democratic forms of government of the Greeks and the Romans did not survive antiquity. Instead, new types of rules were formed by the nobility in the Middle Ages. While in France the Sun King Louis XIV managed to establish a centrist absolutist monarchy, the more than 250 territories that made up the Holy Roman Empire of the German nation were related in a complex structure headed by the Emperor but acknowledging the freedom of the nobles, the Church and the cities in their local areas. The feudal system defined a loyalty relationship between the master and the servant

\textsuperscript{129} In detail for instance Vogelsang \textit{Geschichte Chinas}.
\textsuperscript{130} van Ess \textit{Der Konfuzianismus}.
\textsuperscript{131} FCC, Judgment of 17.8.1956, 1 BvB 2/51, 5 BVerfGE 85, 138-139 – KPD [German Communist Party].
\textsuperscript{132} The \textit{Constitution of the Republic of South Africa}, at the end of apartheid, constitutes a \textit{caesura}, albeit a very different one.
\textsuperscript{133} On the public perception of the Federal Constitutional Court Köcher \textit{FAZ} 10.
In the countryside, peasants were serfs and were not entirely free. They had limited assets and had to buy their way out of it if they wanted to leave the territory. In modern times, the vassal also owed allegiance to the king.

The jury system has existed in England, Wales and the US for many centuries. In Europe, on the other hand, the inquisitorial process dominated until the eighteenth century, expressly permitting embarrassing interrogation with instruments of torture. The presumption of innocence and the prohibition of torture were persistently demanded by the famous Italian criminal lawyer Beccaria. Feuerbach abolished torture in the newly created Kingdom of Bavaria in 1806. The restriction on penalties is thus one of the achievements of our modern times. The constitution of Bavaria, created in 1818, can also be regarded as a restriction of the rights of the sovereign.

4 Comparative legal assessment and outlook

4.1 Liberalism versus the paternalistic state

The saying that anyone can go from washing dishes to becoming a millionaire has been around in the US for a long time. But is this still true? From the educational perspective, this applies only to a certain extent: the principle of equality and the pursuit of happiness are implemented in

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134 See First Part, 18th title § 19 General Prussian Land Law; Coing Europäisches Privatrecht 1500 bis 1800 § 72 p 360.
136 First Part, 18th title § 20 General Prussian Land Law; Coing Europäisches Privatrecht 1500 bis 1800 § 72 p 354.
137 On torture in the context of "embarrassing interrogation", see for instance pt I art XXXVI-XXXVIII Constitutio Criminalis Theresiana, 1768.
138 Beccaria Von Verbrechen und Strafen § XVI: "Ist es aber ungewis, so darf man den Beklagten aus eben der Ursache nicht auf die Folterbank bringen, weshalber man keinen Unschuldigen quälen sol [...]." ["If it is uncertain, the defendant must not be put on the rack for the very reason that no innocent person should be tortured [...]."]
139 On the work of Beccaria see for instance Ambos 2010 ZStW 504; Schüler-Springorum 1991 KritV 123.
139 See Criminal Code for the Kingdom of Bayern, 1813. On the history of torture see for instance Mittermaier Das deutsche Strafverfahren § 75.
140 Compare title II § 1 para 2 of the Bavarian Constitution, 1818: "Der König ist das Oberhaupt des Staates, vereinigt in sich alle Rechte der Staatsgewalt und übt sie unter den von ihm gegebenen, in der gegenwärtigen Verfassungsurkunde festgesetzten Bedingungen aus." ["The king is the head of the state, unites in himself all the rights of the state power and exercises them under the conditions given by him and established in the present Constitutional Charter."]
141 See the Preamble of the Declaration of Independence of 4 July 1667: "[...] the Pursuit of Happiness".
reality only to a limited extent. Comparable developments can also be found in the People's Republic of China. The control of abusive actions – for example, in the area of competition law – takes effect only at a very late stage. Here, the market economy could perhaps do with a little more "socialist oil". Where socialist oil is perhaps lacking in the US or China, there may already be too much of it in Germany and Europe. If rigid prohibitions on terminating employment regulate the markets too strongly, such rules cement market structures and result in market rigidity. The ability to revoke Internet purchases without cause gives consumers a right to withdraw from contracts. A right of withdrawal has anti-competitive effects because companies with a strong market position, such as Amazon, can economically afford more generous returns, while small companies are forced out of the market because of such high costs.

4.2 Opportunities and risks of a strong constitution

4.2.1 The trivialisation of fundamental rights in the analysis of private law cases

The comparison shows the different role of the constitution for a society – from programme rules to the dominating factor in daily life. However, which concerns arise with an extensive concept of the constitution? The termination for own use in tenancy law in Germany is largely determined by the cases heard by the Federal Constitutional Court. Cases become problematic when that Court acts as a "super-revision authority" with regard to specialised courts and attempts to solve problems that resort in specific subject areas through the application of constitutional law in the absence of a constitutional violation. A certain restraint makes sense, if only because ordinary law often has more precise standards that balance the interests of

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142 Interestingly, the happiness index is the highest in the Scandinavian countries which are known for encouraging redistribution of wealth within society, see UN Sustainable Development Solutions Network World Happiness Report 2021 18.

143 Compare von Gierke Die soziale Aufgabe des Privatrechts 13.

144 Rent indexes, limits to rent increases and the strict requirements regarding notice of personal need mean that existing tenants often pay only half or a third of the market rate compared with new tenants. As a result, two different housing markets exist, one for existing tenants and one for new tenants.

145 For instance, when it placed the tenant's right of possession under the property protection of art 14 para 1 German Basic Law, see FCC, Order of 26.5.1993, 1 BvR 208/93, 89 BVerfGE 1, 6-8 – Besitzrecht des Mieters [Tenant's right of possession]; polemically, Sender 1994 NJW 1518, 1519: "oberstes Amtsgericht insbesondere für Eigenbedarfsklagen von Vermietern" ["Highest District Court in particular for landlords' own needs actions"].
the parties, whereas fundamental rights as principles require further substantiation and often need to be weighed up extensively.  If all problems were to be offloaded onto the constitution, the sense of which problems are really important and need the protection of the constitution would be lost. The Federal Constitutional Court thus contributes to a "trivialisation of fundamental rights".

4.2.2 The constitution as a stabilising set of values in society

A similar problem arises in the relationship between the constitutional court and parliament. In the United Kingdom and the US, the laws passed by their parliaments are routinely accepted by the highest court. Beyond that, however, the US Supreme Court has been politicised. Republicans traditionally take a narrow view of the role of developing the law, invoking the language of the time when it was drawn up, or the original intent of the legislature. This is to allow the legislature, not the courts, to resolve social problems. On the other hand, Democrats tend to be progressive and see it as the task of the highest court to develop solutions to current problems, such as strengthening the protection of minorities. The decisive factor is thus which of the political parties has the support of the majority of the judges in the nine-member Supreme Court.

In Germany, too, there is an extensive debate as to whether the Federal Constitutional Court exercises too much control over parliament and interferes with the competences of the legislature by means of a broad

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146 Vividly Rüfner "Grundrechtsadressaten" § 197 mn 112; Lerche "Grundrechtswirkungen im Privatrecht" 215, 232.
147 In detail, Möllers Legal Methods ch 10 mn 26-75.
148 Clearly Röhl and Röhl Allgemeine Rechtslehre 673. Emphasised, Wahl 1984 NVwZ 401, 409: "Das Verfassungsrecht enthält nicht in nuce die gesamte Rechtsordnung." ["Constitutional law does not contain in nuce the entire legal order."]
149 Thus, the instructive special opinion of Grimm in FCC, Order of 6.6.1989, 1 BvR 921/85, 80 BVerfGE 137, 164-170 – Reiten im Walde [Riding in the woods]; Schönberger 2012 VVDStRL 296, 327.
150 For Great Britain, see Bingham Rule of Law 162-163; for the USA, see fn 92 above.
151 For the so-called "textualism" see Scalia and Garner Reading Law No 58; Easterbrook 1994 Harv JL & Pub Pol'y 61, 68. On "purposivism" see Washington v Glucksberg 1997 521 US 702. On different approaches to interpreting the South African Constitution, see van Staden "Theoretical (and constitutional) underpinnings of statutory interpretation" 1.
152 Examples include rulings on the carrying of weapons (fn 93) or on the admissibility of the death penalty (fn 98).
153 For the "living originalism" see Balkin Living Originalism 324 and on the recognition of same-sex marriage fn 95.
154 For the state of the dispute, see Carter and Burke Reason in Law 182-185. However, a recent study puts this contrast into perspective, see Gluck and Posner 2018 Harv L Rev 1298.
interpretation of the Constitution.\textsuperscript{155} The interpretation of the Constitution as a set of values develops the Constitution further. Value is not a category of law, but of "morality, and thus not of the ought, but of the good".\textsuperscript{156} The Constitution thus gives the Federal Constitutional Court the opportunity to "negotiate society’s concepts of justice".\textsuperscript{157} If the Constitution requires constant updating by citizens,\textsuperscript{158} this requires the power of interpretation in the form of an up-to-date understanding of the Constitution. A dynamic interpretation of the Constitution\textsuperscript{159} allows for the respective moral values of society to be taken into account.\textsuperscript{160} If we follow the case law of the Federal Constitutional Court on the constitutionality of tax and social policy laws, it is striking that the Court often gives very precise specifications as to what the law should be in future.\textsuperscript{161} The Federal Constitutional Court thus disregards the legislature’s legislative prerogative and its own obligation to exercise judicial self-restraint.\textsuperscript{162} The narrowing of the scope for assessment and prognosis would lead to a "silent degradation of the first branch of government",\textsuperscript{163} because the Court would treat the legislature like a mere public authority.\textsuperscript{164} The Federal Constitutional Court is a player involved in the political and social controversies of the present day.\textsuperscript{165} Especially during the current Corona pandemic, supporters of a stronger control of the Federal Constitutional Court emphasise the advantage that the court offers an authoritative and therefore binding solution to a legal problem while scientific and ethical discussions can remain open to society in general.\textsuperscript{166}

\textsuperscript{155} On this discussion, Möllers Legal Methods ch 13 mn 88-89.
\textsuperscript{156} Thus Alexy Theorie der Grundrechte 125, 143; Volkmann Grundzüge einer Verfassungslehre der Bundesrepublik Deutschland 134-135; Volkmann 2020 JZ 965, 967.
\textsuperscript{157} Thus the wording of Volkmann Grundzüge einer Verfassungslehre der Bundesrepublik Deutschland 167-169, 177-179.
\textsuperscript{158} Böckenförde Die verfassungsgebende Gewalt des Volkes 22; Volkmann 2018 JZ 265, 270-271.
\textsuperscript{159} Voßkuhle 2019 JuS 417, 418-421.
\textsuperscript{162} FCC, Order of 31.7.1973, 2 BvF 1/73, 36 BVerfGE 1, 14-15 and guiding principle 2 – Grundlagenvertrag [Basic contract].
\textsuperscript{163} Lepsius "Chancen und Grenzen des Grundsatzes der Verhältnismäßigkeit" 1, 11.
\textsuperscript{164} Möllers "Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts" 281, 385; "demokratietheoretisch problematisch" ["problematic in terms of democratic theory"].
\textsuperscript{165} Volkmann Grundzüge einer Verfassungslehre der Bundesrepublik Deutschland 177-181: Federal Constitutional Court as a judicially institutionalised part of the political process.
\textsuperscript{166} Poscher FAZ 7; Lepsius FAZ 9.
When social problems are controversial, however, the battle of opinions should be fought out in parliament and not in court. This is required by the separation of powers doctrine and the imperative that political issues be decided as part of the political process. The concept that the legislature has the primary responsibility to make laws is also easy to justify. In taking risky decisions with an uncertain outcome, the administration and the legislature are often superior to the courts. Courts often lack the necessary tools such as expert commissions and the comprehensive overview necessary to consider and include extra-legal considerations. If in case of doubt every action of the executive and every statute of the legislature carries the risk of being "unconstitutional", there is a danger that the parliament will hesitate when committed action is required. Courts cannot take such decisions away from politicians. This does not preclude the Federal Constitutional Court from reviewing evidence and, in particular, demanding a rational and verifiable procedure. Otherwise, however, political decisions must be left to the discretion of the politicians.

5 Convergence theory and outlook

Convergence theory assumes that economic systems converge over time. In the past, there was hope that the Western understanding of democracy would rub off on the People's Republic of China and lead to a rapprochement. In comparative law, common law and civil law have converged over the last few decades, and this also applies to legal

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168 In the wording of Baur 1957 JZ 195, 196.
169 On the discussion of compulsory vaccination for all citizens in Germany, which has so far not been much discussed, see for example Kretschmann and Söder FAZ 8.
170 Thus the classification at Petersen Verhältnismäßigkeit als Rationalitätskontrolle 148-153.
172 From an economic point of view, Peters Wirtschaftssystemtheorie und Allgemeine Ordnungspolitik 84.
173 This policy of "change through trade" began after the opening of China from 1978 under Deng Xiaoping and affected the policies of US Presidents Carter (establishment of diplomatic relations), Bush and Clinton (strategic partnership). Cappelletti "Doctrine of Stare Decisis and the Civil Law" 381; Markesinis "Learning from Europe and Learning in Europe" 1, 20-27; De Cruz Comparative Law in a Changing World 514-517; Kramer "Konvergenz und Internationalisierung der juristischen Methode" 31, 34-44.
Three theses can be used to illustrate the perceptions of justice, and perhaps involving an image of overlapping circles as the best illustration of the relation among them:

(1) Different legal systems can have common values and concepts of justice. The circles overlap in this core area. This applies, for example, in a narrow area of natural law, such as when the police and army are supposed to protect the citizens of a country from violence.\(^\text{176}\)

(2) Then there are large areas in which perceptions of justice differ, or in some cases even contradict each other. This applies, for example, to the scope of distributive justice according to Aristotle. National peculiarities, even sensitivities, can be explained by history, culture, politics, and geography. They develop a great capacity to endure and stand in the way of harmonisation.\(^\text{177}\)

(3) With such differences, there is a danger of one-sided ethnocentrism – that is, the danger of assessing another culture in terms of one’s own values.\(^\text{178}\) A socialist democracy such as China will probably always be more authoritarian and paternalistic than a parliamentary democracy.\(^\text{179}\) As a result, a process of harmonisation or convergence is successful only if it takes place voluntarily, out of inner conviction, and is not imposed from the outside. Such examples of selective harmonisation can be found – such as Supreme Court decisions to limit extensive punitive damages\(^\text{180}\) or the death penalty\(^\text{181}\) – while in Europe preventive elements are on the rise.\(^\text{182}\) Apart from that, it would be desirable if national politicians could use comparisons with other countries to find out how their own country’s shortcomings could be remedied. More preventive elements could be included in tort law in

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176 On the Natural Law from an anthropological point of view see Hart *Concept of Law* 193-200; Möllers *Legal Methods* ch 2 mn 119.


178 Fikentscher *Modes of Thought* 117: “Ethnocentrism means that the researcher uses his or her own bias while problematizing, concluding, reasoning, or systematizing the study of another culture, reasoning, or systematizing issues of another culture.” Also see Demleitner 1999 *Ariz St LJ* 737, 740-744; Frankenberg 1985 *Harv Int’l LJ* 411, 421-426.

179 Baron and Yin-Baron *Die Chinesen* 412.

180 See fn 103 above.

181 See fn 98 above.

182 See fn 183 above.
Germany.\textsuperscript{183} In order to make it easier for consumers to enforce their rights, the European legislature has introduced class actions.\textsuperscript{184} European lawmakers could learn from the Chinese party by naming strategic interests and then also implementing them. This includes a European digital single market so that European companies could better compete against large companies such as Amazon and Google. But to go into these questions in more depth would require an essay of its own.\textsuperscript{185}

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List of Abbreviations

AcP  Archiv für die civilistische Praxis
Am J Comp L  American Journal of Comparative Law
AnwBl  Anwaltsblatt
Ariz St LJ  Arizona State Law Journal
B & Ad  Barnewall and Adolphus's King's Bench Reports
BGB  Bürgerliches Gesetzbuch
BGBl  Bundesgesetzblatt [Federal Law Gazette]
BGHZ  Amtliche Sammlung des BGH in Zivilsachen
BverfGE  Amtliche Sammlung des BVerfG
CLJ  Cambridge Law Journal
CC  Chinese Civil Code
Chicago-Kent L Rev  Chicago-Kent Law Review
CELJ  China-EU Law Journal
Cir  Circuit
CLC  Company Law Cases
CLP  Current Legal Problems
Colum L Rev  Columbia Law Review
COVuR  COVID-19 und Recht
D  Digest
ECJ  European Court of Justice
Einl  Einleitung
ER  English Reports
EU  European Union
FAZ  Frankfurter Allgemeine Zeitung
FCC  Federal Constitutional Court of Germany
FCJ  Federal Court of Justice of Germany
F2d  Federal Reporter, Second Series
Harv Int'l LJ  Harvard International Law Journal
Harv L Rev  Harvard Law Review
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
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<tr>
<td>Wils KB</td>
<td>Wilson's King's Bench and Common Pleas Reports</td>
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<td>ZChinR</td>
<td>Zeitschrift für Chinesisches Recht</td>
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<td>ZfdA</td>
<td>Zeitschrift für deutsches Altertum und deutsche Literatur</td>
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<td>ZfRV</td>
<td>Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung</td>
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<tr>
<td>ZStW</td>
<td>Zeitschrift für die gesamte Strafrechtswissenschaften</td>
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