

Thoughts on a Methodology of European Constitutional Law

By Philipp Dann*

A. Introduction

Constitutional law is special not only for the salient importance of its substance, but also for its concentrated yet open form and terminology. Hardly surprising, therefore, the issue of how to interpret and analyze constitutional law is a commonly and sometimes hotly debated topic in most constitutional systems.¹

It is not so in the European Union, though. Here, such questions have seldom been raised. Although discussion of the European Court of Justice and its general methods of interpretation is intensive and critical,² little thought is given to the specific question of interpreting the Union's constitutional law and even less to methods and approaches of European constitutional scholarship.³ Considering the emergence of European constitutional law in past years and the breadth and scope of constitutional debate in the EU today, this state of discussion seems hardly appropriate.

* Dr. iur., LL.M. (Harvard), Research fellow at the Max Planck Institute for Comparative Public and Public International Law in Heidelberg, Germany (Email: pdann@mpil.de). I am grateful to Joseph Windsor for his help on the translation, and to Jürgen Bast and Niels Petersen for substantive comments.

¹ MICHAEL DORF & LAWRENCE TRIBE, ON READING THE CONSTITUTION (1991); ANTONIN SCALIA, A MATTER OF INTERPRETATION "FEDERAL LAW AND THE COURTS" (1997); MICHEL TROPER, LA THÉORIE DU DROIT, LE DROIT, L'ÉTAT (2001); Otto Pfersmann, *Theorie de l'interprétation constitutionnelle*, 17 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 351 (2001); PETER HÄBERLE, EUROPÄISCHE VERFASSUNGSLEHRE 268 (2005); HANS J. KOCH, SEMINAR: DIE JURISTISCHE METHODE IM STAATSRECHT (1977); as to the debate in South-Africa ZIYAD MOTALA & CYRIL RAMAPHOSA, CONSTITUTIONAL LAW 13 (2002).

² Joxerramon Bengoetxea et al., *Integration und Integrity in the Legal Reasoning of the European Court of Justice*, in THE EUROPEAN COURT OF JUSTICE 43 (Gráinne De Búrca & Joseph H.H Weiler eds. 2001); 2 FRIEDRICH MÜLLER & RALPH CHRISTENSEN, JURISTISCHE METHODIK (2003); Hans Kutscher, *Thesen zu den Methoden der Auslegung des Gemeinschaftsrechts, aus der Sicht eines Richters*, in GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFTEN (BEGEGNUNGEN VON JUSTIZ UND HOCHSCHULE) 1 (1976).

³ But see Armin von Bogdandy, *A Bird's Eye View on the Science of European Law*, 6 EUROPEAN LAW JOURNAL (ELJ) 208 (2000); FRANCIS SNYDER, NEW DIRECTIONS IN EUROPEAN COMMUNITY LAW 12 (1989).

On the contrary, it is the calling of European constitutional scholarship to reflect on its methodological arsenal. It should inquire into its set of interpretative rules and analytical approaches, it should discuss, whether its object justifies a special set of methodological tools – and what such tools should be.

The following paper considers these questions in three steps. The first part will ask why the topic of European constitutional law should actually justify a specialized methodology – and how such a methodology can be developed (A.). Considering the specific nature of this body of law, the role and cognitive interests of legal academia and the virtues of a debate as such, it will argue for the distinct value of such a methodology.

The second part will then attempt to sketch contours of a methodology of European constitutional law (B.). It will propose that the analysis of European constitutional law must go beyond mere interpretation, so as to encompass three different methodological dimensions, namely interpretation, comparison, and systematization. The heuristic function of distinguishing these dimensions is to facilitate a more precise localization and discussion of the particular methodological challenges facing European constitutional law and its analysis.

Finally, an afterthought shall contemplate a rarely observed, though certainly not insignificant aspect of method-conscious analysis, that is the personal attitude of the critic, or, as it will be called here: his or her habitus (C.).

B. Preliminary Questions on a Methodology for European Constitutional Law

I. A Specialized Methodology for European Constitutional Law – Why so?

The issue of how to interpret constitutional law is a familiar motif in many countries.⁴ However, before simply copying the question, transferring it to the European level and asking how European constitutional law should be analyzed, one might ponder first why this area of law may justify a specialized methodology.

The case against such a specialized methodology is strong. Firstly, the acceptance of special rules to analyze European constitutional law must presume the relativity of methodologies and, thus, their multiplicity. Hesitance regarding such relativity seems called for. A shared methodology of all legal disciplines has a unifying element. It is one of the great advantages of legal academia, in contrast to many

⁴ See literature cited, *supra* note 1.

other fields of social sciences, that it is much less divided into schools of thought and different methodologies. Also, the relatively close ties and permeability between legal academia and practice is based in no small part on this shared reservoir of accepted methods and arguments.⁵ This common methodological basis appears fundamental, especially to a discipline, such as European constitutional law, based so strongly on court-actions and case law.

Another unifying aspect of methodology might militate against a specialized methodology. Those who follow the same rules, that is, speak the same methodological language as it were, have a chance of understanding. This aspect should be of particular significance in a heterogeneous Europe of many languages and legal cultures. Characteristic methodological differences certainly exist, for example, between the practices of continental and British jurists;⁶ nonetheless, common foundations can be seen across the quite different legal cultures.⁷ To compromise such commonalities by way of a disciplinary specialization would be difficult to justify.

Further concerns are perhaps even more fundamental. Is not the very question of a methodology for a European constitutional scholarship incurably German—and thus more of a national cul-de-sac than the route to a European debate? Other countries, indeed, discuss the rules for constitutional interpretation; however, such discussion relates predominantly to the action of (constitutional) courts and precisely not to scholarly methods.⁸ Why should the German delight in methodological navel-gazing be imposed on other countries and on European law? And even if one were to venture into such a topic, a separate question would be how such a debate could be carried out productively. National methodology debates are already highly complex and, for the most part, far from agreement. How is it supposed to function on a pan-European level? And in the end does one not have to ask whether the call for such a debate resonates with the none too

⁵ Ulfried Neumann, *Wissenschaftstheorie der Rechtswissenschaft*, in *EINFÜHRUNG IN DIE RECHTSPHILOSOPHIE UND RECHTSTHEORIE DER GEGENWART* 387 (Arthur Kaufmann & Winfried Hassemer eds., 5th ed. 1989); 1 FRIEDRICH MÜLLER & RALPH CHRISTENSEN, *JURISTISCHE METHODIK* 30 (2004).

⁶ 2 LÉONTIN JEAN CONSTANTINESCO, *RECHTSVERGLEICHUNG* 30 (1972); *But see* STEFAN VOGENAUER, *DIE AUSLEGUNG VON GESETZEN IN ENGLAND UND AUF DEM KONTINENT* (2001). As to the differences in legal reasoning even between common-law systems, *see* PATRICK S. ATIYAH & ROBERT SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987).

⁷ A systematic comparison of methods of constitutional interpretation in Europe is still missing. For statutory interpretation, *see* *INTERPRETING STATUTES* (Neil MacCormick & Robert S. Summers eds., 1991); WOLFGANG FIKENTSCHER, 1-3 *METHODEN DES RECHTS* (1975/1976); VOGENAUER, *supra* note 6.

⁸ *See* literature cited, *supra* note 1.

subtle echo of a hegemonic project to export German viewpoints into other academic cultures?

However valid these questions may be, in this very pointedness they indicate the value of a reconsideration of methodological issues. A discussion about methodological understandings and cognitive interests could serve both as a starting point for self-reflection and as a point of crystallization of self-conceptions.⁹ Scholarship on European law is not exactly blessed with this kind of reflection.¹⁰ But wherever it is found, the debate on methodologies has reflected and sometimes clarified the self-conception of Community law—in the emancipation from international law as well as in delimitation from national law.¹¹ It remains, however, to be seen, whether a methodological discussion, in and of itself, could act as a unifying element. In any case, it would surely lead to more transparency in the handling of European constitutional law or would at least serve to improve awareness of intransparency.

Beyond these rather general considerations, several concrete factors do speak for a reevaluation of the methodology of European constitutional law and for a (moderate) methodological relativism.¹² Adequate methods promise rationality.¹³ Over-simplified methods carry the danger of irrationality and camouflage. This seems especially true in European matters. The rash and imprudent transfer of nationally impregnated legal terms to the European level can lead to results just as dubious as the indiscriminate acceptance of supposedly objective, empirical assumptions—two phenomena observable, for instance, in the debate over the European democratic deficit.¹⁴ Just as the Europeanization of national legal

⁹ 3 MICHAEL STOLLEIS, *GESCHICHTE DES ÖFFENTLICHEN RECHTS* 153 (1999); Christoph Möllers, *Braucht das öffentliche Recht einen Methoden- und Richtungsstreit?*, 90 *VERWALTUNGSARCHIV* 187 (1999).

¹⁰ H. Schepel & R. Wesseling, *The Legal Community. Judges, Lawyers, Officials and Clerks in the Writing of Europe*, 3 *EUROPEAN LAW JOURNAL* 165 (1997).

¹¹ JOCHEN ANWEILER, *DIE AUSLEGUNGSMETHODEN DES GERICHTSHOFES DER EUROPÄISCHEN GEMEINSCHAFTEN* 76 (1997). On the institutional side of this development, see RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE* 16 (1998).

¹² Stefan Grundmann, *Methodenpluralismus als Aufgabe*, 61 *RABELS ZEITSCHRIFT* 424 (1997).

¹³ Andreas Voßkuhle, *Methode und Pragmatik im öffentlichen Recht*, in *UMWELT, WIRTSCHAFT UND RECHT* 181 (Hartmut Bauer et al. eds., 2003).

¹⁴ On how to deal with the national roots of the vocabulary of European constitutional law, see *infra*, Part C.III.1.

structures leads to reconsideration of methodical rules in national discourse, so too might the inverse prove beneficial.¹⁵

Additionally, the specific cognitive interests of academia justify the consideration of a special methodology for European constitutional law, in delimitation and in complement to judicial methodology.¹⁶ The correct and convincing resolution of a case, as is the judiciary's task, follows methodological rules which are different than those employed for a systematic penetration of a legal field and the scholarly explication of its underlying concepts. Legal academia is called to reveal broader contexts, in which to consider the law; it is called to scrutinize and challenge the law itself as well as its praetorial development. In doing so, legal academia can—and must—make use of extralegal standards.¹⁷ Thus, the methodology of European constitutional law must surpass a mere analysis and critique of the interpretive methods of the ECJ; indeed, it must delineate the entirety of an independent scholarly methodology.

Finally, the consideration of European constitutional law methodology is justified by the nature of its object.¹⁸ Not only in the national context,¹⁹ but also in the European, the unique nature of constitutional law incites reflection on its methodology.

II. On the Nature and Notion of Constitutional Law – Nationally and in the EU

The specific nature of constitutional law, on the national level, follows from its substance, form, and function. The relevant aspects shall briefly be noted here.²⁰

¹⁵ Voßkuhle, *supra* note 13, at 178.

¹⁶ Eberhard Schmidt-Aßmann, *Methoden der Verwaltungswissenschaft*, in *METHODEN DER VERWALTUNGSRECHTSWISSENSCHAFT* 393 (W. Hofmann-Riem & E. Schmidt-Aßmann eds., 2004); MARTIN KRIELE, *THEORIE DER RECHTSGEWINNUNG* 37 (2d ed. 1976); *but see* Bernhard Schlink, *Bemerkungen zum Stand der Methodendiskussion in der Verfassungsrechtswissenschaft*, 19 *DER STAAT* 106 (1980).

¹⁷ KRIELE, *supra* note 16. Looking rather at the self-understanding of legal academics, *see* Ralf Dreier, *Zum Selbstverständnis der Jurisprudenz als Wissenschaft*, 2 *RECHTSTHEORIE* 41 (1971).

¹⁸ MÜLLER & CHRISTENSEN, *supra* note 2, at 30; Rudolf Bernhard, *Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht*, 24 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 451 (1964); *but see* OLIVER LEPSIUS, *GEGENSATZAUFHEBENDE BEGRIFFSBILDUNG* 304 (1994).

¹⁹ For the German discussion, *see* Horst Ehmke, *Prinzipien der Verfassungsinterpretation*, 20 *VERÖFFENTLICHUNG DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER* 62 (1963); Ernst-Wolfgang Böckenförde, *Die Methoden der Verfassungsinterpretation*, 29 *NEUE JURISTISCHE WOCHENSCHRIFT* 2097 (1976).

²⁰ *See* KARL LÖWENSTEIN, *POLITICAL POWER AND GOVERNMENTAL PROCESS* 123 (1957); KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 3 (20th ed. 1999); MARTIN

First of all, constitutional law deals with power and its limitations. It establishes the framework for political disputes, sets procedures and fundamental values, and circumscribes the basic order of a polity. Constitutional law also serves to foster national self-affirmation and unity. At the same time, it acts as a communicative link between societal and legal discourse. In terms of form, constitutional law norms are as a general rule rather open, broad, and seldom formulated as conditional standards. Furthermore, rigorous procedures restrict its being amended. Finally, with supremacy over statutory law, constitutional law also functions to enable systemic coherence.

And what, in contrast, is specific to European constitutional law? Before answering this question, we should first clarify what exactly the term is intended to connote, since there are several concepts (and the denegation) of "European constitutional law".²¹ Two basic conceptions can be distinguished, namely a formal and a material concept. The formal concept refers to the contours of European primary law.²² The material concept of European constitutional law, in contrast, comprehends only certain foundational provisions that are considered as fundamental, such as basic values or institutional settings.²³

The present article makes use of the formal conception of constitutional law. Admittedly, the material conception seemingly captures the "true" substance of constitutional law, separating the significant from the insignificant in the mass of European primary law. Yet it requires the drawing of difficult boundaries, since the standards for differentiating between significant and insignificant are, by nature, unclear and subjective. Also, the concept of a material constitutional law leaves dubious its degree of and relationship to the concept of constitutional supremacy.

MORLOK, WAS IST UND ZU WELCHEM ENDE STUDIERT MAN VERFASSUNGSTHEORIE? 84 (1988); ULRICH PREUSS, ZUM BEGRIFF DER VERFASSUNG (1994); FRANCIS HAMON & MICHEL TROPER, DROIT CONSTITUTIONNEL 17 (28th ed. 2003).

²¹ See JÖRG GERKRATH, L'EMERGENCE D'UN DROIT CONSTITUTIONNEL POUR L'EUROPE 51 (1997); Christoph Möllers, *Pouvoir Constituant - Constitution - Constitutionalisation*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast eds., forthcoming 2005); ANNE PETERS, ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS 38 (2001). As to the development into a "constitution," see MARLENE WIND, SOVEREIGNTY AND EUROPEAN INTEGRATION 123 (2001); JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE (1999).

²² Möllers, *supra* note 21. On the notion and scope of primary law, see KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 705 (2d ed. 2005).

²³ PETERS, *supra* note 21, at 91. As to this distinction, see N. Petersen, *Europäische Verfassung und Europäische Legitimität*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 445 (2004).

Against this backdrop, a formal understanding of constitutional law proves to be more persuasive as well as more transparent.

On this basis, we can now turn to the specific characteristics of European constitutional law. What are these? First, European constitutional law describes a legal order that is not a state, but uses the terminology of state law. Basic conceptual terms, such as constitution, democracy, or law, readily call this dilemma to mind.²⁴ Union constitutional law also describes a legal order that is beyond national and conceptual unity – and defies attempts to serve these concepts, as national constitutional law regularly does. Instead, European constitutional law has to deal with a sometimes distressing heterogeneity based on sectoral and territorial differentiation.²⁵

The indeterminacy of language, typical of constitutional law generally, is at the European level coupled with multilingualism and textual complexity. European constitutional law is not contained in a single, discrete text; rather, it is to be found in diverse sources and in diverse languages.²⁶ While these sources have consisted of the various founding treaties of the Communities, and then the Union, plus the protocols, even under the Constitutional Treaty it would be four quite distinct parts of a treaty and a distressing myriad of protocols.²⁷

Moreover, a particular openness characterizes the substantive contours of European constitutional law. This openness is more than the prospective openness that is common to every constitution.²⁸ What is meant here is that national legal orders as well as the European legal order take part in defining Union constitutional law, in particular, as regards fundamental rights.²⁹ At the same time, the supremacy of

²⁴ Armin von Bogdandy, *Zur Übertragbarkeit staatsrechtlicher Figuren auf die Europäische Union*, in DER STAAT DES GRUNDGESETZES 1034 (Michael Brenner ed., 2004).

²⁵ DANIEL THYM, UNGLEICHZEITIGKEIT UND EUROPÄISCHES VERFASSUNGSRECHT (2004); ALEX WARLEIGH, FLEXIBLE INTEGRATION (2002); FILIP TUYTSCHAEVER, DIFFERENTIATION IN EUROPEAN UNION LAW (1999).

²⁶ Franz Mayer, *The Language of the European Constitution – beyond Babel?*, in THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION 359 (Adam Bodnar et al. eds., 2003); VIVIANE MANZ, SPRACHENVIELFALT UND EUROPÄISCHE UNION (2002).

²⁷ Currently, the primary law of the EC/EU contains some 35 protocols. The Constitutional Treaty has 36 protocols and 50 declarations. See Manfred Zuleeg, *The Advantages of the European Constitution*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 21.

²⁸ MORLOK, *supra* note 20, at 105.

²⁹ NEIL MACCORMICK, DEMOCRACY, SUBSIDIARITY AND CITIZENSHIP 335 (1997); Torsten Kingreen, *Article 6 EUV*, in KOMMENTAR ZUM EU-VERTRAG UND EG-VERTRAG para. 33 (Christian Callies & Matthias Ruffert eds., 2d ed. 2002).

European constitutional law, a cornerstone of the importance of constitutional law in the national realm³⁰, is not undisputed.³¹

Finally, European constitutional law is set apart by its own unique dynamic, resulting not only from the teleological orientation of the treaties themselves,³² but also from the political dynamic of treaty revisions in the past twenty years.³³

III. On the Development of a European Methodology – Epistemological Options

If the contours and unique nature of the object of a specialized methodology can be sketched, and if good reasons for reflection on a European constitutional methodology can be named, then one meta-query remains open. That is the question of how such a methodology of European constitutional law can be developed at all.

Such a methodology would find its starting point in the currently used methods. A systematic comparison of the methodologies in Europe would, thus, be the most desirable route to arrive at a common European method. Conceivably, the national methodological arsenals could be analyzed, and various critical schools of thought could be juxtaposed, thereby testing their suitability for extrapolation onto the European project. Such an analysis would reveal similarities and differences and bring about a common arsenal. Such an undertaking, however, is beyond the scope of this article, not to mention the fact that the necessary preparatory work seems to be lacking.³⁴ The systematic and pan-European comparison of constitutional methodologies and its reflection onto issues facing Europe, as a whole, are still desiderata.

³⁰ Rainer Wahl, *Der Vorrang der Verfassung, in* VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG, 121 (Rainer Wahl ed., 2003).

³¹ PETERS, *supra* note 21, at 305.

³² AMARYLLIS VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 141 (2002); THE DYNAMICS OF EUROPEAN UNION (Roy Pryce ed., 1990). As to the aspect of dynamic interpretation, see Rudolf Streinz, *Der effet utile in der Rechtsprechung des EuGH, in* Festschrift für Ulrich Everling 1491 (Ole Due ed., 1995); Joxerramon Bengoetxea, LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE 251 (1993).

³³ LENAERTS & VAN NUFFEL, *supra* note 22, at 41; Ulrich Everling, *The European Union between Community and National policies and legal orders, in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 21, at part II.

³⁴ See literature cited, *supra* note 7.

Nonetheless, the previous thoughts might provide a starting point, hinting at two significant factors that shape a European methodology of constitutional law: the nature and specific features of European constitutional law itself – and the cognitive interests of academia (in contrast to those of courts).

C. Sketches of a Methodology of European Constitutional Law

European constitutional law grapples with an entirely new phenomenon and is observed by a multinational academia with diverse and specific cognitive interests. A methodology of European constitutional law, which matches this subject and those observers, must go beyond mere rules of interpretation. Legal scholarship, in general, and European constitutional scholarship, in particular, surely encompass the interpretation of legal texts, but also include intra- and interdisciplinary comparison and systematization. Thus, the following methodological sketch distinguishes these three dimensions of legal analysis, namely, interpretation, comparison, and systematization.

This trichotomy primarily has a heuristic function. It promises to frame better and more transparently the methodological challenges specific to European constitutional analysis; that is, it promises to highlight the various methodological peculiarities in analyzing European constitutional law. Especially if a European conversation on these issues is to succeed, the debate on its aspects should already be as transparent as possible.

The interrelationship of these dimensions then is neither chronological nor hierarchical. Rather, they each ask distinct questions and thus elicit distinct insights about the law at hand. The respective insights inform and complement the others; they reinforce each other's content reciprocally.

A methodology of European constitutional scholarship is meant to capture what distinguishes the analysis of this body of law from the analysis of European secondary law – and from the analysis of national constitutional law. This starts with the methods of interpretation.

I. Interpretation

European constitutional law consists of texts and thus requires exegesis and interpretation.³⁵ In Community law and later in Union law, the methodological discussion has concentrated on this hermeneutic dimension of legal analysis. In its

³⁵ HELMUT COING, *GRUNDZÜGE DER RECHTSPHILOSOPHIE* 319 (4th ed. 1985); HANS-GEORG GADAMER, *WAHRHEIT UND METHODE* 307 (1963); KLAUS FRIEDRICH RÖHL, *ALLGEMEINE RECHTSLEHRE* 69 (1994).

course, this discussion reflected the methodological emancipation of Community law from international law, and also its delimitation from the methods of national law.³⁶

For the scholarship on European constitutional law this interpretive dimension is unquestionably essential, as it shares the general canon of rules, i.e. grammatical, historical, systematic and teleological interpretation of a norm.³⁷ But further questions may be raised. It has to be asked whether the interpretation of European constitutional law also has specific aspects, in contrast to the interpretation of secondary law, or whether such differentiations might be reasonable. For reasons of transparency, we might distinguish between (1) rules and (2) principles of interpretation:³⁸

1. *Rules of Interpretation*

Turning to the rules of interpretation, the objective here is obviously not to formulate completely new rules exclusively for constitutional interpretation; instead, the question is whether there might be certain characteristic shifts of emphasis between the interpretation of constitutional law and secondary law. The two following examples may demonstrate this.

The ECJ's case law plays a much more prominent role in the systematic interpretation of constitutional law than does secondary law.³⁹ Because the latter is more easily amended, it permits the lawmaker to take a more active role, thereby reducing the importance of case law. In contrast, constitutional law's resistance to quick amendments correspondingly increases the importance of precedents.

Teleological interpretation, to name a second example, generally is a central interpretive rule of Union law.⁴⁰ But it relates to fundamentally different objectives in European constitutional law and in secondary law. For the latter, the objectives

³⁶ ANWEILER, *supra* note 11, at 76.

³⁷ CARL FRIEDRICH VON SAVIGNY, *JURISTISCHE METHODENLEHRE* 18 (G. Wesenberg ed., 1951). About Savigny and these rules, see 3 WOLFGANG FIKENTSCHER, *METHODEN DES RECHTS* 51, 67 (1976); U. Huber, *Savignys Lehre von der Auslegung der Gesetze in heutiger Sicht*, 58 *JURISTENZEITUNG* 1 (2003). Presenting a similar list with regard to European Community, see BENGOETXEA, *supra* note 32, at 233.

³⁸ ATIYAH & SUMMERS, *supra* note 6, at 70.

³⁹ CARSTEN BUCK, *ÜBER DIE AUSLEGUNGSMETHODEN DES GERICHTSHOFS DER EUROPÄISCHEN GEMEINSCHAFTEN* 201 (1998); BENGOETXEA, *supra* note 32, at 240.

⁴⁰ BENGOETXEA, *supra* note 32, at 251.

enumerated in the text of the directive or regulation serve as a point of orientation; in the former, the basic considerations of the treaties come to the fore.

In contrast to these shifts in systematic and teleological interpretation, the demise of a supposed difference can be seen regarding the rule of historical interpretation. The widespread opinion that historical interpretation is impermissible in Union law owing to the lack of publication of the *travaux préparatoires*⁴¹ has become invalid since they began to be published.⁴² If the Constitutional Treaty enters into force, historical interpretation by recourse to the myriad documents of the Convention could possibly even play a significant role in the future.⁴³

2. Principles of Interpretation

Principles of interpretation can be differentiated from the just described rules of interpretation. Their differentiation indicates two categories of interpretational tools and their relative dependence on the interpreted object.⁴⁴ On the one hand, rules of interpretation are rather narrow, independent in terms of the object and are thus, generally speaking, applicable across all legal disciplines, though also accounting for extenuating features, as seen above. On the other, principles of interpretation derive from specific material problems, which is to say, they have a topical core. Such principles of constitutional interpretation can be understood, as Horst Ehmke put it, as “substantive rules of problem-solving, developed through problem-solving.”⁴⁵ Such principles of interpretation have not yet been formulated for European constitutional law. But they might play a specific role, which can also be demonstrated by two examples.

An interpretive fundamental of *in dubio pro parte una* could be considered for the new Constitutional Treaty, in light of the divergence between its Parts I and III. One might also weigh the merits of a principle of preference, in cases of doubt, for the ‘Community method’ and its institutional implications. Such a principle would, for

⁴¹ HANS PETER IPSEN, *EUROPÄISCHES GEMEINSCHAFTSRECHT* 134 (1972); RUDOLF BERNHARD, *AUSLEGUNG VÖLKERRECHTLICHER VERTRÄGE* 133 (1963). *But see* Carl Friedrich Ophüls, *Über die Auslegung der Europäischen Gemeinschaftsverträge*, in *FESTGABE MÜLLER-ARMACK* 285 (F. Greiß ed., 1961).

⁴² *DOKUMENTE ZUM EUROPÄISCHEN RECHT* (Reiner Schulze ed., 1999/2000).

⁴³ Thomas Oppermann, *Europäischer Verfassungskonvent und Regierungskonferenz 2002-2004*, *DEUTSCHE VERWALTUNGSBLÄTTER* 1264 (2004).

⁴⁴ ATIYAH & SUMMERS, *supra* note 6, at 70; JOSEF ESSER, *GRUNDSATZ UND NORM IN DER RICHTERLINCHEN FORTBILDUNG DES RECHTS* 87, 107 (1956); ROBERT ALEXY, *THEORIE DER GRUNDRECHTE* 71 (2d ed. 1994); Joseph Raz, *Legal principles and the Limits of Law*, 81 *YALE L.J.* 838 (1972).

⁴⁵ Author’s translation, *see* EHMKE, *supra* note 19, at 182.

example, apply to cases of conflicting or overlapping legal bases or procedures: in doubt, the ordinary legislative procedure under Article III-396 CT would be the normal case, preferred over any given special procedure.

II. Comparison and Contextualization

Beyond interpretation, a second dimension of legal analysis and methodology is comparative law, or as it shall be referred to here: comparison and contextualization. This dimension does not deal with the understanding of a provision based on its wording, its systematic context, its purpose, nor its history. Rather, comparison pursues a deepened understanding of law by way of contrast – with norms of other legal orders or through knowledge about the norm, be it political, historical, economical, or conceptional.⁴⁶ If interpretation operates endogenously, then comparison operates exogenously, so to speak.

However, the labeling as comparison and contextualization implies the larger radius of this dimension of legal analysis. Law is placed in the broader context of its neighboring branches of academia.⁴⁷ This broader notion of comparison includes (but is not limited to) synchronic⁴⁸ and diachronic⁴⁹ comparative law,⁵⁰ and also inter-, intra-, and transdisciplinary analysis.⁵¹

Turning to comparison in Union constitutional law, this dimension here has a particular importance and carries particular difficulties. The European constitution

⁴⁶ ESIN ÖRÜCÜ, *THE ENIGMA OF COMPARATIVE LAW* (2004); *COMPARATIVE LEGAL STUDIES* (Pierre Legrand ed., 2002). Arguing for a comparative methodology of administrative law, see Christoph Möllers, *Theorie, Praxis und Interdisziplinarität in der Verwaltungsrechtswissenschaft*, 93 *VERWALTUNGSARCHIV* 46 (2002).

⁴⁷ This is not only meant in a substantive, but also a methodological way since comparison is a central method in most humanities, see *VERGLEICH UND TRANSFER: KOMPARATISTIK IN SOZIAL-, GESCHICHTS- UND KULTURWISSENSCHAFTEN* (Hartmut Kälble et al. eds., 2003).

⁴⁸ Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225 (1999); GIORGOS TRANTAS, *DIE ANWENDUNG DER RECHTSVERGLEICHUNG BEI DER UNTERSUCHUNG DES ÖFFENTLICHEN RECHTS* (1998); Karl-Peter Sommermann, *Funktionen und Methoden der Grundrechtsvergleichung*, in 1 *HANDBUCH DER GRUNDRECHTE* 659 (Detlev Merten & Hans Papier eds., 2004).

⁴⁹ As an example (on the subject of institutional law of the EU), see PHILIPP DANN, *PARLAMENTE IM EXEKUTIVFÖDERALISMUS* 21, 43 (2004); Stefan Oeter, *Souveränität und Demokratie als Probleme der "Verfassungsentwicklung" der Europäischen Union*, 55 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 659 (1995).

⁵⁰ Susanne Baer, *Verfassungsvergleichung und reflexive Methode*, 64 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 737 (2004) 737; but see BERNHARD, *supra* note 18, at 451.

⁵¹ See *INTERDISZIPLINARITÄT* (Jürgen Kocka ed., 1987); MARKUS KÄBISCH, *INTERDISZIPLINARITÄT* (2001).

stands, like hardly any other subject matter, at the intersecting point of highly varied disciplinary interests. Insofar, it can be conceived of as a transdisciplinary object of analysis; indeed, one could even consider constitutionalization itself, in part, as the result of an interdisciplinary discourse.⁵² It is no surprise, therefore, that the 'law in context' school emerged from the study of European constitutionalism – and in a cross-national and inter-disciplinary (Florentine) environment.⁵³

At the same time, European constitutional scholarship, not unlike comparative constitutional law in general, faces particular methodological difficulties. Especially in constitutional law, substantial differences often hide behind superficially similar formulations. Some scholars even believe that constitutional law represents such a culturally and nationally distinct law, as to prevent any meaningful legal-constitutional comparison.⁵⁴ Such a viewpoint regarding Union constitutional law, however, would be absurd. Nevertheless, the typical, "functional approach" to comparative law – especially as developed in private law⁵⁵ – encounters particularly obvious limitations here.⁵⁶ The methodology, therefore, should be expanded to include a more intensive analysis of the basic national understandings underlying the text, because such understandings shape historical experience, which in turn shapes cognitive history.⁵⁷ Even for this reason alone, comparative law relates closely to an expanded form of contextualization, which must be performed in dialogue with neighboring academic branches, that is, interdisciplinarily.

However, a unified methodology of legal comparison seems elusive.⁵⁸ Too divers are the contexts and too context-related the steps of analysis. However, certain

⁵² The list of contributions from several disciplines, which contributed substantially to the understanding and development of European constitutional law, is long. See B. HAAS, *THE UNITING OF EUROPE* (1958); HANS PETER IPSEN, *EUROPÄISCHES GEMEINSCHAFTSRECHT* (1972); HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE* (1986); ROBERT O. KEOHANE & STANLEY HOFFMANN, *THE NEW EUROPEAN COMMUNITY* (1991); Joseph H.H. Weiler, *The Transformation of Europe*, in *THE CONSTITUTION OF EUROPE* 10 (Weiler ed., 1999).

⁵³ Francis Snyder, *Editorial*, 1 *EUROPEAN LAW JOURNAL* 3 (1995); see WIND, *supra* note 21, at 113.

⁵⁴ RAOUL BERGER, *GOVERNMENT BY THE JUDICIARY* (2nd ed. 1997); see TUSHNET, *supra* note 48, at 1269.

⁵⁵ KONRAD ZWIEGERT & HEINRICH KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 34-36 (3d ed. 1998).

⁵⁶ Baer, *supra* note 50, at 739.

⁵⁷ See Rainer Wahl, *Verfassungsvergleichung als Kulturvergleichung*, in *VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG*, *supra* note 30, at 96.

⁵⁸ SOMMERMANN, *supra* note 48, at 659; ÖRÜCÜ, *supra* note 46, at 51.

comparative challenges and tasks for the comparative analysis of European constitutional law can still be formulated. Three are particularly noteworthy.

First of all, comparison in European constitutional law must perform a specific task in areas that are substantively open, such as in fundamental rights (Art. 6(2) EU) or state liability (Art. 288(2) EC). Here, comparison as methodological approach is not only beneficial or simply interesting, but even normatively imperative.⁵⁹ The ECJ is – in these areas – explicitly called to progressive development of the law, indeed, to judicial law-making.⁶⁰ As such, it makes use of a specific method, which has (in German literature) been called *wertende Rechtsvergleichung* (valuing or evaluative comparative law).⁶¹ Methodically, this is not a functional comparison of legal provisions; hence it is not an analysis of a provision's objectives in its given context. Rather, it is a method of carefully selecting or crafting certain rules on the basis of prior evaluation. The standard of selection comprises the goals of safeguarding the highest possible level of protection, especially in fundamental rights, and the new rules' compatibility with the objectives and structures of Union law.⁶² Hence, it is not a simple transfer of national rules onto European law, but the development of common European standards.

Another, second aspect makes European constitutional law especially attractive for comparison – and that is its dynamic. Given the constantly shifting *gestalt* of Union law, its current specifics and its developmental stage can best be perceived by scholarly comparison with other legal orders or with individual legal doctrines. Comparison of the Union with other systems – especially other dynamic systems – seems most likely to permit flexible and at the same time precise localization and analysis.⁶³ This is true, whether one is analyzing individual legal principles, institutional designs, or the character of the Union as such. Federalism as a framework has proven particularly appropriate. Federal systems are by nature

⁵⁹ ANWEILER, *supra*, note 11, at 359. The South-African constitution proscribes in its Art. 39 that “when interpreting the Bill of Rights, a court [...] must consider international law, and may consider foreign case law.” See MOTALA & RAMAPHOSA, *supra* note 1, at 36.

⁶⁰ MÜLLER & CHRISTENSEN, *supra* note 2, at 317.

⁶¹ Ernst Werner Fuss, *Die allgemeinen Rechtsgrundsätze über die außervertragliche Haftung der Europäischen Gemeinschaften*, in *STUDIEN ZUM STAATS- UND VÖLKERRECHT: FESTSCHRIFT FÜR RAUSCHHOFFER* 43 (Manfred Abelein ed., 1977); Markus Heintzen, *Gemeineuropäisches Verfassungsrecht in der Europäischen Union*, 32 *EUROPARECHT* 8 (1997).

⁶² See MÜLLER & CHRISTENSEN, *supra* note 2, at 315-316; Jürgen Kühling, *Grundrechte*, in *EUROPÄISCHES VERFASSUNGSRECHT* 590 (Armin v. Bogdandy ed., 2003).

⁶³ See SIONAIDH DOUGLASS-SCOTT, *EUROPEAN CONSTITUTIONAL LAW* (2002) (constantly and convincingly employing a comparative look at her object).

dynamic and multifaceted—and thereby directly impel to comparison of their components and their stages of development. A comparative localization of Union constitutional law—in the context of its own dynamic development as well as in contrast to other federal systems—thus appears particularly promising.⁶⁴

Finally, a third aspect calls for a comparative approach to European constitutional law, namely, the European Union's specific evolution from an organization for market integration into a political union.⁶⁵ This unique genesis—from economic association to political community—has elicited various disciplinary points of view. Already within legal studies in Germany, the disciplines of private law and public law present widely varying conceptions of the Union, a situation explained in no small part by this genesis.⁶⁶ But also beyond that, the genesis of the European endeavor lends itself exceptionally well to interchange with other academic branches, that is, to interdisciplinary contextualization: what meaning does its origin have for the current Union, or where might remnants of the previous order still manifest themselves in the present? An understanding of European constitutional law should benefit even more from the viewpoints of other academic branches with respect to this genesis.⁶⁷

In sum, one can distinguish three different motives and approaches of comparison to European constitutional law: first, the substantive openness of European constitutional law calls for a “valuing comparative law”; second, the special dynamic of European integration is motive for a “dynamic or diachronic comparative law”, juxtaposing European constitutional law to other inherently dynamic systems of law; and finally, the very special genesis of the EU from market association to political union instigates a special kind of “transdisciplinary comparative approach” to contextualize this European *Sonderweg*.

⁶⁴ See, e.g., 1 INTEGRATION THROUGH LAW (Mauro Cappelletti *et al.* eds., 1986); Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AMERICAN JOURNAL OF COMPARATIVE LAW 205 (1990); Christoph Schönberger, *Normenkontrolle im EG-Föderalismus*, 38 EUROPARECHT 617 (2003); Philipp Dann, *European Parliament and Executive Federalism*, 9 *European Law Journal* 551 (2003); see Ignatz Seidl-Hohenveldler, *Das föderalistische Prinzip als Mittel einer vergleichenden Darstellung des Rechts der Internationalen Organisationen*, in 1 FESTSCHRIFT LEIBHOLZ 795 (Karl Dietrich Bracher ed., 1966).

⁶⁵ Everling, *supra* note 33.

⁶⁶ Ernst Joachim Mestmäcker, *Zur Wirtschaftsverfassung in der Europäischen Union*, in ORDNUNG IN FREIHEIT 263 (Rolf Hasse ed., 1994).

⁶⁷ But see Voßkuhle, *supra* note 13, at 182; Schmidt-Aßmann, *supra* note 16, at 398.

III. Systematization

To systematize the manifold is ambition and task of all disciplines of legal academia.⁶⁸ Constitutional theory and constitutional doctrine are both involved in performing this task of systematization. And both thereby go – methodologically – beyond the two dimensions described so far. Interpretation and comparison serve, respectively, the hermeneutic comprehension and the contrasted understanding. Systematization, in contrast, deals with synthesizing the interpretive and comparative insights. It seeks to provide general categories⁶⁹ and their constituent terms and concepts.⁷⁰

It is this dimension and task which continues to confront the study of European constitutional law with its greatest challenge: to comprehend, conceptually and terminologically, its object and thereby the evolving legal and political order therein.⁷¹ Two methodological aspects of systematization in European constitutional law shall be considered here: (1) the dilemma of the vocabulary and ways of dealing with it, and (2) further pitfalls of systematization in European constitutional law.

1. Dilemma of the Vocabulary of European Constitutional Law and How to Deal With It

The vocabulary of European constitutional law itself contains a fundamental dilemma. The EU is neither a state nor intended to evolve into one. Nonetheless, Union constitutional law operates with terms and concepts which either derive from national constitutional law or have somehow evolved in the context of the evolution of modern constitutionalism, and are thus intrinsically linked to the modern nation-state. The usage of such terms in the Union's constitutional law seems to be as much a legal-political strategy⁷² as an expression of the modern

⁶⁸ See ARMIN VON BOGDANDY, SUPRANATIONALER FÖDERALISMUS ALS WIRKLICHKEIT UND IDEE EINER NEUEN HERRSCHAFTSFORM 9 (1999).

⁶⁹ Schmidt-Aßmann, *supra*, note 16, 395; EBERHARD SCHMIDT-ASSMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSDIEE 2 (2d ed. 2004); KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 429 (6th ed 1991).

⁷⁰ See RÖHL, *supra* note 35, at 31.

⁷¹ Peter Badura, *Bewahrung und Veränderung rechtsstaatlicher Verfassungsstrukturen in den internationalen Gemeinschaften*, in 21 VERÖFFENTLICHUNG DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 38 (1964); Martin Morlok, *Möglichkeiten und Grenzen einer europäischen Verfassungstheorie*, in DEUTSCHE UND EUROPÄISCHE VERFASSUNGSGESCHICHTEN 118 (Roland Lhotta et al. eds., 1997).

⁷² Case in point is the early self-description of the European "Assembly" as "European parliamentary Assembly" and its rules of procedure as those of a "European Parliament" (Treaty Establishing the

nation-state's monopoly on the vocabulary of political organization.⁷³ It may depend on whether one perceives the use of such terminology as ultimately hypocritical (and hence sees, for example, the Constitutional Treaty merely as a "semantic constitution"⁷⁴) or whether one wants to understand the terms and concepts of the European treaties as an indication of the Union's progression.⁷⁵ In any case, it seems incumbent on European constitutional scholarship to break the current state-monopoly on legal concepts and to resurvey their concrete content and meaning in a Union context.

Various approaches can be suggested to that end. It would perhaps be imprudent, not to mention impracticable, to expend hope and scholarly energy on the development of an entirely new European vocabulary. The term supranationality exhibits how painstaking the establishment and enrichment of new concepts can be, in particular when propagated mainly by academia without judicial assistance.⁷⁶

At the same time, European constitutional scholarship should avoid stumbling into the trap of simple but ultimately empty *sui generis*-classifications, thereby exposing its "classificatory impotence".⁷⁷ *Sui generis*-terms can act as middle stages for conceptual construction and can thus be functional. As such, they draw attention to phenomena that are yet unidentified, or unconceptualized. They point out gaps and conceptual shortages. But filling those gaps—that is, conceptualizing and providing a term, or forming concepts—is a separate, subsequent matter.⁷⁸

European Community art. 5, Mar. 24, 1957, Official Journal C 325. *in* 2 KOMMENTAR ZUM EWG-VERTRAG, art. 137, para. 1 (Hans von der Groeben et al. eds., 1960); also for the use of the notion of "Law" in the Constitutional Treaty, see Jürgen Bast, *Legal Instruments*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 21, at part V.

⁷³ As to the history of the modern state, see WOLFGANG REINHARD, *GESCHICHTE DER STAATSGEWALT* (2000).

⁷⁴ See, e.g., Möllers, *supra* note 21, at Part VI.

⁷⁵ See, e.g., Armin von Bogdandy, *Konstitutionalisierung des europäischen öffentlichen Rechts*, 60 JURISTENZEITUNG 529 (2005).

⁷⁶ J. C. Wichard, *supra* note 29, at para. 2; VERHOEVEN, *supra* note 32, at 134; WOLFRAM HERTEL, *SUPRANATIONALITÄT ALS VERFASSUNGSPRINZIP* (1999). A somewhat contrary example could be the notion of "institutional balance," invented by the ECJ, but not really picked up by scholars, see LENAERTS & VAN NUFFEL, *supra* note 22, at 560.

⁷⁷ Bogdandy, *supra* note 24, at 1034.

⁷⁸ Providing a convincing demonstration, see Bast, *supra* note 72.

Above all, scholars have to work with, and on, traditional, inherited concepts. Academia and its methods are critical.⁷⁹ European constitutional scholarship should critically dissect these legal, political, and judicial concepts in the Union context and stratify their temporal and conceptional content. Especially those concepts inherited from the state demand inquiry into what about them is necessarily state-related and what can be conceived outside the state context.⁸⁰ The concept of federalism is exemplary. In its state-restricted sense of federal state, it is certainly improper for use in the Union's context.⁸¹ In its original form as conceptual federalism, however, it contains varying currents of meaning, which have proven quite beneficial to European constitutional law, without having to resort to the significantly more recent concept of political science, that of the multilevel system.⁸² Generally, the study of European constitutional law should work on its concepts, differentiate pre-state, state, and post-state levels of meaning and identify their crucial content.

Sometimes, though, the point is simply more honesty. Not infrequently, academia (at least in Germany) tends to insist on peculiarly strict and demanding conceptualizations when it comes to EU matters. Concepts are then reduced to their often hardly practicable, idealized forms, so that their use for the EU seems presumptuous. The best example is the concept of democracy. German scholars like to pretend as if the homogeneous nation-state were the only conceivable vehicle for democracy. In doing so, they not only display their grandiose ignorance of less homogeneous, multilingual nation-states and their unquestionably democratic forms (e.g. Switzerland, Belgium, Canada, India); they also expose themselves as simply incapable of utilizing the tremendous versatility of an old and multilayered concept.

But working on and with concepts goes beyond diagnosing their state-related components, beyond merely stratifying and differentiating. It can also be prescriptive. Concept formation, then, becomes system formation; it promotes conceptualization. Such efforts come up against their own problems and risks.

⁷⁹ Schlink, *supra* note 16, at 107.

⁸⁰ See Joe Shaw & Antje Wiener, *The Paradox of the "European Polity,"* in RISKS, REFORM, RESISTANCE, AND REVIVAL - THE STATE OF THE EUROPEAN UNION 64 (Maria Green Cowles ed., 2000); UTZ SCHLIESKY, SOUVERÄNITÄT UND LEGITIMITÄT VON HERRSCHAFTSGEWALT (2004).

⁸¹ See Christoph Schönberger, *Die Europäische Union als Bund*, 129 ARCHIV DES ÖFFENTLICHEN RECHTS 81 (2004).

⁸² BOGDANDY, *supra* note 68; Cappelletti et al., *supra* note 64; DANN, *supra* note 49.

2. *Pitfalls of Systematizing European Constitutional Law*

In European constitutional law, systematization is confronted with, above all, the unwieldy phenomena of absent unity and asynchrony.⁸³ These are equally formative and persistent characteristics of the European makeup. Here, European constitutional scholarship must resist overhasty diagnosis of normalities and teleologies, which are often inspired by the nation-state's arsenal of concepts.⁸⁴ Otherwise, European fundamental freedoms quickly become 'fundamental rights' lacking only the right doctrine; regulations become laws; and the European Parliament becomes a sort of Bundestag or Sejm lacking only the right of initiative. In such process, European uniqueness falls by the wayside.

The phenomenon of disunity however also involves another risk – the one of yielding to it. Disorder then becomes a principle, and asynchrony becomes postmodern progress. As charming and tempting as this may initially seem, it can prove to be just as ineffectual as recourse to *sui generis*-labels. Constitutional scholarship would then fail to fulfill its function to promote the law's transparency and manageability. It would waste its chance to play a formative role. Through its basic nature and supreme rank, constitutional law has an exceptional impact on the law, in general.⁸⁵ However, this influence is obstructed where constitutional law gets caught in particularities and exceptionalities. The mere acknowledgement of disorder does not dispense with the scholarly duty of differentiation and systematization.

One promising method of systematization has thus far been largely neglected in European constitutional law, although it seems fine-tuned for differentiation and dynamics: the analytical use of typologies or models.⁸⁶ Such analysis strives to identify what is typical—the model content as it were—of the given normative material, thereby spotlighting the differences between special and general. Constructing types or models thus connects closely with a comparative approach.

⁸³ Deirdre Curtin, *The Constitutional Structure of the European Union*, 30 COMMON MARKET LAW REVIEW 17 (1993); C. Richmond, *Preserving the Identity Crisis*, 16 LAW AND PHILOSOPHY 377 (1997); BOGDANDY, *supra* note 68; THYM, *supra* note 25.

⁸⁴ IPSEN, *supra* note 41, at 1050.

⁸⁵ SCHMIDT-ARßMANN, *DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSDIEE*, *supra* note 69, at 5, 11-12.

⁸⁶ LARENZ, *supra* note 69, at 443; Susanne Baer, *Schlüsselbegriffe, Typen, Leitbilder als Erkenntnismittel und ihr Verhältnis zur Rechtsdogmatik*, in *METHODEN DER VERWALTUNGSRECHTSWISSENSCHAFT*, *supra* note 16, at 223.

A type is an intensification and ultimately only understood in juxtaposition with other types, where it reveals its full cognitive force. Such a methodical approach might prove highly beneficial to a European constitutional law that so far tends to be secluded in the category of *sui generis* and often resists comparison.⁸⁷

D. An Afterthought on Methodology and Habitus

Methods delineate ways to rationalize scholarly insight. They enable the 'traceability' of outcomes and knowledge. But then again, methods remain reliant on the will and specific mindset of the researcher to actually apply them. It is this habitus, as I would like to call it, that ultimately acknowledges the method.

Such a habitus, as such self-reflexive and method-conscious, is a fundamental precondition of the analysis of European constitutional law, although obviously not exclusive to the treatment of this body of law. Three aspects, however, underscore the peculiar significance of habitus to European constitutional law. Firstly, the heterogeneity of the Union. If constitutional law functions as a communicative nexus between legal system and society⁸⁸, the performance of this task must be transparent and method-conscious—all the more in the multinational order of the EU. It is the heterogeneity of the multinational Union combined with the complexity of the European Constitution, which makes it the more urgent for the legal community to explain its subject – not just to its colleagues but to a broader public. And this task surely is enhanced by the use of transparent methods.

Secondly, the particular dynamic of European constitutional law puts the constitutional critic to the test. Political developments and their legal outcome afford him or her far less opportunity than his or her nationally-focused counterpart to keep a certain distance from the object of research. Perhaps the goal, here, is not so much 'academic self-restraint' as a particular transparency via methodological clarity.

And finally, a third aspect renders habitus especially important in European constitutional law. That is the fundamental importance of law for the European Union and European integration as such. In the course of integration, the law has served as backbone, providing a well-respected means to achieve common goals amidst the heterogeneous political interests of the Member States. If integration

⁸⁷ Examples for such approaches are with regard to the constitution, Möllers, *supra* note 21; and with regard to the EU's institutional structure, DANN, *supra* note 49.

⁸⁸ NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 468 (1993).

through law is one of the secrets of integration, dealing with the law requires a certain respect, or to put it differently: a certain habitus.

This leads back to the starting point of these thoughts on a methodology of European constitutional law. Their intention was to mark a topic and initiate further debate, but also to venture beyond the self-imposed limits of scrutinizing the ECJ only. Methodological debate should cover all approaches and avenues to the analysis of European constitutional law. The distinction made here between three dimensions of methodological approaches, that is interpretation, comparison and systematization, is an offer to clarify the value of different approaches and specify the precise challenges. The combination of these three dimensions offers an integrated method, which should be able to encompass the specifically European and the specifically constitutional challenges posed by that law.

