

Concepts of Justice and National Context Outlining Legal Comparisons Between the Federal Republic of Germany, the United States of America, and the People's Republic of China

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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.

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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.¹ 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.² 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.³

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.⁴ Aristotle substantiated the concept of justice and differentiated between corrective justice and distributive justice.⁵ Corrective justice (*iustitia commutativa*) determines what is due to each through the principle of reciprocity.⁶ Another manifestation of corrective justice is found in the liberal market economy in the idea of equivalence, the *do ut des* principle⁷ 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, Letlhokwa George Mpedi and from Germany especially Michael Martinek, and Reinhard Zimmermann.

⁴ Greek τὸ τὰ αὐτοῦ πράττειν καὶ μὴ πολυπραγμονεῖν δικαιοσύνη ἐστὶ, see Plato *Politeia* IV 433a. Quite similar, about 900 years later, the *Corpus Iuris Civilis* repeated in the institution (l. 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.⁸ 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.⁹ 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.¹⁰ 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*.¹¹ It is obvious that the theory of legal systems provides only a rough tool for structuring comparative law.¹² 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,¹³ of which the Republic of South Africa provides a perfect example.¹⁴

⁸ Dreier 1996 *JuS* 580, 583. See in more detail 2.1.3 below.

⁹ On the principle of functionality, see Kötz 1990 *RabelsZ* 203, 209-210; Esser *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* 31-35, 349-350.

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-Spinozi 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.

¹³ Zweigert and Kötz *Introduction to Comparative Law* 66; Kischel *Rechtsvergleichung* § 4 mn 23-24.

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.¹⁵ Legal history is therefore regarded as an important source for comparative law work.¹⁶ The study of social reality is the task of the sociology of law.¹⁷ Others speak of legal culture when examining the values society holds towards the law and legal institutions.¹⁸ The term is also used in a European context.¹⁹ Similarly, legal anthropology calls for identifying modes of thought in individual cultures that lead to commonalities or differences.²⁰ Others analyse the psychology of a people.²¹ Finally, legal geography can help explain differences in comparative law.²²

In fact, the concept of "legal culture" is fuzzy²³ and there are also concerns regarding the psychology of peoples – especially in Germany, against the

¹⁵ Historic explanations of the legal methods can be found in Harke "Juristenmethode in Rom" § 2; Baldus "Gesetzesbindung, Auslegung und Analogie" § 3; Möllers *Legal Methods* ch 14 mn 66-73.

¹⁶ von Savigny *System des heutigen römischen Rechts* Vorrede XV; Pringsheim 1935 *CLJ* 347, 349: "comparative law without the history of law is an impossible task". Dissenting opinion, Kischel *Rechtsvergleichung* § 4 mn 50.

¹⁷ Reh binder *Rechtssoziologie* mn 1. Among the representatives in Germany, above all, Eugen Ehrlich; regarding legal realism, for example, Oliver Wendell Holmes Jr, Roscoe Pound and Benjamin Cardozo. See also Zweigert and Kötz *Introduction to Comparative Law* 45; Michaels "Functional Method of Comparative Law" 345, 350.

¹⁸ Bell 1995 *CLP* 63, 70: "a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts". Also see Friedman "Concept of Legal Culture" 33, 34; van Hoecke and Warrington 1998 *Int'l & Comp LQ* 495, 498; Cotterrell *Law, Culture and Society*. Also see the anthology of Varga *Comparative Legal Cultures*. See Kohler *Das Recht als Kulturerscheinung*.

¹⁹ Wieacker *Voraussetzungen europäischer Rechtskultur*; Häberle *Europäische Rechtskultur*; Gibson and Caldeira 1996 *Law & Soc'y Rev* 55; Zimmermann 2007 *JZ* 1; Wilhelmsson, Paunio and Pohjolainen *Private Law and the Many Cultures of Europe*.

²⁰ Fundamentally Fikentscher *Modes of Thought*; Fikentscher *Law and Anthropology*. On this for instance Möllers 2015 *JZ* 569, 570; Röver 2015 *Am J Comp L* 549, 553-556.

²¹ Thus previously Tacitus *Germania*; Montesquieu *De l'Esprit des loix* book 14-18 about the Indians, Japanese, Chinese. Also see Schopenhauer *Parerga und Paralipomena* § 287 (complete edition by Julius Frauenstädt, 1946): German ponderousness.

²² See Montesquieu *De l'Esprit des loix* book 14-18 about the Indians, Japanese, Chinese; Grossfeld *Macht und Ohnmacht der Rechtsvergleichung* 134-148: Geography and Law.

²³ Cotterrell "Concept of Legal Culture" 13, 14, 17, 29. On the dispute in detail, Kischel *Rechtsvergleichung* § 4 mn 32-37.

background of the National Socialist racial doctrine of the Third Reich.²⁴ Without having to explore the debates and problems of related disciplines, it is therefore proposed to refer only to the "national context".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.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.²⁷ The offer is freely revocable until acceptance, and the parties are generally not protected under the common law where negotiations are broken off.²⁸ In case of doubt, there are no pre-contractual duties of disclosure²⁹ and in case of doubt the wording of the contract applies and not some hypothetical intent of the contracting parties.³⁰ In

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."].

²⁵ Kischel *Rechtsvergleichung* § 4 mn 45-48.

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."

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

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.

²⁹ Kötz *European Contract Law* 180 with further references.

³⁰ On the "parol evidence rule" see Lord Denman, in *Goss v Lord Nugent* 1833 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

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.

³⁴ In labour law, Hay *Law of the United States* mn 666; Möllers and Brusckhe 1989 *JR* 441. On the "tenancy at will" in US tenancy law Hay *Law of the United States* mn 453.

³⁵ Critical Boyne 2018 *Am J Comp L* 299, 300-302; Agarwal 2020 *Int'l J Leg Develop & Allied Issues* 152, 164.

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

³⁷ *Civil Code of the People's Republic of China*, 28 May 2020. An English version is available at <https://perma.cc/538B-FS3A>.

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.

liberalism⁴¹ 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 workers⁴³ 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

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 "Einl 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 Rückübereignung [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.⁴⁸ 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*.⁴⁹ The initiation of a contract may trigger legal obligations if the counterparty was entitled to rely on a statement.⁵⁰ In some cases there are also pre-contractual duties of disclosure.⁵¹ Finally, codification also allows for filling omissions by incorporating higher-level law such as the Constitution⁵² 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.⁵³ 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*.⁵⁴

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".

⁵⁰ FCJ, Judgment of 20.09.1984, III ZR 47/83, 92 *BGHZ* 164, 175-176 – Verschulden beim Abschluß eines formbedürftigen Kooperationsvertrages [Fault in conclusion of a form-requiring cooperation agreement].

⁵¹ FCJ, Judgment of 11.8.2010, XII ZR 192/08, 2010 *NJW* 3362, 3363 – Thor Steinar; similar previously RG, Judgment of 7.7.1925, II 494/24, 111 *RGZ* 233, 234 – Arglistige Täuschung [Wilful deception]; FCJ, Judgment of 28.6.2006, XII ZR 50/04, 168 *BGHZ* 168 mn 15.

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.

⁵⁴ FCJ, Judgment of 8.12.1981, 1 StR 416/81, 1982 *NJW* 896; FCJ, Judgment of 24.3.1988, III ZR 30/87, 104 *BGHZ* 102, 105 – Ratenkreditvertrag [Instalment loan agreement]; FCJ, Judgment of 2.7.2004, V ZR 213/03, 160 *BGHZ* 8, 16-17 – Vergleichswertmethode [Comparative value-method]; FCJ, Judgment of 10.2.2012, V ZR 51/11, 2012 *NJW* 1570 mn 8-9; FCJ, Judgment of 24.1.2014, V ZR 249/12,

Moreover, throughout the twentieth and twenty-first centuries, legislatures and case law have developed the market economy into a social⁵⁵ or environmental-social⁵⁶ market economy. Consumer protection law is where the protection of the consumer exceptionally requires a correction of contractual freedom.⁵⁷ 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.⁵⁸ 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.⁵⁹ 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 Aristotle⁶⁰ leads to a strong state, protects the citizen in many circumstances,⁶¹ 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

2014 *NJW* 1652 mn 8; Ellenberger "§ 138" mn 25-29; in detail Möllers *Legal Methods* ch 8 mn 41, ch 9 mn 35-36, 54.

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.

⁵⁹ Compare *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees* [1999] OJ L171/12, art 7; *Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC* [2019] OJ L136/28, art 21 and § 476 German Civil Code. On this Kötz *Vertragsrecht* mn 614-619.

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.⁶² Thomas Hobbes summed this up by pointing out that it is the parties who can best determine the value of something.⁶³ It is no coincidence that Adam Smith's concept of the "invisible hand" described the market as best regulating itself through supply and demand.⁶⁴ 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.⁶⁵ Under Anglo-American law, the assumption is that individuals provide for themselves.⁶⁶ 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.⁶⁷ To this day, this leads to extensive contracts with countless clauses, especially in the Mergers and Acquisitions sector.⁶⁸ Even today, those courts are dominated by commercial disputes, while in Germany many legal actions concern consumer protection.⁶⁹

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* rule⁷⁰ makes previous case law binding.⁷¹ 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

⁶² For example, the British East India Company, in-depth Blakemore 2019 <https://www.nationalgeographic.com/culture/article/british-east-india-trading-company-most-powerful-business>.

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 undisturbed].

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.⁷²

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

It is not just the *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 *mixtum compositum* of market economy and the socialist planned economy of the People's Party. This liberal approach is more in line with *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.⁷³ This includes, for example, an extensive range of sanctions – including punitive damages⁷⁴ or the death penalty.⁷⁵ The market economy and globalisation do not necessarily lead to democracy.⁷⁶ Instead the Chinese explain their modernisation as a consistent return to the core values of their own culture.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.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.⁷⁹ In recent years, judicial interpretation – i.e. the

⁷² See for instance Radbruch *Der Geist des englischen Rechts* 11; Coing *Juristische Methodenlehre* 24; Fikentscher *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 *Common Law* 1).

⁷³ Anon *FAZ* 29; Gusbeth 2021 <https://www.handelsblatt.com/politik/international/angst-um-politische-stabilitaet-wie-china-die-marktmacht-seiner-tech-konzern-brechen-will-/27393294.html>.

⁷⁴ Compare for instance § 179, § 1185 *Chinese Civil Code* and § 55 *Chinese Consumer Protection Law*. On this Möllers "Principles in the Chinese Civil Code" 55, 65. On § 47 of the *Tort Act* see Eberl-Borges *Einführung in das chinesische Recht* mn 355. For an extension Binding 2014 *CELJ* 223, 239. However, critically Bu 2014 *ZfRV* 261, 273.

⁷⁵ Herrmann "Gedanken zur Todesstrafe in Japan" 401.

⁷⁶ Baron and Yin-Baron *Die Chinesen* 411.

⁷⁷ Baron and Yin-Baron *Die Chinesen* 409.

⁷⁸ Pißler 2016 *RabelsZ* 372, 392-393; Kischel *Rechtsvergleichung* § 9 mn 67 as well as fn 79-81 below.

⁷⁹ Thus, the notion of Ahl 2007 *ZChinR* 251; one may also speak of "explanations" or "interpretations" Pißler 2016 *RabelsZ* 372.

interpretation or explanation by the SPC – has been particularly relevant.⁸⁰ It remains to be seen whether the combination of a market economy and a planned economy will be successful in the long run.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 *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 *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".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.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 *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,⁸⁴ Rousseau⁸⁵ and Montesquieu,⁸⁶ the fathers of the *US Constitution* developed an elaborate system of checks and balances

⁸⁰ Pißler 2016 *RabelsZ* 372, 374-376. This is reminiscent of the legal application technique during the *General Prussian Land Law* period (fn 82).

⁸¹ Note Fikentscher (*Demokratie* 20), who also considers these approaches to be incompatible with Confucian ideas of unity.

⁸² Patent for publication of the new general land law for the Prussian States of 5.2.1794 p XXI, which precedes the *General Prussian Land Law*. About the procedure see §§ 46, 47, 50 introduction *General Prussian Land Law*.

⁸³ For an overview see Greco Roxin's *Strafrecht Allgemeiner Teil* § 5 mn 12-17.

⁸⁴ Locke *Two Treatises of Government* book II ch II, XII-XIV.

⁸⁵ Rousseau *Du Contrat Social Ou Principes Du Droit Politique* ch VI: Du pacte Social.

⁸⁶ Montesquieu *De l'esprit des lois* book 11 ch 6.

between the branches of government.⁸⁷ 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 [...]".⁸⁸ Fundamental rights are defined primarily as defensive rights.⁸⁹ 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.⁹⁰ Around 200 further laws were subsequently declared unconstitutional.⁹¹ Since the 1930s, however, the Supreme Court has reversed its position and largely refrains from judicial review in the area of economic legislation.⁹² Under the Constitution every citizen still has the right to carry a weapon.⁹³ With abortion, it is the mother's right to privacy and thus the right to abortion that is protected, and not the unborn life.⁹⁴ Recently the Supreme Court recognised marriage between same-sex couples.⁹⁵ The arguments are not based on duties to protect, but on the violation of freedoms or equality rights.⁹⁶ 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 und 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.

⁹⁰ *Lochner v New York* 1905 198 US 45. On this, Redlich, Schwartz and Attanasio *Understanding Constitutional Law* § 6.03 167-176.

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.

⁹³ Amendment 2 of the *US Constitution* and *District of Columbia v Heller* 2008 554 US 570, 576-592. Also see Hay *US-Amerikanisches Recht* mn 70a.

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 SCt 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 punishment⁹⁷ 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.⁹⁸ Felony convictions can result in prison sentences of more than 100 years.⁹⁹ 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,¹⁰⁰ and was then further developed in England.¹⁰¹ 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.¹⁰² The Supreme Court upheld a violation of due process under the 14th Amendment because the ratio of punitive damages was grossly excessive at 1:500.¹⁰³

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

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.

¹⁰³ *BMW of North America, Inc v Ira Gore, Jr* 1996 517 US 559, 575, 586; also see *State Farm Mutual Automobile Insurance Co v Campbell* 2003 538 US 408, 410. On this Brand 2005 *JL & Com* 181, 189; Behr 2003 *Chicago-Kent L Rev* 105, 119-120.

leads China.¹⁰⁴ There are no fundamental rights, only programme rules.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.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.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.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*.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

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."

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

¹⁰⁶ Baron and Yin-Baron *Die Chinesen* 387-396.

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*.

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.

¹⁰⁹ FCC, Judgment of 15.1.1958, 1 BvR 400/51, 7 *BVerfGE* 198, 206-207 – Lüth.

against the rights of the mother).¹¹⁰ 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.¹¹¹

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 1948.¹¹² 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*.¹¹³ 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.¹¹⁴ The Federal Constitutional Court, against the clear wording and the intent¹¹⁵ 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.¹¹⁶ 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

¹¹⁰ FCC, Judgment of 25.2.1975, 1 BvF 1/74 *et al*, 39 BVerfGE 1, 42 – Schwangerschaftsabbruch I [Abortion I] and FCC, Judgment of 28.5.1993, 2 BvF 2/90 *et al*, 88 BVerfGE 203, 254 – Schwangerschaftsabbruch II [Abortion II].

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.

¹¹⁴ Article 2 para 2 *European Charter of Fundamental Rights* and *Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty* (1983), as amended by *Protocol No 11*, BGBl 2002 II 1054.

¹¹⁵ On this, note the voices explicitly arguing for life imprisonment, reproduced in FCC, Judgment of 21.6.1977, 1 BvL 14/76, 45 BVerfGE 187, 194-202 – Lebenslange Freiheitsstrafe [Life sentence].

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.¹¹⁷ 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.¹¹⁸

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 1215.¹¹⁹ 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.¹²⁰ In terms of political power, the Germans left their states to end their allegiance to their feudal lord¹²¹ and gain freedom. Immigrants to the Americas displaced local indigenous peoples but did not encounter an existing form of rule.¹²² They were able to

¹¹⁷ Alexy *Theorie der Grundrechte* 100-104; von Arnould 2000 *JZ* 276, 279; Schlink "Der Grundsatz der Verhältnismäßigkeit" 445, 448.

¹¹⁸ FCJ, Judgment of 4.6.1992, IX ZR 149/91, 118 *BGHZ* 312, 313, 338-346 – Punitive damages. On this Behr 1994 *JL & Com* 211; Brand 2005 *JL & Com* 181, 191; Hay 1992 *Am J Comp L* 729. On the Supreme Court's limitation of the amount of damages, see fn 103 above. The European Court of Justice allows punitive damages if they are common in national law, ECJ, Judgment of 13.7.2006, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, C-295/04 *et al*, EU:C:2006:461 mn 93 – Manfredi.

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 Verkaufung ihrer Haab und Güter gegen zimlichen, billichen Abtrag der Leibeigenschafft 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.¹²³ 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,¹²⁴ 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,¹²⁵ 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.¹²⁶ 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.¹²⁷ To act as a deterrent, the deep pocket doctrine requires higher damages against legal persons.¹²⁸ 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

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.

¹²⁶ *BMW of North America, Inc v Ira Gore, Jr* 1996 517 US 559, 569.

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

¹²⁸ MacCoun 1996 *Law & Soc'y Rev* 121.

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.¹²⁹ The schools teach about the different dynasties of the emperors and Confucius Institutes can be found everywhere.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 Jìnpíng, 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.¹³¹ The *German Basic Law* with its system of values is therefore part of the German identity.¹³² The Constitution has recently been celebrated and the Federal Constitutional Court continues to be one of the most popular state institutions.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

¹²⁹ In detail for instance Vogelsang *Geschichte Chinas*.

¹³⁰ van Ess *Der Konfuzianismus*.

¹³¹ FCC, Judgment of 17.8.1956, 1 BvB 2/51, 5 BVerfGE 85, 138-139 – KPD [German Communist Party].

¹³² The *Constitution of the Republic of South Africa*, at the end of apartheid, constitutes a *caesura*, albeit a very different one.

¹³³ On the public perception of the Federal Constitutional Court Köcher *FAZ* 10.

(vassal).¹³⁴ 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.¹³⁵ In modern times, the vassal also owed allegiance to the king.¹³⁶

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.¹³⁷ The presumption of innocence and the prohibition of torture were persistently demanded by the famous Italian criminal lawyer Beccaria.¹³⁸ Feuerbach abolished torture in the newly created Kingdom of Bavaria in 1806.¹³⁹ 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.¹⁴⁰

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 happiness¹⁴¹ are implemented in

¹³⁴ See First Part, 18th title § 19 *General Prussian Land Law*; Coing *Europäisches Privatrecht 1500 bis 1800* § 72 p 360.

¹³⁵ See von Repgow *Sachsenspiegel* book 3, XLII, § 6; Kolb 1974 *ZfdA* 289, 300; generally Meder *Rechtsgeschichte* 233-236.

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, weshalb 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 [...]"]. 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 Baiern*, 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."]; on this, Böckenförde *Staat, Verfassung, Demokratie* 34.

¹⁴¹ See the Preamble of the Declaration of Independence of 4 July 1667: "[...] the Pursuit of Happiness".

reality only to a limited extent.¹⁴² 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".¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ 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

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, Sendler 1994 *NJW* 1518, 1519: "oberstes Amtsgericht insbesondere für Eigenbedarfsklagen von Vermietern" ["Highest District Court in particular for landlords' own needs actions"].

the parties,¹⁴⁶ whereas fundamental rights as principles require further substantiation and often need to be weighed up extensively.¹⁴⁷ 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.¹⁴⁸ The Federal Constitutional Court thus contributes to a "trivialisation of fundamental rights".¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹ This is to allow the legislature, not the courts, to resolve social problems.¹⁵² 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.¹⁵³ 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.¹⁵⁴

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

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 On 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.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".¹⁵⁶ The Constitution thus gives the Federal Constitutional Court the opportunity to "negotiate society's concepts of justice".¹⁵⁷ If the Constitution requires constant updating by citizens,¹⁵⁸ this requires the power of interpretation in the form of an up-to-date understanding of the Constitution. A dynamic interpretation of the Constitution¹⁵⁹ allows for the respective moral values of society to be taken into account.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.¹⁶¹ The Federal Constitutional Court thus disregards the legislature's legislative prerogative and its own obligation to exercise judicial self-restraint.¹⁶² The narrowing of the scope for assessment and prognosis would lead to a "silent degradation of the first branch of government",¹⁶³ because the Court would treat the legislature like a mere public authority.¹⁶⁴ The Federal Constitutional Court is a player involved in the political and social controversies of the present day.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.¹⁶⁶

¹⁵⁵ On this discussion, Möllers *Legal Methods* ch 13 mn 88-89.

¹⁵⁶ Thus Alexy *Theorie der Grundrechte* 125, 143; Volkman *Grundzüge einer Verfassungslehre der Bundesrepublik Deutschland* 134-135; Volkman 2020 *JZ* 965, 967.

¹⁵⁷ Thus the wording of Volkman *Grundzüge einer Verfassungslehre der Bundesrepublik Deutschland* 167-169, 177-179.

¹⁵⁸ Böckenförde *Die verfassungsgebende Gewalt des Volkes* 22; Volkman 2018 *JZ* 265, 270-271.

¹⁵⁹ Voßkuhle 2019 *JuS* 417, 418-421.

¹⁶⁰ See FCC, Judgment of 26.2.2020, 2 BvR 2347/15, 153 *BVerfGE* 182 mn 210-213 – Geschäftsmäßige Sterbehilfe [Professional euthanasia].

¹⁶¹ For instance, FCC, Order of 7.11.2006, 1 BvL 10/02, 117 *BVerfGE* 1, 30-37; FCC, Order of 27.2.2002, 2 BvR 553/01, 2002 *NJW* 2699 – Menschenunwürdige Unterbringung von Strafgefangenen [Inhumane housing of prisoners]; FCC, Judgment of 11.9.2007, 1 BvR 2270/05 *et al*, 119 *BVerfGE* 181, 229-240 – Rundfunkfinanzierungsstaatsvertrag [Broadcasting financing state contract].

¹⁶² FCC, Order of 31.7.1973, 2 BvF 1/73, 36 *BVerfGE* 1, 14-15 and guiding principle 2 – Grundlagenvertrag [Basic contract].

¹⁶³ Lepsius "Chancen und Grenzen des Grundsatzes der Verhältnismäßigkeit" 1, 11.

¹⁶⁴ Möllers "Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts" 281, 385: "demokratiethoretisch problematisch" ["problematic in terms of democratic theory"].

¹⁶⁵ Volkman *Grundzüge einer Verfassungslehre der Bundesrepublik Deutschland* 177-181: Federal Constitutional Court as a judicially institutionalised part of the political process.

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 laws¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ This does not preclude the Federal Constitutional Court from reviewing evidence and, in particular, demanding a rational and verifiable procedure.¹⁷⁰ Otherwise, however, political decisions must be left to the discretion of the politicians.¹⁷¹

5 Convergence theory and outlook

Convergence theory assumes that economic systems converge over time.¹⁷² 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.¹⁷³ In comparative law, common law and civil law have converged over the last few decades,¹⁷⁴ and this also applies to legal

¹⁶⁷ FCC, Judgment of 11.11.1999, 2 BvF 2/98 *et al*, 101 *BVerfGE* 158, 217-218; Hermes 2002 *VVDStRL* 119, 129.

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 FCC, Judgment of 9.2.2010, 1 BvR 1/09 *et al*, 125 *BVerfGE* 175, 238 – Hartz IV; FCC, Judgment of 14.2.2012, 2 BvL 4/10, 130 *BVerfGE* 263, 301-302 – W-Besoldung [Civil servants salary W].

¹⁷⁰ Thus the classification at Petersen *Verhältnismäßigkeit als Rationalitätskontrolle* 148-153.

¹⁷¹ Compare for instance FCC, Order of 14.1.1981, 1 BvR 612/71, 56 *BVerfGE* 54, 80-81 – Flugverbot [Flight ban]. See recently on the Covid-Pandemic, FCC, Order of 19.11.2021, 1 BvR 781/21, 2022 *COVuR* 24 mn 216-237 – Infektionsschutzgesetz [Infection protection law].

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).

¹⁷⁴ 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.

methods.¹⁷⁵ 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.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.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.¹⁷⁸ A socialist democracy such as China will probably always be more authoritarian and paternalistic than a parliamentary democracy.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 damages¹⁸⁰ or the death penalty¹⁸¹ – while in Europe preventive elements are on the rise.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

¹⁷⁵ Vogenauer *Die Auslegung von Gesetzen in England 1300*; De Cruz *Comparative Law in a Changing World* 273-280; Fleischer 2011 *RabelsZ* 700. On the state of the dispute, Möllers *Legal Methods* ch 14 mn 118-118a.

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.

¹⁷⁷ Critical of the theory of convergence, Schlesinger 1995 *Am J Comp L* 477, 480-481; Legrand 1996 *Int'l & Comp LQ* 52, 60-64; Kischel *Rechtsvergleichung* § 7 mn 247-250.

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.¹⁸³ In order to make it easier for consumers to enforce their rights, the European legislature has introduced class actions.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.¹⁸⁵

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¹⁸³ Approaches can be found in FCJ, Judgment of 15.11.1994, VI ZR 56/94, 128 *BGHZ* 1, 16 – Caroline von Monaco. Further Wagner "Neue Perspektiven im Schadensersatzrecht" 5, 68-105.

¹⁸⁴ *Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on Representative Actions for the Protection of the Collective Interests of Consumers and Repealing Directive 2009/22/EC* [2020] OJ L409/1. In detail on the VW diesel scandal and the draft directive see Gsell and Möllers *Enforcing Consumer and Capital Markets Law*.

¹⁸⁵ In detail Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung *Transformation gestalten* ch 4.

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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
BGBI	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

Harv JL & Pub Pol'y	Harvard Journal of Law and Public Policy
Int'l & Comp LQ	International and Comparative Law Quarterly
Int'l J Leg Develop & Allies Issues	International Journal of Legal Developments and Allied Issues
Jb f Dogmatik	Jahrbücher für die Dogmatik des heutigen römischen und deutschen Rechts
JL & Com	Journal of Law and Commerce
JR	Juristische Rundschau
JuS	Juristische Schulung
JZ	Juristenzeitung
KPD	Kommunistische Partei Deutschlands [German Communist Party]
KritV	Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
lit	Litera (Buchstabe)
Law & Soc'y Rev	Law and Society Review
mn	margin number
NJW	Neue Juristische Wochenschrift
NPCSC	National People's Congress
NVwZ	Neue Zeitschrift für Verwaltungsrecht
OJ	Official Journal of the European Union
Paul	Paulus
pr	Principium
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RG	Reichsgericht
RGZ	Amtliche Sammlung des Reichsgerichtshofs in Zivilsachen
SCt	Supreme Court
SPC	Supreme People's Court
Tul L Rev	Tulane Law Review
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States Reports
USA	United States of America
VVDStRL	Veröffentlichung der Vereinigung der Deutschen Staatsrechtslehrer
Waffen-SS	Waffen-Schutzstaffel

Wils KB	Wilson's King's Bench and Common Pleas Reports
ZChinR	Zeitschrift für Chinesisches Recht
ZfdA	Zeitschrift für deutsches Altertum und deutsche Literatur
ZfRV	Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaften