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Constitutional Litigation as Dispute Processing – Comparing the U.S. Supreme Court and the German Federal Constitutional Court

Ralf Rogowski and Thomas Gawron

Abstract: The paper compares the U.S. Supreme Court and the German Federal Constitutional Court (*Bundesverfassungsgericht*) by using a socio-legal perspective. In this view, the US Supreme Court is a constitutional court functionally comparable to the German constitutional court because more than half of its decisions focus on constitutional law issues. Like its German counterpart it engages in judicial review of legislation and is the institution to which citizens turn to claim their constitutional rights, and in particular those with little or no financial means to engage in litigation. The paper borrows insights from socio-legal studies for the comparison and proposes in particular to view constitutional litigation as dispute processing. It distinguishes three phases of dispute processing: mobilization of disputes, decision making in court, and implementation of judicial decisions. The paper investigates docket control exercised at the two courts, internal ways of case disposal with a particular focus on the interplay of judges and legal assistants, as well as conditions of implementation of decisions. Finally, it analyses functional aspects that include composition and impact of the courts on democracy and political culture.

Generally, constitutional litigation has two functions: to protect fundamental rights of citizens and to supervise legislative activities of the government. The introduction of constitutional litigation is often understood as an important step in the modernization of the political and legal systems of a country. From an evolutionary perspective, constitutions and their judicial enforcement are crucial achievements in establishing both autonomous legal orders and democratic political orders based on the notions of checks and balances of the central powers, the rule of law, and inalienable individual rights (see Luhmann 1990; see also Luhmann 1993: 468-481; Murphy 1993).

However, constitutions and their enforcement bodies differ significantly among countries. The organization and the tasks of constitutional courts reflect both historical peculiarities and political arrangements within nation states (Padoa-Schioppa 1997). A comparison of constitutional courts, such as this one between the U.S. Supreme Court and the German Federal Constitutional Court (*Bundesverfassungsgericht*), can illuminate these differences. It can also point to similarities in the political cultures of Western democracies.

Nevertheless, the comparison of these courts is immediately confronted with a methodological question: Is the U.S. Supreme Court a constitutional court? Are we comparing like with like? The Federal Constitutional Court deals exclusively with constitutional law and is thus not an appellate court. It is responsible for judicial review of legislation and is open to any citizen who wishes to file a complaint about a violation of a basic right. In contrast the U.S. Supreme Court occupies the top of the federal judicial system and has appellate jurisdiction in all cases arising from federal courts. However, the Supreme Court is also the highest constitutional court in the U.S. More than half of its decisions focus on constitutional law issues (see Wieland 1990: 343). It engages in judicial review of legislation and is the institution to which citizens, particularly those with little or no financial means to engage in litigation, turn to claim their constitutional rights. More than two-thirds of all Supreme Court petitions are in forma pauperis, brought by indigent people for whom the fee and the requirement of multiple copies are waived (see Baum 2012: 96-8). Thus, in contrast to Mauro Cappelletti (1989: 142: "The Supreme Court should be compared not to the special constitutional courts, but rather to the highest courts of appeal on the continent"), the U.S. Supreme Court is, in our understanding, comparable to the German Federal Constitutional Court, particularly when functional and sociological aspects are taken into consideration.

Constitutional courts have been compared in a number of ways. A large part of the existing comparative research focuses on policy making in constitutional courts and their relationship to the legislature (see the special issue of *Comparative Political Studies*, Vol. 26, 1994, no. 4 on constitutional courts; Becker 1987; Schmidhauser 1987: 7-33; Landfried 1988; Jackson, Tate 1992; Stone-Sweet 2000; Hönnige 2007; see also Tate, Vallinder 1995). In addition, there are comparative studies on the judicial behavior of judges (see Schubert, Danelski 1969) and a range of legal comparisons (Mosler 1962; Cappelletti 1971; Favoreu 1986; Stark, Weber 1986; Brünneck 1992; Hönnige 2008).

The concept of our book differs in some respect from these approaches. We adopt a sociolegal perspective that understands constitutional litigation as dispute processing. This approach focuses on the reality of dealing with cases, the judicial organization and the routines developed in decision-making of the courts. The sociological dispute-processing perspective views litigation as a process in which a social or political conflict is transformed into a legal dispute, and then back into a social or political conflict. It distinguishes three phases of dispute processing: mobilization of disputes, decision making in court, and implementation of judicial decisions.

The book applies the dispute-processing approach to constitutional litigation in Germany and the U.S. It is structured accordingly. In Part I, Access, Success and Case Selection, are concerned with mobilization of cases and questions of procedure and docket control at the two courts. Part II, The Process of Decision Making, comprises analyses of internal ways of case disposal with a special emphasis on the role of personnel, including judges and the legal assistants at the Federal Constitutional Court, respectively justices and the law clerks at the U.S. Supreme Court. Part III, Structures and Processes of Implementation, contains discussions of conditions of implementation and some assessments of the impact of decisions of the Federal Constitutional Court and the U.S. Supreme Court on the political process. The final Part IV, Organizational Comparison, is devoted to comparative analyses of the two constitutional courts, with particular foci on functional aspects, composition and impact on democracy and political culture.

Access, Success, and Case Selection

Among the general public both courts enjoy a high prestige. They regularly achieve the highest scores in public opinion polls and rank above other national political institutions (see Friedman 1975; Beyme 1999; Kommers, Miller 2012: 39-40). Furthermore, both courts adjudicate in disputes over basic rights granted to citizens in their written constitutions (for a comparative overview, see Glendon 1995). Their high prestige and their rights jurisdiction are important factors in explaining the caseload of both courts. The following table shows the caseload development, in five-year averages, at the Supreme Court and the Federal Constitutional Court from 1951 to 2010.

Table 1-1: Cases Filed in the U.S. Supreme Court and the German Federal Constitutional Court 1951-2010 (in five-year averages)

	U.S. Supreme Court	German Federal Constitutional Court
1951-1955	-	680
1956-1960	1812	1090
1961-1966	2383	1417
1966-1970	3191	1623
1971-1975	3787	1590
1976-1980	3985	2729
1981-1985	4249	3451
1986-1990	4788	3543
1991-1995	6531	5037
1996-2000	8157	4965
2001-2005	9132	5041
2006-2010	9438	6316

Sources: For the U.S. Supreme Court numbers are taken from Baum 1998: 122, Figure 3-1 for the years 1951-1995 and for the years 1996-2010 own survey based on data from <http://www.uscourts.gov/Statistics/JudicialBusiness/archive.aspx>. For the German Federal Constitutional Court own survey based on data from Statistik des Bundesverfassungsgerichts, Tabelle "Statistik für das Geschäftsjahr 2010, A I 2: Verfahrenseingänge" <http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/Archiv/2010/gb2010/A-I-2.html>.

The caseload development reflects a constant rise in popularity of both courts after World War II. Furthermore, it shows a dramatic rise of cases in the 1990s. The latter rise is mainly due to an

extraordinary increase in petitions in forma pauperis and their equivalents in the form of constitutional complaints in the Federal Constitutional Court (Kagan, Elinson, in this volume, and Grossman, Epp 2002 for the U.S. Supreme Court; Blankenburg, in this volume, for the German Federal Constitutional Court). Since the number of judges or justices has not risen, the increase has put enormous strain on both courts. They have each reacted with procedures that shape conditions of access and regulate selection of cases for full hearings.

In sociolegal terms it makes sense to distinguish between barriers of access and barriers of success. Access barriers are factors that hinder the filing of a case. Success barriers are related to legal and organizational conditions that prevent a case from being admitted and subsequently won. Access barriers can be financial burdens and limited legal knowledge of the litigants, lack of social competences or support in establishing contact with the legal system, or the diffuse nature of the interest pursued. Success barriers include the nature of legal rights, judicial policies, and organizational interests guiding the case selection in judicial institutions (on the distinction between access and success barriers, see Rogowski 1996).

The two courts differ significantly in relation to legal and social conditions of access. In the United States, access barriers seem lower than in Germany. In general, given the high density of lawyers in the United States, finding legal representation seems easier. However, to bring a case to the Supreme Court requires specialist lawyers. There is an official Supreme Court Bar comprised of lawyers prepared to handle a case in the Supreme Court, although experience in arguing a case before the Supreme Court does not seem to be necessary to become a member of this Bar (McGuire 1993). Probably more important is the group of specialist lawyers, often former law clerks, who frequently participate in cases before the Supreme Court. Furthermore, the collective organization of diffuse interests is an important factor in the preparation of claims for constitutional litigation in the United States (one of the most active of these interest groups is the National Association for the Advancement of Colored People [NAACP]; see Tushnet 1987). For more than fifty years, privately-funded advocacy organizations and government-funded lawyers offices organize litigation campaigns and provide legal assistance to overcome access barriers. Interest groups are also major participants in litigation either as sponsors or through amicus curiae briefs (see Kagan, in this volume). They managed to build up an impressive support structure for rights litigation in the United States (Epp 1998, especially ch. 4).

The role of lawyers and interest groups is different in Germany. The Federal Constitutional Court understands itself as a "citizens' court." In filing a constitutional complaint, it is not necessary for a citizen to hire a legal representative. This contrasts with litigation in all other federal supreme courts where an obligation exists to be represented in court by a member of the small, specially accredited bar for final appeals in Karlsruhe. In the beginning of the Court in the 1950s, more than 80 percent of all constitutional complaints were initiated by the parties themselves. Even in 1995, a third of all complaints were still filed by the complainants without being represented by an attorney (see Blankenburg, in this volume). Interest groups rarely play a significant role in preparing or assisting constitutional complaints or other forms of constitutional litigation. Generally, the Court is not seen as a platform for advancing causes pursued by social movements.

Given the stark contrast in access conditions, it is remarkable that success rates are similar in the United States and Germany. Success at constitutional courts has to be defined in a twofold manner: the first success is for the case to be admitted and the second is to win the case. The actual rate of admitted constitutional complaints in the Federal Constitutional Court is as low as the rate of petitions granting a writ of certiorari in the U.S. Supreme Court. Only 1 to 2 percent of filed complaints and petitions are admitted for decision on merit in both courts (Blankenburg, in this Volume; Baum 2012: 86).

The following Table 1-2 sheds light on the practice of admittance at the Supreme Court and the Federal Constitutional Court. It compares for the year 2010 decisions on merit and summarily decided cases with cases denied, dismissed, or withdrawn at both courts. The data reveal the enormous filter effect. In 2010, only 90 out of 7828 cases were decided on merit in the Supreme Court and 115 out 6344 case received a full decision by one of the two senates or the chambers of the Federal Constitutional Court.

Table 1-2: Cases Disposed at the Supreme Court and the Federal Constitutional Court in 2010

Cases ...	Supreme Court	Federal Constitutional Court
Decided on merit	90	115
Summarily decided	82	25*
Denied, dismissed, or withdrawn	7656	6204
total	7828	6344

* Other decisions (Zwischen-/Nebenentscheidungen) of the two FCC senates, including interim relief.

Sources: "The Supreme Court, 2010 Term," Harvard Law Review, Vol. 125, 2010-1, 370, table II (C): "Method of Disposition" <http://0-web.ebscohost.com.pugwash.lib.warwick.ac.uk/bsi/pdfviewer/pdfviewer?vid=3&sid=084d34ac-57fc-41a3-b7b1-bad04df4a367%40sessionmgr110&hid=128>; Statistik des Bundesverfassungsgerichts, Tabelle "Statistik für das Geschäftsjahr 2010, A III 2: Erledigungen" <http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/Archiv/2010/gb2010/A-III-2.html>.

The jurisdiction of the U.S. Supreme Court is comprised of two types: original jurisdiction, in which the Court acts as a trial court, and appellate jurisdiction. The vast majority of U.S. Supreme Court cases arise from legal proceedings initiated in lower courts, mostly federal courts. In this appellate jurisdiction, the Court enjoys autonomy in accepting or rejecting cases. The decision on the standard petition for constitutional litigation (writ of certiorari) by which the Court calls up the case from a lower court is entirely discretionary (Rule 10 of the Rules of the Supreme Court). This large autonomy creates difficulties for litigation strategies. The lack of predictability and objective criteria in accepting petitions thus constitutes an enormous success barrier.

In contrast, individual cases can be brought to the Federal Constitutional Court relatively easily. However, they have to meet the strict objective criteria of admittance of either of two procedures, namely, the constitutional complaint and the preliminary ruling or concrete norm control procedure (Arts. 93 I 4a and 100 I of the Basic Law in conjunction with articles 80 to 82

and 90 to 95 of the Federal Constitutional Court Act). These criteria work both ways: they generate to some extent legal certainty among litigants, at least among their legal representatives, in how to prepare a case. However, the criteria also create the basis on which the Court can swiftly reject complaints and thus legitimize the high rate of denials and dismissals of constitutional complaints.

The practice of acceptance and rejection reveals the strong concern of both courts to protect themselves from caseload overflow. Selection is thus a mechanism for caseload management. Furthermore, through the selection process, cases are excluded that are not deemed relevant for the development of the law. Both courts are indeed "fishing for the right cases" and operate with criteria that reveal specific judicial policies. Through the selection of cases, they set their agenda.

However, the agenda setting process reveals some differences. The Federal Constitutional Court operates mainly with legal criteria. Only constitutional law questions can be heard. However, the criteria ("constitutionally relevant," "intensity of the infringement of basic rights," and so on — see Heun, in this volume) are deliberately vague and leave enough flexibility to select cases in accordance with the Court's general agenda.

The selection process at the U.S. Supreme Court seems more policy-oriented. It is task- rather than goal-oriented (Grossman and Epp 2002; see also Perry 1994 and Schwartz 1997). Each justice (supported by his or her clerks) usually adopts a specific policy agenda and the selection process is often the result of internal political negotiation between justices (Provine 1980). Furthermore, the Court follows a rather hybrid agenda influenced by institutional norms and individual preferences. These include considerations of a case being brought too early or too late (the case not being "ripe") or of pertinent facts or law having changed (the case becoming "moot") (O'Brien 1993: 217-220). Probably the best known among the institutional norms is the so-called "political question" doctrine according to which the Court decides that a particular political branch should resolve the issue and not the Supreme Court (in relation to the judicial restraint and the political question doctrine, see Lamb 1982: 21-2). However, it has to be stressed that the decision to apply the "political question" doctrine is a judicial and not a political decision (Henkin 1976).

The Process of Decision Making

It is well known that the political and ideological preferences of judges or justices influence both case selection and decision making on merit. Research on judicial behavior has provided insights on voting behavior of justices and judges in decision making (Schubert 1960; Schubert 1964; Rottleuthner 1973). Furthermore, the personal backgrounds, education, and professional careers of Supreme Court justices in particular, as well as their attitudes and values, have been foci of empirical research (see Menez 1984; Segal, Spaeth 1993).

However, analyzing the behavior of individual judges or justices is unlikely to fully reveal the reality of the decision-making process at any constitutional court. The eight or nine judges sitting together do not act in isolation. They are a group, and their group interactions are a strong influence on their decision making (Vermeule 2011). They often form coalitions, and the minority is allowed to publish “dissenting opinions” in both courts (in Germany since 1970). Furthermore, in order to analyze the decision-making process in its entirety, one has to analyze, not only the voting behavior or interactions of judges and justices in senates and conferences, but also the internal decision making regarding the vast majority of routine cases. These include negative decisions on hearing certiorari petitions and constitutional complaints. These cases dominate the day-to-day decision making in the two courts.

At the U.S. Supreme Court there are a number of procedures designed to screen petitions for hearing. Except for a small number of cases that require a decision (mandatory appeals), the vast majority of cases - a quarter of which are so-called paid cases and three quarters of which are *in forma pauperis* cases without payment of fees or other restrictions (on the growth of paupers’ petitions, see Baum 2012: 97-8) — are decided on a discretionary basis. The Supreme Court has adopted a standard procedure in handling these cases (see the account of the agenda setting process in Grossman, Epp 2002). Copies of all petitions go to each justice’s chamber. The justices and their law clerks then prescreen the cases. Approximately 800 petitions per term are put on the list of cases to be discussed in conference (see Johnson, Sorensen, in this volume). The Chief Justice creates the discuss list, but cases can be added by each justice (Ward, in this volume).

In contrast, most cases are first handled in so-called chambers at the Federal Constitutional Court. Each senate appoints on an annual basis several chambers consisting of three judges each. The chambers deal with all constitutional complaints and concrete norm controls. They have the power to reject by unanimous vote or admit the complaint or norm control to a full hearing. They even can decide on the merits in case of a prior decision of the Court on the issue (see Kranenpohl, in this Volume). Since a few years, important chamber decisions are published in a separate collection of decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts*, BVerfGK, see Massing, in this volume).

The FCC is characterized by a high degree of jurisdictional specialization. In fact each of the sixteen judges is considered an expert in charge of particular areas of law. The court adopts each year at the beginning of the court's term an official schedule (*Geschäftsverteilungsplan*) in which legal subject areas are allocated to specific judges. Based on this schedule, the President and the Vice-President decide which judge is to act as rapporteur (see Kranenpohl, in this volume). Case assignment might take interests and expertise of judges into account (Kommers, Miller 2012, 26). However, the overarching characteristic of the procedures for the handling of cases is highly bureaucratized at the FCC.

The responsibility for preparing of "routine cases" is in both courts delegated to law clerks and legal assistants who prescreen petitions, respectively prepare constitutional complaints to be discussed in chambers. The delegation of these cases to the law clerks or assistants relieves the burden of the constitutional judges. It creates space for the discussion of "big cases" in a small circle, in the conference of all nine Supreme Court justices or the hearing of the senate at the Federal Constitutional Court. In an important way law clerks and assistants form part of the decision-making team. The judges or justices rely heavily on these assistants and in routine cases of constitutional complaints and certiorari petitions the assistants or clerks carry the main burden. In addition to preparatory work on constitutional complaints for the chambers, each of the legal assistants of the Federal Constitutional Court assists in preparing two to three decisions in the senate each year (see Wieland 2002). These are decisions for which his or her judge is the reporter (Massing, in this volume).

Law clerks or legal assistants are assigned to individual judges or justices. In either courts judges or justices have four law clerks, with the exception of the Chief justice in the U.S Supreme Court, who has five. The judges and justices select their assistants and law clerks personally and observe personal preferences and individual sympathies. The legal assistants are appointed for three to four years, the law clerks for only one year. Whereas legal assistants work in close cooperation with their judge, the law clerks work more often with each other (Ward, in this volume). Eight of the nine Supreme Court justices have combined their clerks in a so-called "certiorari pool" in which petitions and the writing of memoranda are distributed among clerks (Ward, in this volume; see also O'Brien 1993: 173; Perry 1991: 43-51).

The legal assistants of the Federal Constitutional Court are recruited as experts with experience in a specific legal field. Each judge of the Federal Constitutional Court runs his or her own department, which is exclusively responsible for the handling of cases in one or more specific areas of law. With the exception of a few assistants who had worked as academic assistants for their former professor of constitutional law and now their present constitutional judge, most legal assistants in the Federal Constitutional Court have been judges at lower specialized courts. Indeed, they are recruited for both their experience in judicial decision making and their knowledge of a particular field of law.

In the Supreme Court, on the other hand, decisive criteria are that law clerks are law graduates from prestigious Ivy League law schools and from the region favored by the selecting justice. An increasing number of candidates have also been clerking for judges on other courts (see Mazor 2002; see also O'Brien 1993: 166-177). They are at the beginning of their professional life, spending a year at the most prestigious legal institution of the country before embarking on a lucrative career as a lawyer. Their attitude to work is often marked by a high identification with the Supreme Court and idealism towards the law.

For the assistants and clerks, the period spent at the Constitutional Court forms a significant part of their professional career. Furthermore, through them both constitutional courts influence and contribute to shaping central segments of their respective national legal professions. In the Federal Republic, the former legal assistant typically moves into the higher levels of the judiciary. In the United States the former law clerk typically starts working for a law firm or the government in Washington, D.C. or on Wall Street. These different patterns reflect

neatly the differences in importance among the two legal cultures attached to careers in the judiciary and in legal practice.

In both courts the number of cases heard and decided on merit is small (see table 1.2). In admitted cases oral arguments play a large role in the Supreme Court (Baum 2012: 107-8 and Johnson, Sorenson, in this volume) whereas formal public hearings are a rare event in the FCC (see Schlaich, Koriath 2012, Rdnr. 69 and Kommers, Miller 2012, 27). A difference between the courts exists in relation to possibilities of external interests to influence the procedure. At the Supreme Court the procedural device of *amicus curiae* brief allows interested parties to provide information and present their views on their initiative. In contrast in Germany third parties have to wait for the FCC to invite them as participants.

Deliberations among judges differ between the courts. Whereas deliberations in the senates of the FCC are characterised by discursiveness (Kranenpohl 2010: 133-98 and in this Volume) and a drive towards consensus, an argumentative style dominates in the U.S. Supreme Court. Evidence for dissensus among justices in the Supreme Court is the fact that a majority of decisions are not unanimous and that it is common for justices to disagree in dissenting or concurring opinions (54 % of decisions with opinions in the 2010 term, Baum 2012: 111, Table 4.1). Less than 10% of the published decisions of the FCC are issued with a dissenting opinion (*Sondervotum*, see Statistik des Bundesverfassungsgerichts, Tabelle "Statistik für das Geschäftsjahr 2013, A I 7: Entscheidungen mit oder ohne Sondervotum").

Impact, Implementation, and Evaluation

From a dispute processing perspective, implementation constitutes the third phase in treating judicial cases after mobilization and decision-making. However, judicial institutions have limited means of influencing enforcement of their decisions. Constitutional courts in particular operate in specific social contexts which they cannot ignore. They do not just solve individual disputes but take part in the treatment of social and political problems in society at large. However, the social or political problem underlying constitutional litigation is rarely solved by the decision of the constitutional court.

Neither court can mobilize money or administrative resources (bailiffs, the police, or the military) to ensure the effective implementation of their decisions. Wanting special implementation agencies, they are dependent on other institutions to implement their decisions. Sometimes they can encourage other institutions to act favorably. Constitutional judges may use personal contacts with other judges, as well as careful public relations and close contact with the media. Over the past years, judges of the Federal Constitutional Court have frequently commented in newspapers, magazines, or television on certain constitutional interpretations and the tasks of the Constitutional Court and actively cultivate contacts with vested interests (Kranenpohl 2010, Ch. 8).

The academic awareness of postjudicial events and processes triggered by constitutional decision making varies between the United States and Germany. Analyses of the impact and implementation of U.S. Supreme Court decisions have been available since the beginning of the 1960s. In Germany, postjudicial processes have only recently caught the attention of social scientists and legal academics.

In general, research on postjudicial processes can be divided into three types of study: impact, implementation, and evaluation research (Gawron, Rogowski 2007, Ch. 2). Impact studies analyze the court in its social and political environment. They tend to ask grand questions about social change instigated by court decisions (Rosenberg 1991). Methodologically, however, they are rather narrowly confined in focusing on the addressees or recipients of the decisions (see Wasby 1970; Becker, Feeley 1973). Impact is assessed behavioristically by analyzing communication processes, motivation for resistance and sanctions for disobedience (see Baum 2013: 196-202). Famous examples of successful impact studies are those that dealt with Supreme Court decisions on school desegregation, school prayer, and abortion (Keynes, Miller 1989, Epstein, Kobyłka 1992 and McGuire 2009; see also from a German perspective Heldrich 1972). Comparable examples for the Federal Constitutional Court are cases concerning freedom of speech (Lüth decision), abortion and classroom crucifixes (Liebl 1990, Henne, Riedlinger 2005, Schaal 2006).

There exists in the U.S. an extended body of research on resistance of political powers to decisions of the Supreme Court. Congress and the President are known for openly criticizing the Supreme Court, ignoring its decisions or even using political means to restrict the court in form of legislative initiatives limiting its jurisdiction, verbal attacks and politicizing selection of

justices (Baum 2013: 206-8). In these cases we can talk about a ‘negative impact’ of the Supreme Court in form of negative reactions in actual politics, although this is viewed by others as ‘positive impact’ in terms of strengthening democratic control and republicanism (see, for example, Habermas 1996, Ch. 6).

Whereas impact research is mainly interested in the recipients of policies, the implementation approach focuses on organizations that administer policies and on the processes that occur during the enforcement of these policies (Canon, Johnson 1999). This research perspective assumes that implementation agents enjoy some autonomy in implementing policies. Implementation research found that political programs are systematically undermined by factors related to the implementation process (Pressman, Wildavsky 1984/1973), and that implementation agents engage in implementation games (Bardach 1977).

The implementation approach views judicial implementation as a form of policy implementation (Baum 1977; see also Baum 1976; Schmidhauser, Berg 1972). It understands judicial decisions as programs that contain both general — in the case of constitutional courts often political — statements and behavioral instructions for participants to the dispute. It distinguishes between symbolic and instrumental parts of the program. The instrumental part aims directly at the implementation process. However, judicial implementation is more than policy implementation. We suggest distinguishing five implementation arenas that follow system specific logics. These arenas are courts, legislator, administration, collective interest groups and private economic actors (Gawron, Rogowski 2007, Ch. 3).

From an implementation perspective, constitutional courts recognize differences among implementing agents by using different steering mechanisms. In their relationship to other courts, a main steering mechanism consists in the shaping of procedures (on interjudicial relationships, see Tarr 1977; Gawron, Rogowski 2007, Ch. 4). In relation to administrative agencies, the courts steer through constitutional interpretations that choose between administrative law doctrines and through limiting the scope of discretion by favoring the position of certain participants in the administrative arena (for the U.S., see Shapiro 1968, and for Germany, see Gawron 2013).

In relation to legislation, both constitutional courts generally operate cautiously and exercise some form of judicial self-restraint either as a doctrine or in practice. However, both courts engage in judicial review of legislation and regularly find existing laws unconstitutional. In these cases, when legislative change is required, the Supreme Court has little means to

demand obedience from Congress or the president; its relationship to these political powers "is one between equals rather than one of hierarchy" (Baum, in this volume). In general, this also holds true for the relationship of the Federal Constitutional Court and the German legislature. However, there is a subtle difference. The Federal Constitutional Court can rely on the assistance of excellently positioned implementation agents. The relevant departments in the Federal Ministry of justice, especially the so-called constitutional law department, understand themselves as the mouthpiece of the Constitutional Court (Gawron, Rogowski, in this volume).

Evaluation research adopts a broader view than impact and implementation research. It looks at the societal impact of constitutional courts, for example, the impact of interpretations of legal conditions like the rule of law, civil liberties and freedom of speech on democratization processes (see Epstein et al. 2001 and Kneip, in this volume). Such evaluation of the courts can include their impact on value structures in society, like the "spirit of equality and harmony" (Lietzmann, in this volume).

Evaluation research looks at all three levels of program, implementation process, and addressees or beneficiaries of constitutional court decisions. By evaluating the positive or negative impact after the implementation of decisions, such research aims to improve the quality of programs mandated by subsequent decisions (Gawron, Rogowski 2007: 43-5).

In an evaluation perspective, court judgments are of central concern, as they are the main instruments whereby constitutional courts may shape implementation processes. Evaluation research emphasizes that, in order to guarantee effectiveness, judgments not only need to be clear and precise in their instructions to the implementing agents but must also reflect social and political consequences of constitutional decision making.

Evaluation research assumes that new conflicts continuously emerge as a result of the decision of a constitutional court. Such research focuses on how decision making at constitutional courts is actually concerned with these self-generated conflicts and with the shortcomings of previous decisions. From an evaluation point of view, it is important to study the form of argumentation (Luhmann 1995) and the techniques both courts use to consider social, political, and legal consequences during decision making.

Furthermore, evaluation research enables us to ask wider sociological questions, like those posed by social systems theory. Such questions include the function of the courts' autonomy and the basis of self-reproduction or autopoiesis of constitutional decision making

(Gawron, Rogowski 2007, ch. 6; Rogowski 2013). From a systems theoretical perspective, constitutions and constitutional courts are assessed as mechanisms of structural coupling of the legal and the political system (Luhmann 1993: 470-481). In fact, systems theory suggests that the U.S. Supreme Court and the Federal Constitutional Court be viewed as organizations increasingly engaged in a process of reflexive decision making, in which the role of constitutional litigation as part of dispute processing in society is continuously reevaluated.

Organizational Comparison

The U.S. Supreme Court and the German Federal Constitutional Court differ in age, in size, and in location. The Supreme Court was introduced in conjunction with the Constitution of the United States of America in 1787. Its competencies are regulated in Article III of the Constitution and in the judiciary Act of 1789. It is thus two hundred and twenty-five years old. The German Federal Constitutional Court was introduced in 1949 by the Basic Law (*Grundgesetz*), in which its competencies and composition are regulated in Articles 93 and 94. The Court itself was established in 1951 and the 1951 Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) regulates its composition and proceedings. It is thus just over sixty years old.

In size, the Federal Constitutional Court is almost twice as large as the Supreme Court. It now consists of two panels with eight judges each ("twin court" — the original number of twelve judges per panel was decreased to ten in 1956, and finally to eight in 1963). The German judges tend to be younger than the Supreme Court justices. The sixteen judges are appointed for a maximum of twelve years but not beyond the retirement age of sixty-eight. The U.S. Supreme Court consists of one panel with nine judges, appointed for life. In the nineteenth century most justices died in office. Even today justices only resign or retire voluntarily if falling seriously ill or reaching a very high age (Baum 2012: 59-65).

The seat of the Supreme Court is in the nation's capital, Washington, D.C. It reflects the fact that the Court forms part of the U.S. government and that it plays a particular role in the balance of power at the federal level. The seat of the Federal Constitutional Court is in

Karlsruhe. It is thus not located in the capital of the Federal Republic but "outside the political power center" (Rinken 2002). However, Karlsruhe is widely seen as the nation's "legal capital" since it is also the seat of Germany's highest court of appeal for civil and criminal matters, the Federal Supreme Court (Bundesgerichtshof), the largest and most important of the federal courts.

One function of both constitutional courts is to arbitrate between bodies of the state or between states as part of the Federation or the Federal Republic. In this respect, the Federal Constitutional Court takes up the tradition of the Court of the Empire (Reichsgericht) that adjudicated, until 1806, disputes among the members of the Holy Roman Empire of the German Nation. During the nineteenth century, there were a number of special courts and procedures for constitutional conflicts, none of them having any great influence (Robbers 1990). Neither did the unification of Germany in 1871 and the formation of the German Empire (Deutsches Reich) lead to the establishment of a separate constitutional court. The first step in this direction was taken after World War I when a State Court (Staatsgerichtshof) was established for conflicts over jurisdictions between a state and the Reich government and for reviewing decisions by the highest state organs (Caldwell 1997: 147 and 160-170). However, the Weimar Constitution of 1919 did not grant this court jurisdiction over fundamental individual rights. These rights became justiciable only after World War II. In conjunction with the adoption of a catalogue of basic rights, the establishment of a Federal Constitutional Court with powers to adjudicate in the two main areas of basic rights and state affairs was announced in the Basic Law of 1949 (Doemming, Füsslein, Matz 1951; see also Laufer 1968; Schiffers 1984; Lhotta 2003; Lembcke 2007; Kneip 2009).

The Federal Constitutional Court and the Supreme Court both played an important role in the formation of their respective nations. In its early period, the Federal Constitutional Court was particularly engaged with problems of federalism of the newly established Federal Republic. The decisions on the merger of states in the Southwest of Germany (BVerfGE 1, 14, 1951 - Southwest State case)¹ and the incorporation of the Saar area into the Federal Republic (BVerfGE 4, 157, 1955 — Saar Treaty case) are leading examples. In this period the Court also developed, initially guided by an antifascist impulse and by recourse to natural law principles, an

¹ The Official Collection of the Decisions of the Federal Constitutional Court (Amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts) will, throughout the book, be cited as BVerfGE.

understanding of basic rights, which allowed for the creation of an extensive common law of the Federal Constitutional Court. A particular topic, which preoccupied the Court early on, was rights of civil servants employed during the Nazi period; the Federal Constitutional Court limited their pension entitlements, in opposition to all other supreme federal courts that favored an apolitical assessment of the civil service during the Nazi period (BVerfGE 3, 58 — Civil Servant case and BVerfGE 6, 132 — Gestapo case; Limbach 2011). Furthermore, the FCC was able to influence the process of democratization in the new Federal Republic in a decisive manner by fostering ending the autocratic regime, institutionalising new democratic structures, and consolidating democracy in general (see Kneip, in this volume and Bryde 2006).

The U.S. Supreme Court played a crucial role during the formative years of the United States. In particular its arbitration of interstate conflicts and its endorsement of a national economic policy contributed in a decisive way to the building of the American nation (Hurst 1986. see also Höreth 2008, ch. 4). By developing a particular notion of federalism it strengthened the federal powers. Later, after the Civil War, in the period between 1865 until 1937, the Supreme Court was concerned with developing a liberal-capitalist ideology protecting free markets against state intervention. After 1937, the focus shifted towards the protection of civil rights (Tushnet 2009: 28-34). During the 1980s, most of these rights were again denied and the Court became increasingly conservative on issues such as labor relations and environmental protection (Pacelle 1991; see also Baum 2012: 175-7).

Since its beginnings, the Supreme Court has struggled over its powers of judicial review of legislation. Indeed, it is one of the most remarkable aspects of this institution that it was able to define its own powers of judicial review. In the famous decision of *Marbury v. Madison* (5 U.S. [1 Cranch] 137 [1803]) the Supreme Court adopted the doctrine of judicial review and applied it for the first time to a congressional statute. Through judicial review, the Court asserted its authority to determine what the Constitution means. The Court developed this doctrine into a powerful instrument to review federal legislation and decisions of the president. In *Cooper v. Aaron* (358 U.S. 1 [1958]) it expanded the doctrine by declaring that governors and state legislatures were bound to uphold decisions of the Supreme Court and its constitutional interpretations, just as they were bound to uphold the Constitution itself (on *Cooper* and *Marbury*, see Hall 1992: 197-8 and 521-3; see also the assessment of judicial review powers of the Supreme Court by Tushnet 1999 and 2014). In this context it is worth mentioning that the

Supreme Court is not the exclusive decision maker in constitutional litigation, but that constitutional issues can be raised in any lower or appellate state or federal court in the United States (see also Kagan, in this volume).

The German Federal Constitutional Court was granted powers of judicial review by the Basic Law. From the beginning, a major task has been to control federal and other legislative acts. The Federal Constitutional Court extended its influence through excessive interpretation of its judicial review powers. In particular, it declared itself to be competent to control any act of the state as potentially violating basic rights (the leading decision was BVerfGE 6, 32, 1957 — Elfes case; see Henne, Riedlinger 2005). However, unlike the Supreme Court it is obliged to decide highly politicized cases and cannot resort to a political doctrine in order to reject decision making (see also Currie 1994: 170-1; Jestaedt et al. 2011 and several contributions in van Ooyen, Möllers 2006).

Both constitutional courts enjoy independence from the political system in their decision making, but are, at the same time, controlled by the political system. Their personnel, that is, the judges, are selected in political procedures and the selection of judges and justices is in both courts, although in different forms, politicized. In Germany, the major political parties nominate candidates to be elected as judges by the Federal Parliament (Bundestag) and the Federal Council (Bundesrat). Each judge is thus nominated either by the government or the opposition of the day and the parties observe that there exists political parity among the judges (Stüwe, in this volume; Billing 1969; Laufer 1968). In contrast, in the United States the president nominates the candidates who must be confirmed as Supreme Court justices by the Senate. The president's political convictions and personal preferences shape the composition of the Supreme Court (Kagan, Elinson, in this volume; Abraham 1992; Watson, Stookey 1995; Hiesel 2010).

However, that the politicization of the judicial selection process does not automatically mean politicization of decision making in the courts can be demonstrated in relation to dissenting opinions. Their use differs significantly between the courts (see the reference to dissenting opinions in the section on The Process of Decision Making). The low use of dissenting opinions in the FCC can be explained by another practice. Its legal reasoning reveals a high degree of self-reference and path dependency lowers the possibility of dissensus (Rogowski 2013; Deters, Krämer 2011; Hoffmann-Riem 2006).

The role of the public differs in the selection of the judges of the two courts. In the United States, each prospective justice has to endure lengthy public hearings of the Judiciary Committee of the Senate. In Germany, the discussions are less public. Half of the judges are elected in nonpublic, almost secretive meetings of a Judicial Committee (*Richterwahlausschuß*) consisting of twelve members of the Federal Parliament (see Stüwe, in this volume). The Federal Council elects the other half after nonpublic negotiations between representatives of the German states and leading party officials. Three of the judges in each senate must have been a judge at one of the other federal supreme courts prior to their appointment as a member of the Federal Constitutional Court. There has been a tendency over the last two decades to increase the number of law professors on the bench.

Both constitutional courts enjoy an elevated position in their national political cultures (Jacob 1996; Vanberg 2005; Lembcke 2007). The chief justice of the Supreme Court and the president of the Federal Constitutional Court both perform symbolic political functions. In the U.S., these include the swearing in of the incoming president. In Germany, the president of the Federal Constitutional Court is fifth in line to officially represent the Federal Republic, after the federal president, the president of the Federal Parliament, the president of the Federal Council, and the federal chancellor (see Schlaich, Koriath 2012: 20).

The U.S. Supreme Court and the German Federal Constitutional Court might differ in age, in size, and in location but they also show similarities. This is particularly true in relation to the function they occupy for the political culture of their countries (Schlögel 2015). They have been successful as ultimate arbiters in fundamental questions concerning their respective political systems and were able to pacify their countries, albeit the Federal Constitutional Court more so than the Supreme Court which reflects the different degrees of politicization of the two courts. Moreover, there is a good chance that the two established constitutional courts might begin to learn from each other. It would indeed be desirable that the courts find forms of cooperation that benefit their decision-making practices.

Note

1 The Official Collection of the Decisions of the Federal Constitutional Court (Amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts) will, throughout the book, be cited as BVerfGE.

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