Theory and Method of Comparative Constitutional Law

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1 Introduction – Comparative Private Law and Comparative Constitutional Law, Similarities

A shrinking world characterised by global trade and transnational companies have made comparative private law to a common everyday activity. Because of globalisation of political ideas and ideals comparative constitutional law has become a living and practical reality as well. Foreign constitutions were models when the former communist states transformed their economic-social systems and constitutions to western style democracies, and comparative constitutional law has been applied when national or foreign experts have elaborated new constitutions for states that have undergone disintegration, so-called failed states.[1] Ever since the American and French revolutions in the 18th century even stable states preparing constitutional reforms use constitutional comparisons, and today also the international human rights conventions make it necessary for states to comparing and making sure that their national constitutions live up to the obligations of those conventions; that process also involves comparisons with how other states, contracting parties, apply the conventions.

Comparison within the fields of private law and public law presents both similarities and differences. Turning first to similarities, the reason why comparison is undertaken, the *aim* of comparison, is often the same. Firstly, the government or legislator, parliament, may find it desirable, when reforming national legislation, to look at solutions offered by foreign law.[2] When making such unilateral revision it may chose simply to use foreign statutes as models or it may even go as far as uniformity, meaning that it incorporates the foreign legislation or institute into national law, so-called *legal transplant*.[3] Reformation of national law may also be the result of bilateral or multilateral action by states wanting to harmonize their legislations via international conventions. CISG[4] is an example of such a convention within the field of private law and the European Convention on Human Rights and Fundamental Freedoms is an example within the field of public law.

Secondly, a similarity consists in the fact that courts, both the general and the administrative courts, make comparisons with the help of foreign law in order to find proper or up to date solutions and to fill in lacunas of national law that might exist in the private as well as in the public law fields. Comparing law has even been qualified a fifth interpretive method completing the textual (grammatical), the historical or subjective, the systematic, and the teleological

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1 Notice the activity of the Venice Commission of the Council of Europe.

2 Anne Smith, *Internationalisation and Constitutional Borrowing in Drafting Bills of Rights,* International and comparative Law Quarterly, 2010, pp. 867 -893.

3 Thomas Waelde and James Gunderson, *Legislative Reform in Transition Economies – a Short-cut to Social Market Economy Status,* International and Comparative Law Quarterly, 1994, pp. 347-378. T. Arvind, *The 'Transplant Effect' in Harmonization*, International and Comparative Law Quarterly, 2010, pp. 65-88.

4 United Nations Convention on Contracts for International Sale of Goods.

methods.[5] Not only national courts but also international courts and tribunals draw on comparisons. The International Court of Justice shall for example deduce applicable general principles from national law via comparison,[6] and comparisons are also made regularly by the European Court of Human Rights and by the Court of Justice of the European Union. Membership of the European Union entail for the domestic courts that comparison becomes a normal part of their activity. They are to apply and interpret union legislation, regulations and directives, in a way that it achieves a common meaning over the union territory, and that is attained by making comparisons with the interpretation and application made by the Court of Justice of the European Union in its case law and with the jurisprudence of other member states.[7] During recent years international comparative law has also grown in importance as an academic subject.[8]

2 Comparative Method

The differences between comparison of private law and of public law appear more distinctly when turning to the *method* of comparative law; and those are particularly clear when it comes to constitutional law. Certainly, the fundamental condition is the same. Comparison is about making a real comparison which provides answers about similarities and differences. If the study is reduced to only one legal system, even if that study is about foreign law, it cannot reach the qualification of comparison; and this is true also for compilations of foreign constitutions[9] and for studies in national law that includes at the end a description of foreign law, so-called *Länderberichten*, (country reports). Real comparisons have to include both analysis and evaluation of subjects belonging to two or more legal systems.

Comparisons both of private law and of public law can be made in the form of macro comparison, i.e. of the totality of the legal orders, as well as of micro

5 Axel Tschentscher, *Dialektische Rechtsvergleichung – Zur Methode der Komparastik im öffentlichen Recht*, Juristenzeitung 17/2007, p. 812; Peter Häberle, *Grundrechtregelung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als "fünfter" Auslegungsmethode*, Juristezeitung 1989, p. 913 et seq.

6 Statute of the International Court of Justice, Article 38.

7 Case 238/81 *CILFIT*, [1982] ECR 3415.

8 It has resulted in articles and publications such as those mentioned in fn.9 and e.g. *Comparative Constitutional Law*, eds. Tom Ginsburg and Rosalind Dixon, Edward Elgar Publishing 2011, 680 pages; and *The Cambridge Companion to Comparative Law*, eds. Mauro Bussani, Ugo Mattei, Cambridge University Press, 2012, 410 pages.

9 Collections like the one published by Deutsche Forschungsgemeinschaft with the publishing company Saur, English net edition: www.modern-constitutions.de, and the Oxford compilation, *Constitutions of the Countries of the World*, are of course very good tools for making comparisons. However *The Oxford Handbook of Comparative Law*, Oxford, 2012, also contains analytical comments, and it is therefore more than a compilation.

comparison, i.e. of selected legal rules or institutes.[10] However, this fact does not make comparison of private law and of constitutional law similar. The *methods* of making comparisons in those legal fields are different to a considerable degree.

When it comes to *macro comparison*, the great comparatists, ever since the beginning of the 20th century, when comparative law was separated from legal history and "legal ethnology" and became an established field of legal science, have grouped countries together whose legal systems have similar attributes, and regarded them as belonging to families of law.[11] This classification makes comparison easier as the comparatist can assume that law in countries belonging to the same family are not fundamentally different. As law originating from only a limited number of countries have been spread to or inspired other countries,[12] an investigation may be based on the legal system of the "mother" country.[13] Common law constitutes such a family, civil law systems are by some referred to one civil law family[14] while other comparatists make a distinction between a roman (French) part, a German one and a Scandinavian one. Legal systems influenced by Islam is seen as a third family; oriental systems are considered to constitute a fourth one, and some comparatists hold that African systems are a fifth family. Interest in the socialist legal family has today been lost.

However, this division into legal families is of little use for constitutional comparison. It has mainly been constructed for making comparisons of private law, and it is conceived of by lawyers in private law. For a lawyer in constitutional law the USA, a common law country, is closer to Germany, a civil law country, than is England, and this is so because of their federal form of government and of the fact that constitutional control in the two countries is exercised by courts, by the Supreme Court in the USA and by the Verfassungsgericht in Germany. Many of the criteria for explaining, analysing and comparing that is used for determining what legal family a country belongs to, however, are possible to apply also when comparing constitutions, in spite of the fact that the purpose of using those criteria is not to group countries together into legal families. Legal concepts, sources of law and hierarchy of norms are used for macro comparisons both within the field of private law and of constitutional law. Even the simplest criterion is valid, the one saying that if

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10 Michael Bogdan, *Komparativ Rättskunskap*, Norstedts, Stockholm, 1993, p. 61.

11 For a condensed account of the development and character of comparative law *see*: K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, Oxford, 3rd ed. 1998, p. 2 et seq.

12 English law has spread to the common law countries and other former colonies, French law to its former colonies, to most Latin countries in Europe and Latin America, to Belgium, the Netherlands, and Luxembourg, German law to Austria, Central and Eastern Europe, Greece and Japan and has as well to a certain extent influenced law in China, Korea and Thailand.

13 K. Zweigert & H. Kötz, op. cit. fn.9, p. 68; Michael Bogdan, op. cit. fn.8, p. 87.

14 René David and John Brierly, *Major Legal Systems in the World Today*, Steven & Sons, London, 3rd edition, 1985.

a lawyer from one country without major difficulties is able to apply the law of another country, those two countries may be presumed to belong to the same family.[15] The comparatist of constitutional law notices if the legal order of a country belong to democracy or dictatorship, to a state based on rule of law or to a corrupt system.

Zweigert & Kötz bases the differentiation between legal families on their "style", and the factors that he has defined for determining "style" has some relevance also for comparing constitutions. They are: historical background and development; its predominant and characteristic mode of thought in legal matters (e.g. abstract norms and inductive application of law characterized by civil law mode of legal thinking or inductive application of law characterized by common law countries); especially distinctive institutions; the kind of legal sources it acknowledges and the way it handles them; the influence on the legal order of ideology of religious or political nature.[16] When using those factors for comparison of constitutions the result will not be groupings of legal families, but they may serve as analytical standards anyway in order to explain similarities and differences of constitutional orders. An important difference between traditional private law macro comparison and constitutional comparison is also the fact that the former emphasizes courts and their importance for legal thought, while constitutional comparison is close to political science and its emphasis on political conceptions and processes.[17] Democratic countries having diverse legal thought may be more similar than countries with authoritarian political system. Political culture is consequently an important factor for constitutional comparison.[18]

The focus of *micro comparison* is not the legal systems as such but specific legal institutes or issues. The method for making micro comparisons is somewhat different from that of macro comparisons because the *function* of the specific rule is more important in micro comparison than in macro comparison. Otherwise the difference of method is not significant. In both the two cases the analysis must include the nature of the legal systems and consideration has to be taken of the historical, political, economic and ideological context. Functionality is consequently a key of the comparative method.

The *first step* of the comparison is to decide about what question should be compared,[19] the so-called *tertium comparationis*; it could e.g. be the possibility

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15 Ibid. P. 21; K. Zweigert & H. Kötz, op. cit. fn.9, p. 68; Michael Bogdan, op. cit. fn.8, p. 87.

16 K. Zweigert & H. Kötz, op. cit. fn.9, p. 68 et seq.

17 For a critique of a judge centred study of case law in comparative constitutional law, see Christoph Möllers and Hannah Birkenkötter, *Towards a new conceptualism in comparative constitutional law, or reviving the German tradition of the* Lehrbuch, International Journal of Comparative constitutional Law, 2014, pp. 603-625.

18 See Ran Hirschl, *From comparative constitutional law to comparative constitutional studies*, International Journal of Comparative Law, 2013, pp. 1-12., arguing for including political processes into the study.

19 Daniel Halberstam means that, in order for a comparison to have sense, the comparatist should not only select countries that are similar enough, but also to select a problem to investigate, *tertium comparationis*, that should be expected to have been solved in some

to appeal against an administrative decision. Functionality is part of the *second step* of the comparison. If the comparatist, in the example above, has found that the legal system investigated does not admit court control of administrative decisions, she should not simply draw the conclusion that there is no such right at all. The legal system may offer other means that fulfil that function. There may be forms of administrative appeal to a higher ranking administrative authority. Functionality may in this case also include an investigation of the control power and hierarchy of administrative authorities. Consequently, functionality means that the comparatist shall not take it for granted that foreign law has a similar specific legal institute or rule as the one in national law. Two countries may have found a solution to a problem via different legal ways. The comparison shall therefore depart from the problem or function that is to be solved by a legal rule and investigate in what way that function is attained by the two or more legal systems. An investigation of a major part of the legal systems may then be required.

After having established how the function has been attained by different countries, or that it has not been attained by a country, the *third step* of the comparison starts. It is about explaining why there are similarities or differences. In order to provide answers to that question it is useful to consider the factors defined by *Zweigert* and *Kötz* mentioned above, and, when making comparison of constitutions, special emphasis should be put on political history and development, ideology and religion.

The *fourth step* of the comparison consists of evaluating the different national solutions of the problem considering how far and how efficiently they attain the function they are supposed to fulfil. This evaluation is tinctured by the personal values of the comparatist and can hardly be neutral or objective. In the field of constitutional law the comparatist may look at a function out from three perspectives: from the perspective of citizen's rights and courts or she may favour power by majority elected democratic institutions or efficient delivery resulting from a good functioning technocratic administration.

If the comparison is made for the purpose of legal reform or by courts within their process of interpretation the fourth step will be followed by a *fifth step.* It involves the question of evaluating if and how the foreign legal solution should be adopted into and adapted to national law. This evaluation should include the question whether the foreign solution would easily become part of the national legal order or if it would constitute a legal transplant that would be repelled.[20] The factors defined by *Zweigert* and *Kötz* are useful for such an evaluation as well.

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ways by the compared countries. *Desperately seeking Europe: On comparative methodology and the conception of rights*, Book Review, International Journal of Constitutional Law, Vol.5, nr 1, 2007, p. 174.

20 Thomas Waelde & James Gunderson, op.cit. fn.2, p. 366 et seq.

3 The Notion of Constitution

Turning to the object of comparison, the constitution, already *Aristotle* compared constitutions, and in his classic work "Politics"[21] he made a distinction between what he called real and the corrupted constitutions. The aim of real or true constitutions was to assure well fare of the citizens while corrupted or perverted constitutions lead to advantages for those in government. Axel Tschentscher describes the distinction made by Aristotle with the following figure:[22]

Rulers	**Real constitutions**	**Perversions**
One	Monarchy	Tyranny
Few	Aristocracy	Oligarchy
Many	Polity	Democracy

Carl Schmitt devoted a whole little book to the subject of defining the concept of constitution,[23] but the explication of Aristotle is still of importance for understanding the concept, and consequently what the object of constitutional comparison is. In order to be qualified a constitution the rules are to assure a certain stability and to protect against and put limits to the sudden rise and unbridled exercise of power by a person or by groups. He did not consider that a constitution needed to be in written form, and that is not required today either. It is not possible to assert that countries that do not have written constitutions, such as Great Britain, New Zeeland or Israel, would lack constitutions. A constitution comprises moreover not only the written document, but it can be completed and even informally amended by customary law or political usages considered to be of constitutional relevance, such as decisions by the supreme courts or by constitutional custom observed by the highest political bodies. A consequence of this is that the textual method is very insufficient for constitutional comparison. Comparison must be extended beyond the text of the constitution and include constitutional practice in the form of decisions of the highest courts and political bodies of the countries.

Finer et al. have described constitutions in the following way: "[c]odes of norms which aspire to regulate the allocation of powers, functions and duties among various agencies of government, and to define the relationship between these and the public".[24] This definition includes the three most important parts of a constitution, namely that a constitution confers power to the governing

21 Aristotelses, *Politik*, Leipzig, 1912.

22 Axel Tschentscher, *Comparative Constitutional Law*, draft, "www.servat.unibe.ch/icl/compcons.html", visited 6.10.2014.

23 Carl Schmitt, *Verfassungslehre*, Dunker & Humblot, Berlin, 1965 (1928).

24 S.E. Finer, Vernon Bogdanor, Bernard Rudden, *Comparing Constitutions,*Oxford,1995, p. 1.

bodies of a state; that it regulates the distribution of power between those bodies; and that it regulates the relationship between those bodies and the public.

As to the distribution of power between the bodies of a state both political scientists and legal scientists usually make a distinction between horizontal and vertical balance of power. The horizontal balance refers to the distribution of power between the highest bodies of a state, of the relations between the legislative, parliament, the executive, government, and the judiciary. Already *Montesquieu* regarded this horizontal distribution of power as an important element of a constitution.[25] The second part of a constitution, vertical balance of power, have in view the distribution of power between superior bodies of the state and inferior public bodies, or, as far as federations are concerned, also the power distribution between the states and the federation.

From a comparative law perspective it is consequently fruitful to e.g. compare federal states with each other or federal states with unitary states; or states where executive powers are invested in directly elected presidents having presidential powers or governmental powers in states where the president is designated indirectly by parliament; or representation and powers of parliaments with one or two chambers; or how the rules of a constitution are guaranteed in states permitting constitutional control by courts with those where that power is limited.[26]

As regards the third element of a constitution, the relation between the state and its citizens, it is manifested in modern constitutions by stipulations on individual fundamental rights and liberties. Civil rights mark the limit of state powers in relation to the citizens. Social rights declare what welfare goods the state is obliged to provide to its citizens. In fact, the first documents of constitutional nature were of such kind, giving rights to individuals. The classic example is the English Magna Charta, 1215, which granted protection to nobles from imprisonment without due trial, but worth mentioning is also the statutes of peace by the Swedish king Birger Jarl, in the 1250's, about peaceful court trials, peace of the church area, peace of the home, and peace for women against rape and abduction. These peace statutes obliged the state to give protection to everybody, irrespective of rank, and violation of them was to be severely punished. It can be argued that fundamental rights in constitutions prove that constitutions should be considered to be social contracts between those who govern and those who are governed establishing a certain social order.[27]

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25 Charles-Louis de Montesquieu, *De l'ésprit des lois*, Paris, 1748 and Garnier Frères 1961. John Locke had already in his book *Two Treatises of Government*, 1698, Cambridge University Press, Cambridge, 1960, argued in favour of the judiciary be separated from the political bodies.

26 Axel Tschentscher op.cit.fn.4.p. 810.

27 Pär Hallström, *Nationella avsteg från EU:s rättighetsstadga*, Svensk Juristtidning, 2002, p. 763: Ola Zetterquist, *A Europe of the Member States or of the Citizens*, Lund 2002.

4 Constitution and Democratic Legitimacy in a Comparative Perspective

To *Aristotle* a true constitution would express tradition and stability, as we noted above. He had little confidence in democracy where the populace would decide the order of the day, impressed by unscrupulous orators. However, the general ideological conviction today is that a constitutional order would have little authority if the citizens did not have confidence in it. It needs to enjoy what the political scientists call legitimacy. Usually, one makes a distinction between three components of the concept of legitimacy. The first one is formal legitimacy. It means that public decisions must be taken according to the procedure that is prescribed by law. So this component is intimately related to the legal principle of legality. The second component is democratic legitimacy. Since at least 60 years back the general view is, in most countries of the world, that political decisions shall be supported by the majority of the people, and that the political system permit it to be duly represented where decisions are taken. The third component of legitimacy refers to the ability to deliver, to efficiency. It explains the fact that a government that neither relies on democratic decision making, nor takes the decisions according to due legal procedures, may enjoy public thrust as long as it is able to deliver to the citizens what they appreciate. The question of legitimacy is consequently of importance when comparing the position of constitutions in national legal orders.

The formal legitimacy is of fundamental importance for a legal system. In spite of the fact that a constitution comprises more than the written document it is understood as a law. It makes the supreme law, which assures the unity of the legal system. The legality of other laws, statutes or decisions of the legal system are ultimately derived from the constitution. It is situated at the top of the national norm pyramid, and all other legal norms have to be in conformity with the constitution in order to be valid.

Since the breakthrough of democratic ideas the place where norms are arranged in the hierarchy of the legal order may as a matter of fact be understood as expressing the democratic principle. The people is considered to be the basis and origin of state power.[28] Hierarchy of norms and democratic legitimacy is therefore intimately related. The will of the people is the ultimate basis of the exercise of the power and apparatus of the state.[29] The superior nature of the constitution is made patent by the role of the people both when adopting and amending a constitution, as such acts generally need that the direct voice of the people has been expressed, in many countries by a

28 Cf. The social contract theory.

29 Expressed for the first time in the preamble of the constitution of the USA 1787, "we the People […] establish this Constitution", thereafter repeated in the German constitution 1949, "[…] the German people has adopted […] this Constitution", and e.g. the Indian Constitution 1949, which states "We the people of India […] adopt, enact and give ourselves this constitution", and in the Swedish constitution (Regeringsformen) 1974, Chapter 1§ "All public power in Sweden proceeds from the people".

referendum.[30] The rules about election to parliament of the representatives of the people are often given certain guarantees laid down in the constitution. The parliamentarians themselves, on the contrary, are considered to be delegates, representatives, of the people. They therefore express the will of the people in a somewhat indirect way. Laws or statutes taken by parliament are therefore naturally arranged in a position under the constitution in the legal hierarchy. According to the principle of parliamentarianism a government is appointed by the parliament and it should enjoy its confidence. Consequently, its power is indirect in relation to parliament and according to the principle of democracy governmental regulations and decisions are arranged both under the constitution and acts of parliament. Finally, public administration is subject to the government, the executive, and administrative rules and decisions are arranged at the bottom of the legal hierarchical order, under governmental regulations as well as under those of parliament and of the constitution.

In non-parliamentary systems where the president is chosen by the people in general elections, such as the USA, the democratic principle allows that the president appoints the government, administration, and has a wide regulatory, law making, power. From a democratic point of view, the president has the same representative dignity as congress, and the hierarchical ranking of laws of congress in relation to presidential regulations can only be based on the rules of the constitution. The constitution is the ultimate expression of the will of the people.

In a comparative perspective it may be observed that some countries, like Sweden and Great Britain, puts much emphasis on parliament as the concrete expression of the democratic principle, while other countries, like the USA and Germany emphasis the constitution. This position is reflected in the role of courts as guardians of the constitution having the right to control the validity of laws. The American *Supreme Court* has the right to set aside laws that are not in conformity with the constitution,[31] and so has the German *Verfassungsgericht.* The interpretations made by the Supreme Court in its case law are so important that they better explain the contents of the constitution than do the succinct wording of the constitution itself.

In France, parliament and the democratic legitimacy that it enjoys, is more important than courts. This is reflected by the fact that the French *Cour Constitutionelle*, (Constitutional Court) may only decide that proposals to laws, bills, may not be taken because of their unconstitutionality. Consequently it may only exercise control of laws that have not as yet been taken by parliament, so-called pre-legislative judicial review. This power is less than the

30 Referendum when adopting and making amendments is stated as a possibility in the French constitution, while in Sweden, a referendum only admits the people the right to veto a proposal and it may be overruled by government. However, in Sweden, there needs to be new general elections to parliament in order for amendments to the constitution to be taken. In federations both adoption and amendments of the federal constitution has to be put before the states for ratification in accordance with the principle that a federation consists of one people and several states.

31 Ever since it established that right in the case *Marbury v. Madison,* 5 U.S. 137 (1803) and *McCulloch v. Maryland,* 4 Wheat 316 (1819) and *Fletcher v. Peck* (1810) (state laws).

one of the US *Supreme Court*, which exercises control of laws that have already been taken, so-called post-legislative judicial review. The French *Conseil d'Etat*, the supreme administrative court, may make post-legislative judicial review, but only of governmental acts. Its function is to make sure that the executive does not intrude upon the powers of the parliament.

Also in Sweden the democratic principle has been considered to be better expressed by the parliament than by the constitution and courts. The Swedish *lagrådet*, a judicial committee, may exercise pre-judicial review, but only take non-binding recommendations. During the years 2000 the majority of public opinion and the opinion in in the Swedish parliament, *riksdagen*, changed, and in 2010 the constitution was amended giving more weight to the constitution and courts. Before, post-judicial review of administrative regulations was freely admitted, but review of parliamentary acts, and even of governmental decisions, was only admitted under the condition that they were manifestly contrary to the constitution. This condition of obviousness and the public aversion towards post-judicial review detained the courts from exercising control. According to the amended constitution the condition of "manifest" is cancelled and courts may set aside inferior norms that are in conflict with norms of higher ranging value, but they are to take consideration of parliament as the representative of the people.[32] Since 2010 the supreme administrative court has been less reluctant to control that the constitution is observed while the supreme private law court has had less occasions to exercise that function.

Consequently, legitimacy can explain differences of the balance of power between courts, parliament and government in different countries. In some countries parliament has such a great democratic legitimacy that judicial review is of little need for the stability of the political system. However, a reference to democracy and human rights without it being well grounded on a constitution safeguarded by independent courts may be evidence of a perverted constitution. The constitution on the paper and the real constitution may then be two different things. The words of the constitution could correspond to those of a western style democracy, but they are not observed as decisions are taken in an authoritarian way. Examples of that situation were the political systems modelled on the Soviet Union. Their constitutions contained a full range of provisions on human rights and formally their 'parliaments' had the legislative power, but at the same time their constitutions had provisions stating that the socialist state would be led by the labour class and the Marxist-Leninist party. The formal political bodies had parallel party bodies and decisions by the 'parliament' were prepared by the corresponding party body and taken automatically by the 'parliament'. Moreover, as courts could not control if regulations and decisions of the executive and its many ministries were in conformity with superior law, and they applied the principle of *lex specialis derogat lege generali*, the hierarchy of norms ended upside down. The result was a reversed hierarchy of norms that reflected the absolute power of the executive. Neither such 'semantic' constitutions nor those that can be

32 Regeringsform, (the Instrument of Government,) Chapter 11, §14.

characterized as 'nominal' fulfil the aim of constitutions.[33] 'Nominal' constitutions are those that on the surface establish fundamental and permanent values, but that can be easily amended, e.g. by laws not requiring special qualified majority in parliament.[34]

5 Constitution, Other Legitimizing Values and *Meta-law*

Democratic legitimacy and the principle of democracy are important factors for explaining the horizontal balance of power and analysing the hierarchy of norms of legal orders, but they are not enough for explaining the position of a constitution in a political and legal system. The very contribution of a constitution to stability of the political system and to justice is a legitimizing reason for having one, and with a constitution the essence of the nation is expressed as it includes the fundamental values that the nation is based on or is aiming to achieve.[35] These values are so fundamental that they should be imperturbable. The German constitution even contains a so-called clause of eternity, *Ewigkeitsklausel,* in its Article 79.3, which prohibits changes of its fundamental principles.

An analysis of the constitutional order of certain countries proves that eternal or religious values may be more emphasised than democratic legitimacy and the principle of democracy. Instead, their political and legal system is justified, legitimised, by constitutions referring to higher religious values.[36] One country, Israel, does not have any written constitution, and basis that position on religious belief, even though the country's unwritten constitution, based on western democratic ideas, is carefully observed. The Koran has a constitutional role in countries of strictly Muslim nature, like Saudi Arabia, which declare that the Koran constitute its constitution together with a document assuring the rights of the Saudi royal family; and in Iran a council consisting of the highest religious leaders have the final competence to interpret as well as to execute constitutional power basing themselves on what it regards the highest norm, the Koran.

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33 Gordon Smith, *Politics in Western Europe – A Comparative Analysis,* Gower Farnham, 5th ed. 1989, p. 129.

34 The Israeli basic law prepared at the moment of writing this article, could be quoted as an example, as the contents of its human rights provision on individual equal rights is to be specified in a simple law.

35 E.g. Article 2 of Treaty on the European Union states that: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

36 Note that, according to its Preamble, it is the German people that has adopted the German Constitution, but that it has done so conscious of its responsibility to God and men. A similar provision was discussed to be part of the preamble of the Treaty on the European Union, but it was mitigated and it makes instead a reference to "inspiration from the cultural, religious and humanist inheritance of Europe".

A closer look at the western democracies, however, reveals that the constitution *stricto sensu* is not the highest norm either. The unity of the legal system, where the constitution is the highest ranking norm, is dissolved by a plurality of law.[37] This appears most clearly from the fact that certain values expressed in international compulsory norms are situated above the written constitution. Those norms are public international law rules recognized as *jus cogens,* such as prohibition of genocide, aggressive war, torture etc. Even the constitutional rules have to be in conformity with that law and conflicting law shall not be applied, otherwise the country would breach against international law and the responsible decision makers would have committed international crimes, irrespective of what the national constitution may say. In most cases such actions would be against national law too, as most countries have recognized that those international customary law norms are included in their legal systems.[38] Moreover, in countries taking seriously their participation in human rights conventions, courts and administrative authorities interpret and apply rules of international conventions implemented in national law in accordance with how they have been interpreted by international bodies.

This state of things is particularly true in Europe. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) functions as a super constitution and its Court as a kind of supreme court, to which the citizens can file a complaint, and whose decisions are compulsory for the European countries. Consequently, the result is that those countries that have prioritized parliament as the major expression of democratic legitimacy have made a concession to constitutionality and judicial review. In practice the European protection of human rights is situated at a higher level, or at least on the same level as the human rights expressed in national constitutions. And this is so in spite of the fact that international conventions are on the same level as laws taken by parliament in dualist states and on a level between the constitution and laws in monist states. Anyway, the result is that the closed national legal order has been replaced by legal plurality, where national courts and administrative authorities are obliged to apply rules and principles whose source are external to the national order. As far as Britain is concerned this obligation is stated in *The Human Rights Act* from 1998, which also permits courts to set aside laws that are not compatible with the ECHR. That act contain rules on a simplified parliamentary procedure to annul or amend such incompatible laws as well.[39] On the other hand it is possible for parliament to decide about withdrawing from the ECHR with an ordinary law.[40] As far as Sweden is concerned the law on the ECHR provides it with a semi constitutional nature, as it states that parliament or the government may not

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37 A recent book on the topic is: Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law*, Oxford University Press, Oxford, 2011, 330 pages.

38 Antonio Cassese, *International Law,* Oxford, 2nd edition, 2005, p. 224 et seq.

39 Vernon Bogdanor, Tarunabh Khaitan and Stefan Vogenauer, *Should Britain have a Written Constitution?* The Political Quarterly, Vol.78, 2007, nr.4, p. 502.

40 Judith Pryor, *Unwritten constitutions?* European Journal of English Studies, Vol.11, 2007, nr.1, p. 81.

take decisions affecting the commitments of the convention.[41] On the other hand Swedish law does not have any provision on simplified parliamentary procedure to amend laws in situations where courts have established that Swedish laws conflict with the convention.

In conclusion we can establish that the concept of constitution includes religiously founded or international elements of meta-law nature. And that plurality of law is to take account of. In particular as far as European countries are concerned, international elements, such as the position of international conventions and their application, particularly of the European convention of Human Rights, must be included in a comparison.

6 Constitution and Membership of the European Union

When comparing constitutions involving countries that are members of the European Union (EU) legal plurality also includes EU law. Ever since the Court of Justice of the European Community decided in 1970, in the case *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel,*[42] that EU law shall have supremacy over national laws as well as over their constitutions, EU law has a high ranking position in their constitutional orders. Inspired by the German *so lange* cases[43] the member states do not recognize EU law supremacy over all of their constitutional law, but only the most fundamental human rights and the fundamental structure of their constitutions override EU law.[44] All other national constitutional law is ranked below EU law in their legal hierarchies.

The relation between EU law and national law has been an object of comparative studies, of case law and of political controversy for long, and it is a current subject in journals of European law.[45] The relation is very complicated, as it has many federal characteristics but is not founded on a federal order in the formal sense. It is not based on a constitution but on an international treaty, and therefore it is the national constitution which formally decides about the rank of EU-law in the national legal order. At the same time

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41 Regeringsform (the Instrument of Government), Chapter 2, §19.

42 Case 11/70 *Internanationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

43 *Internanationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel (Solange I)* [1974] 2 CMLR; *Wünsche Handelsgesellschaft (Solange II)* [1987] 3 CMLR.

44 This is e.g. reflected in the Swedish Regeringsform (Constitutional Act) 10 Chapter 6§. An overview of member states rules is done in: Trevor C. Hartley, *The Foundations of European Community Law*, 5th ed. Oxford, p. 243 et seq.

45 The European Union is a model for other organizations in Africa and Latin America, such as the West Africa Economic and Monetary Union, the East African Community, the Central American Common Market, Mercosur, the Andean Community and the Caribbean Community. The Eurasian Economic Union, headed by Russia, has also borrowed some features from the EU.

the national constitutions and their courts have adopted the view of the Court of Justice of the European Union (CJEU) that the legislative power of the member states and of the Union is based on a federal type of distribution of competences, where each legislator is sovereign within its field of competence.[46] Consequently, in cases where national law and Union law contradict each other, the conflict shall be solved by deciding who holds the competence in the field of the matter, the national or the Union legislator. Such questions are decided by the CJUE. It is only if EU law would not be in accordance with such national norms as cannot be delegated to the EU, i.e. the most basic human rights and the fundamental structure of the national constitution, that the question becomes a matter of conflict of norms belonging to the same legal order. In such a case it is up to the national court to decide about whether the EU norm is consistent with the national constitution.

Except for that latter situation the EU enjoy sovereignty within its field of competence and EU legislation shall be applied and its validity shall not be tried by national courts. EU has its own judicial system of review of EU law containing a complete range of remedies permitting the EU institutions and member states to bring action for control of legislation[47], and private persons and undertakings may institute proceedings against decisions addressed to them individually. The line of demarcation between EU and national fields of competence, however, is formulated in the Treaty on European Union and in the Treaty on the Functioning of the European Union in quite a blurred way, and it is the task of CJUE to clarify it via its case law. Just as constitutional courts the CJUE has the task to control the horizontal and the vertical balance of power, and it also has their third task, to determine the relation between the state and the citizens. Human rights of the citizens are not only written down in the EU Charter of Human Rights but they also constitute general principles that have direct effect in the legal order of the member states and that shall be safeguarded both by national courts and by the CJEU. Consequently it is very appropriate to consider the EU constitutional system as a well-nigh federal one and to compare it and the activity of the CJEU with e.g. the constitutional system of the USA and their Supreme Court.

When comparing the EU constitution and e.g. its horizontal balance with corresponding issues in other federal polities it is not enough to make a strict legal analysis. Elements of history, political and legal culture has to be recurred to in order to answer to the question why it has been accepted that interpretations of the US constitution by the US Supreme Court have resulted in informal amendments, and that the oeuvre of the CJEU[48], establishing the main features of EU law, such as direct effect, supremacy and distribution of competences, has been approved by the member states and the public. The

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46 Principle expressed by the European Court of Justice already in the leading case 26/62 *Van Gen den Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

47 The CJEU may declare EU law null and void but only declare that national law breaches against EU law.

48 Under its name in previous treaties: The Court of Justice of the European Communities and the Court of Justice of the European Community (ECJ).

importance of the rule of law and traditional impartiality of courts in western democracies would certainly provide answers, while history, political and legal culture of the Russian Federation would also provide answers to the question why the importance of the supreme courts dwindled since the years 2000 and the executive regained overwhelming power.

When illuminating the role of comparisons of constitutional issues in Europe it is to note that comparisons is a daily practical reality in the work of the European institutions. The European Court of Human Rights compare the law of its members in order to be inspired to make the most progressive interpretation of the European convention of Human Rights that could be accepted by the member countries; and comparison is part of the legislative process of the EU. The proposals to new legislation are prepared in the Commission proper and by the Commission committees consisting of national representatives presenting their national solutions of the matter and comparing them in the perspective of EU legislation; and comparisons of the same kind is done by the Council committees and by the commissions of the European Parliament.

Finally, it may be underlined that comparison of the European Union and its constitutional system with that of federations is done in order to bring the qualities of the Union into relief for pedagogical reasons, but such comparisons has also played a primordial role for reforming the EU in order to make it more democratic and increase its legitimacy. In particular the increase of the power of European parliament in the EU legislative- and budgetary process and in its method of appointing the Commission have resulted from constitutional comparisons.

7 Comparison of Fulfilment of Constitutional Functions in Historic Perspective

In the paragraph two, above, on comparative method, we reminded about that the first step of legal comparison consists of pointing out the question that shall be treated, and that the second step is to define the function of the legal rules or legal institute of interest for the question investigated. Rules fulfilling the same function in the compared legal systems are to be compared. Such comparison results in an understanding about how two or more legal systems have solved the question. The third step of a comparison is to explain why the systems regulate the question in different ways. When making macro comparisons, such as is usual when constitutions are concerned, history and ideology are important explanatory factors. In order to define functions in the framework of constitutional law it is useful to have recourse to concepts concerning functions of constitutions applied by political science. These functions do not vary over time. When comparing to what extent different constitutional orders during different epochs have lived up to those functions, and when explaining differences, history and ideology provide important answers. This short article ends by illustrating in historic perspective the connection between constitutional order and four of its functions.

A *first function* of a constitution is to assure a stable political order. This can be achieved by allowing the power elite of the country to have the constitutional right to be represented in its highest political bodies. The comparison aims at analysing and explaining the development of the composition, position and interrelation of those bodies.

As far as the executive is concerned the constitutional rules about the head of state are to be explained in relation to history, power relations and ideology. Before the break through of democracy royal legitimacy was based on the grace of God, which also legitimized absolutism, well known today in some Muslim countries. Before the break through of the democratic principle the idea of constitutionalism limited the power of the monarch, still holding his power by the grace of God[49], and after its break through the powers of the monarch, such as the Scandinavian ones, are derived from the will of the people as much as are those of presidents, directly or indirectly elected. The power of the Swedish monarch has therefore become as reduced as the one of the German president, while the power of the US president, designed at the time constitutional monarchy was discussed, became as strong as those of a constitutional monarch at the time.[50]

The political power elite is assured that it is represented in the executive thanks to its participation in the government. Before the principle of parliamentarianism guided the appointment of its members, the higher nobility made sure that they were appointed by the monarch to his council, a situation comparable to the appointment of the administration of the US president today. This participation was a necessary step towards the political unification of the countries[51] and according to how this unification developed the representation in government of the lower nobility, of the burghers, of members of the state bureaucracy and of the technocracy grew. Other groups than the nobility organized themselves country wide and expressed their political voice wanting their representation in government. Political parties were formed representing different social groups such as farmers, business, workers etc. and competed for power and representation in government. After the break through of the principle of parliamentarianism the parties are necessary components of governments and the tops of the parties are today's political elites. Comparisons reveal that this development is astonishingly similar in different countries.

As far as the legislative is concerned the question of representation of power elites is fundamental as well. Electoral systems and composition of parliament and its eventual division into chambers are important issues both for comparative constitutional law and for political science. In countries where nationhood is not evident, such as Lebanon or Syria, consisting of different religious groups or clans, the constitution may guarantee that they are represented in parliament. Constitutions may also guarantee that even non-

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49 From the first half of the 19th century until the end of the First World War.

50 Cfr. Richard Albert, *Presidential values in parliamentary democracies,* International Journal of Comparative Law, 2010, pp. 207-236.

51 The higher nobility having strong powers on regional level.

political interest groups are represented. In the one party communist state, the former Soviet Union, the constitution assured representation even of stamp collectors.

The division of parliament into two chambers, one representing wealth and titles and the other numbers and industry is a formula that has been applied not the least in the United Kingdom. The smooth constitutional development there can be explained by the fact that the House of Commons permitted representation of the affluent middle class and gradually of the labour movement as a result of the introduction of general elections, while the nobility retained its representation in the Upper House. The increasing power of the House of Commons reflected development in society as much as the decreasing powers of the Upper House reflected how national wealth was spreading out into more hands and traditional values lost legitimacy.

The constitutional development of Sweden has been smooth too during the 19th and 20th centuries. The constitution of 1809, which in some respects was influenced by the French revolution, retained the traditional division of parliament into four chambers reflecting the major power groups: the nobility, the clergy, the burghers and the farmers. New legislation could only be passed if three chambers voted in favour of it. The high nobility was initially represented in the council of the king (government). However, the old four chamber parliamentary order could not resist development of society despite efforts of adaptation. New social elites were e.g. gradually integrated in the chambers, such as the inclusion of university professors in the chamber of the clergy, but in 1866 a two chamber system was established. The parliamentarians of the first chamber were elected indirectly by the regions while elections to the second chamber were direct and general. However, the relation of wealth and power was reflected by an electoral law on graded number of votes depending on the wealth of the person. The graded voting power was gradually reduced giving access to parliament to the labour movement in a scale proportionate to its numbers. On the European continent it has been more difficult to decide about constitutional changes that reflected new societal power realities. In Germany and Austria changes were decided after revolutions or wars, such as those between the two states themselves and against Denmark and France during the second half of the 19th century; and in France and Russia proposals for reform were not accepted voluntarily by the traditional elites and constitutional changes were effectuated first after revolutions had occurred.

A *second function* of a constitution is to limit state powers. The division of state powers into three branches, the legislative, the executive and the judiciary is since Montesquieu the classic way of limiting state powers. The US constitution, with its clear separation between the executive and the legislative as well as of the judiciary is the most apparent application of his ideas, but it is perhaps the constitution of the Swiss federation, with its emphasis on cantonal powers and use of referendum on local as well as on federal level that limits central powers the most.

With the application of the parliamentarian principle, saying that government shall have the confidence of parliament, the same political party (-ies) have the

upper hand in both government and parliament and as a consequence the strict separation between the two political branches is somewhat diluted. The independence of the judiciary is therefore a necessary guarantee for limitation to state powers. The supreme courts were originally part of the royal power but in accordance with the ideas of Locke[52] they have become separated, at least formally, in most countries. In Locke's native country, Great Britain, the 'supreme court' was an independent unit of the Upper House of the parliament until the establishment of the Supreme Court of United Kingdom in 2009. In Sweden an independent Supreme Court (Högsta domstolen)) was established in 1789, but it was a formal requirement that its judgements were signed by the king until a new constitution was adopted in 1974.

In order to understand the position of the courts a comparison should also include the question whether they can control the powers of the political bodies by exercising judicial review of their acts. If the courts do not have such a competence neither the division of power between the political bodies nor the human rights of citizens can be maintained. Judicial review can be exercised according to two models; one is where ordinary courts are competent to exercise judicial review, e.g. according to the US model, and the other is where a special court has been invested with such competence e.g. as in Germany.

The function of limiting the power of the state includes also the relation between state powers and freedom of the citizen, i.e., the question of how human rights and liberties are assured. A comparison of historical development, ideology and religion explain differences of conceptions, legislation and efficiency of control by courts that human rights are observed. An analysis cannot omit the historical written documents starting with the English *habeas corpus*, in the year 1215, passing by the American and French declarations of human rights, 1776 and 1789 respectively, including various national constitutions and assessing the importance of the UN Covenants on human and social rights, the European and Inter American Conventions and the EU Charter of Fundamental Rights.

While the first function of a constitution is to assure stability to the political order by giving voice and representation of the political elite in the highest state bodies, its *third function* is to integrate various social groups into society. A consequence of the Swedish constitution of 1634, establishing a parliament consisting, of four chambers, was that the farmers were an integrated part of the social system and it gave them a voice, something that was a unique state of things in the world at the time. However, it was the French revolution of 1789 that aimed at integrating all the people by abolishing the guilds and establishing a liberal societal order based on the mottos freedom, liberty and fraternity. By establishing citizenship and the term citizen, *citoyen*, the basis was laid of the nation and of the sovereignty of the people.

Nevertheless, a condition for real integration is that every citizen enjoys an equal right to vote in electing members to the parliament according to the formula one citizen one vote, direct universal suffrage. Questions relating to

52 John Locke, *Two Treatises of Government*, 1698, Cambridge University Press, Cambridge, 1960.

defining the principles determining the constituencies are of importance in that regard and so are laws on voting systems such as those on majority rule, proportional representation or plurality voting. Other constitutional rules are of importance as well such as the right to stand for elections, the freedom of association, the right to form political parties and the right for political parties to take part in parliamentary decision making, as they give a real content to the individual right to vote and integrates different societal groups into the nation.

However, other rules may more directly prevent voting rights from being equal and aiming to give more influence to wealthy people such as relating the number of votes to income or property. Such rules were common in all countries until the end of the First World War. Other rules may exclude religious or ethnic groups from the right to vote. However, the most striking of such rules were those preventing women from the right to vote. In Sweden women had some limited rights to vote under some conditions depending on wealth and tutelage already in the early 18th century, but they had to wait until 1921 in order to enjoy the full universal suffrage. New Zeeland was the first country, already in 1893, to extend the right to vote to women, but it was Finland that was first, in 1906, to have both universal suffrage and the right for women to stand for elections. Switzerland introduced full universal suffrage first in 1971, but women in the canton of Appenzell had to wait until 1991 to vote on municipal level. The reason for those different dates are to be explained by history and religion together with the importance of referenda in Switzerland, while culture and religion explain why Saudi Arabia will extend voting right to women first in 2015 and why the Taliban in Afghanistan abolished the right in 1996.

Of late other groups than citizens have been integrated into society by extending the right to vote in municipal elections to foreigners having resided in the country for a number of years. Some countries apply such rights to all foreigners, while other countries have rules privileging citizens from countries having special ties to each other such as members of the Commonwealth of Nations or the Nordic Council.[53] The European Union have rules on the right for EU citizens residing in another EU country than their own to vote in EU elections as well as in municipal elections in the country where they reside.

A *fourth function* of a constitution is to express the values and the orientation of the political institutions of the country. Those are mostly stated in the preamble of the written constitution or could be understood by reading its substantive contents. A constitution embodies the identity of the nation, of its symbols and of its aspirations. In spite of the fact that the United Kingdom lacks a written constitution its monarchy expresses a symbol of the history of the country and of its greatness. The French constitution of 1958, of the fifth republic, legitimizes the governance that it establishes by referring to the values of the French revolution, and the declaration of human rights of 1789 is symbolically included into its preamble. The communist constitutions during

53 Nowadays the Nordic countries have extended that right to all foreigners.

the 20th century had on the contrary a programmatic character.[54] The October revolution and the power of the industrial- and agricultural workers organized in the communist party have symbolic value and the duty of the state to radically remoulding society is confirmed. World revolution is an aim stated in the Constitution of 1924, the Constitution of 1936 invokes the achievement of the dictatorship of the proletariat, and finally, the Constitution of 1977 recalls the October revolution and the leadership of the Communist party headed by Lenin in order to conclude that the dictatorship of the proletariat having been fulfilled, the Soviet state has become a state of the whole people and can be qualified a developed socialist society. Starting with the 1936 Constitution, social human rights were included and made part of the economic model.

Human rights provisions in constitutions are of particular importance for pointing out the aims and nature of the state. In a comparative and historic perspective it can be tested how the introduction of human rights provisions in constitutions during the late 18th and the 19th century coincided with the passage of countries from *l'ancien regime* to constitutionalism and liberalism. They abolished privileges of the nobility, put a limit to the power of the state and of the guilds and guaranteed the liberty of the individual. The widening of the human rights during the 20th century to not only comprise the civil ones but also economic and social rights, inspired by social liberalism and socialism, reflected political ideas about a more active role of the state to assuring social welfare of its citizens. Even the EU constitution, expressing its aims in the Lisbon Treaty preamble and including the EU Charter on Human Rights as a part of it, reflects how the welfare state constitute a common core of the member states and of how they wish the EU powers to be used and visualized. Maybe that the values and orientation of the EU member states were best expressed already in 1949 by the German Constitution Article 20 stating that Germany is a democratic and social federation where all the power of the state proceeds from the people and legislation is made in accordance with the constitution and applied according to the rule of law and where all Germans have the right to make resistance against someone who sets aside this order, if there is no other remedy.

54 Günter Frankenberg, *Comparing Constitutions: Ideas, ideals and ideology – toward a layered narrative*, International Journal of Constitutional Law, 2006, pp. 439-459.

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