Common Law and Continental Law: Two Legal Systems

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Some Elements of Comparative Constitutional and Administrative Law with Regard to those two Legal Systems

1 Introduction

This paper tries to analyze the main differences between common law and continental legal systems with regard to administrative law and taking into account some aspects of basic constitutional law (though the UK does not have a written constitution). Although both legal systems are committed to the constitutionalism of the modernity, their diversities are much more fundamental than one would imagine from legal systems having the same ideological roots.

When comparing systems of common law, one has to be aware that common law developed differently in its two main historical places: England and in the United States, where the Supreme Court, with its power to review the constitutionality of statutes, has added many new principles on common law concepts. This paper will on certain points take these differences into account but cannot go into all important details that may have an impact on the legal development of particular members of the Commonwealth.

With regard to the continental law system we shall focus mainly on the French and German concepts, which with regard to administrative law and constitutional review have developed somehow different administrative law principles. These systems have had different impacts on almost all European countries. In addition, the French system is followed within the former French colonies, which did not however adapt to the very recent French developments, in particular not to the new French concept of decentralization. Parts of the former French colonies, and also the former socialist countries of Eastern Europe, as well as China, have followed the principles of the continental law system. Japan, adopting already in the end of the 19th century (liberalization from the

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1 When we address Europeans in this paper, we mean those countries on the European continent that have adopted the civil law concept. When we use the label “common law countries” we mean all countries, including the US, committed to the common law, being aware that in the UK Scotland has been influenced by continental law and in North America Louisiana and Québec have some roots in the Code Napoleon.
top) some basic principles of the German Law (BGB) and of the French legal system, also belongs to the family of the civil law countries.

Moreover, one has to be aware that comparative analyses among different countries within the respective system may be very different. Countries which adopted the continental system have established their own specific statutes and laws which differ considerably from territory to territory. In the common law countries there are to be detected much more similarities among different countries. The procedural rules, for instance, the different requirements for evidence in different procedures have the same roots and often former colonial courts find their precedence in the former English Courts of the 18th century and even earlier.

In a first chapter the paper will analyze the historical roots of these differences, focusing in particular the differences in administrative and partially in constitutional law. Then the paper will shortly deal with the consequences of globalization, and in particular with the question of how far human rights may have a universal impact. Finally we shall deal with new tools such as the criteria of World Bank and International Monetary Fund on “good governance”.

2 Continental European Public Law in the Tradition of Hobbes and Napoleon

2.1 Notion of the State

Common and civil law countries have a different understanding of the “state”. Continental Europeans perceive the “state” as the “Leviathan”, which by its authority or sovereignty is the true and only source of law and justice.² The “pouvoir constituant” instituting the state can be seen as the “big bang” out of which the universe of justice, law and legitimate state authority, including the rule of law and human rights is evolving.³ This universe, however, is of course defined by the territory of the state and its authority. The perception of the state as a collective unit containing all elements of justice and law and established by the social contract does not correspond to the understanding familiar to the American legal cultural tradition, which has been influenced by the British constitutionalism, particularly that of the 17th century.


³ That may be one reason why Europeans are more prepared to accept some particularities of human rights against the universalist concept of the US.
Indeed, the American tradition finds its roots in a “Lockean” concept of the state with limited sovereignty and the idea that men are governed by law and not by men. Government and not the state are ruled by law and therefore have to be perceived only as a moderator of the social groups seeking the happiness of people. In the American Declaration of Independence one can find the sentence: “We hold these Truths to be self-evident, that all Men are created equal, that they are endowed, by their CREATOR, with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.” Within this sentence we find two important differences with regard to the continental law concept:

First: the idea that rights are given to the people from God has not been so familiar to continental European constitutions. Based on this view, several American courts consider even that their legitimacy to decide on the rights of the people is directly based on the pre-constitutional rights given by God. According to the historical European tradition, rights are given by the state, that is, by the political authority, and not by God. For this reason, continental Europeans have a different view on the rule of law, which is not considered as a pre-constitutional limit of sovereignty but rather as the obligation to observe the constitution imposed on all state bodies by the constitution.

Second: The idea that the individual pursuit of happiness is on the same level as individual liberty can only mean that the pursuit of happiness is considered to be an unalienable right of the individual and that it is up to the individual to pursue their happiness. Individual happiness, and in particular welfare, are not a responsibility of the state or of the political community. Such “Weltanschauung” could never been found in a constitution influenced by the continental law system. For this reason Europeans are much more inclined to support constitutions which contain social rights. For example, Article Two of the Swiss Constitution requires that welfare be considered as a common endeavor to be achieved with the support of the political community, that is, with the support of the state. The Europeans believe that the pursuit of happiness depends on the common welfare and thus depends on the policy of the state.

2.2 Different Concept of the Constitution

The French revolution established the parliament (assemblée nationale) as the sovereign power which enacts the statutes or bills as representative of the sovereign nation. The parliament is the only law maker and the roots of law are deduced from the parliament. The statutes implement the

\[^{4}\text{Article 2 par. 2: The Confederation “shall promote the common welfare, the sustainable development, the internal cohesion and the cultural diversity of the country.”}\]

\[^{5}\text{Art. 29 of the Déclaration des Droits de l’Homme of 1949: “L’individu a des devoirs envers la communauté dans laquelle seule le libre et plein développement de sa personnalité est possible.”}\]
volonté générale (Rousseau’s "Volonté Générale")°. This concept was basic for the coming state then ruled by Napoleon. Napoleon conceived and organized the State as an instrument enabling him to change the conservative feudal society into a liberal society based on the equal rights of the citizens. This policy of the empire of Napoleon has strongly influenced legal thinking within the liberal Europe, as well as the socialist/communist Europe.

According to continental European constitutionalism, constitutions are not only conceived as instruments to limit governmental power, but they are also seen as the tools to set up, organize and empower the governmental branches in order to establish the liberal state in the 19th century, and later the social welfare state of the 20th century.7

Napoleon - influenced by this instrumental view of the state - conceived the state as an instrument to change society and therefore wanted the administration to be immune from the conservative judges. Thus he invented the concept of public law, which should not be under the jurisdiction of the conservative courts. With this new public law the administration has the power to execute statutes without being accountable to the traditional judges. The possibility for protection against misuse of administrative power was only introduced slowly by the Conseil d’État, which during the 19th century developed some basic principles of administrative law. But even today the power of the administrative courts is limited and the basic concept of administrative law is still based on the assumption that the state is above its subject and thus is not a party on equal footing with its adversary in an administrative process. The administrative court judge has limited powers to implement their decisions with regard to the administration. In addition the judge can only quash administrative decisions and has no power to enforce a specific prohibition or ordered activity of the administration by ruling them to be in contempt of court.

This difference is crucial for the understanding of countries being part of either the civil or common law system. The power of the administration and in particular of the police is different in either of these countries. In common law countries one has to be aware that the courts have much more independent power than in countries with the civil law system. For instance, a case against torture decided by the Supreme Court of Israel could only be initiated with a writ of injunction familiar to common law

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° Art. 6 de la Déclaration des Droits de l’Homme 1789: « La loi est l’expression de la volonté générale. »

7 Article 5 of the Swiss Constitution: (1) The law is the basis and limitation for all activities of the state.
but not to civil law. Courts, which according to the continental law system can only quash decisions, have no possibility to prohibit torture.

2.3 Locke’s Natural Law

The American Declaration of Independence is based on a “Lockean” concept of natural law, the right of resistance and the right of self-determination. The understanding of human rights as pre-constitutional rights limiting the entire state authority still faces difficulties being implemented in European constitutional thinking. According to European thinking, human rights are created by the constitution. But the “Pouvoir Constituant” has a moral, not a legal, obligation to introduce fundamental rights and effective protection against their misuse by governmental power into the constitution.

This may explain, for example, the reluctance of the German constitutional court in Karlsruhe to accept international rulings with regard to human rights, because it would violate the sovereignty of the state. Americans, on the other hand, refuses to be controlled by international courts not only because they consider themselves as the only legitimate nation to decide on the universal implementation of human rights\(^8\), but also because they deny international courts the legitimacy to rule on inalienable rights which only courts with the American tradition and know-how have the legitimacy to decide upon.

2.4 Constituting a State and Constituting a Government

In 1787 the American constitution not only constituted a new government, but much more it constituted a new state, a unity composed of several already existing sovereign states and members of the confederation. In order to give legitimacy to this new state and to convince the European monarchies of the legitimacy of the American independence the constitution, according to Thomas Jefferson, had to make evident six basic pre-conditions:

First: it had to base the declaration on the universal principle that people have been given inalienable rights by the Creator.

Second: it had to prove that the English colonial government violated inalienable rights.

Third: it had give evidence that a people has a right of resistance out of the inalienable rights against a state power violating those rights.

Fourth: it had to demonstrate that the power to govern a people comes from the people, but that this power is limited to the inalienable rights.

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Fifth: it had to determine the people having the power to set up a new government. The American Constitution for instance starts with “We the people of United States”, this is a concept which is open and includes all persons immigrating into the US. The melting-pot is at least the basic constitutional formula. However, in the very beginning the Native Americans and the African slaves were excluded from this formula, a problem which is not solved up to our days. Based on this concept, Americans can easily imagine that people, however fragmented they are, can all over the world establish new constitutions or new states. They have difficulties to understand that in most traditional states the peoples have historical roots linked to the territory.

And sixth: it had to give evidence that the new government would be a government of consent and would thus apply and fully respect the inalienable rights of the people. This explains the reason why American foreign policy has regularly supported movements for de-colonization and now under the Bush Administration declares liberty of the people as basic for peace.

In general, European constitutions are the result of the liberal philosophy of the French revolution. They did - except for Switzerland to a certain extent (the confederation existed for centuries) - not constitute a substantially new state entity, or national unity. They changed the government, the legitimacy of the state and in some instance the society. Thus constitutions constituted only a new government not a new state unit. But the new democracy was organized for the same state unit and for the same subjects living in the same territory. Today, the making of Europe as a new Unity is for the first time in history a unique challenge of historically new constitutional dimension.9

The issue of a government confronted with a non determined territory, as for instance Serbia, is not at all familiar to the tradition of most European states and also for Americans. How can democracy and the rule of law be established in a “state” that has no determined territory? The state does not know which people within what territory are the holders of sovereignty.

2.5 Rule of Law vs. the Rule of the Law or the Etat de Droit (Rechtsstaat)

Finally, we have also to be aware that the very principle of the rule of law so often invoked by the international community has a different meaning

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in the European and the common law traditions\textsuperscript{10}. The rule of law, according to the European perception, limits the government to the normative decisions of the sovereign established in the constitution. According to the saying of Marbury v. Madison\textsuperscript{11} that the American government is a government of law and not of men, the rule of law has pre-constitutional meaning, which goes far beyond the European understanding of the \textit{Rechtsstaat}, which only guarantees the correct application of the constitution by the state authorities.

With regard to the content of the rule of law, the Europeans are more inclined to the substantial rights, while for reasons to be explained later, the common law countries consider the due process content and in particular the \textit{habeas corpus} as the most substantial right. In the European continent substantial rights influence the legislature and are important tools for the constitutional review of statutes. In common law countries the courts empowered by the basic procedural rights will implement justice even though substantial rights may not be given constitutional priority.

For this reason one should be aware that the introduction of procedural rights or substantial rights in a constitution for a country with a civil law or common law tradition has a very different impact on the reality. For a continental judge, substantial rights are crucial, procedural rights have direct an impact on its jurisdiction. For a common law country procedural rights are core rights for any due process, substantive rights may not give the expected impact a European adviser would expect.

\section*{2.6 Federalism}

American Federalism was established in order to strengthen the powers of the states of the confederation to defend their independence with regard to the UK. The strong president and commander in chief of the army is the result of this intention. Internally, the federalists defended this totally new construction as a means to strengthen democracy and to limit governmental power not only horizontally but also vertically. Today federalism is often looked at as a means to accommodate diversity. This was historically one of the purposes of Swiss and later Canadian, Indian, Belgian and then Ethiopian federalism. But it was neither the purpose of German nor of Austrian federalism.

The construction of American federalism is a mirror of the common law system. It is based on the very idea of setting up two parallel sovereignties with, in consequence, three sovereign branches of government. The federal and the state governments were installed with


\textsuperscript{11} Marlbury v. Madison, 5 U.S. 137 (1803).
their own legislatures, executives and judiciaries. The federal judiciary was given jurisdiction on federal laws, the state judiciary on state laws. Federal statutes were to be implemented by federal agencies and state statutes were to be implemented by state agencies.

The rights granted in the first ten amendments of the federal constitution primarily were to protect the people with regard to misuse of powers of federal agencies. The courts of the states, as successor common law courts of the former British courts, did not need special constitutional guarantees. Only the civil war amendments (13th, 14th and 15th amendments) were introduced in order to bind the branches of the federal as well as those of the state governments.

In the continental system such a concept would not be possible. In the continent the main holder of sovereignty is the legislature as the only law maker. Thus, federalism is mainly constructed by the vertical separation of powers of legislation. The federal units are in general responsible for implementing state and federal law. According to the European legal view, law is a unity. Each law is part of this unity. The laws of the federal units are integrated into the hierarchy of law under the federal constitution. Thus the federal units usually have to administer the federal law by their proper administrative agencies. The courts dependent on the federal units have jurisdiction on federal and state law and the federal court can quash any lower court decision on the grounds of federal statutes or the federal constitution. The federal law has supremacy over state law.

Thus, in continental legal systems, federalism is mainly designed along the legislature, while in the common law system federalism has to take into account the division of sovereignty of the three traditional branches of government.

When federalism as a tool to accommodate diversity is used as a constitutional tool in conflict or post-conflict areas, it is very important to bear in mind, that in civil law countries the main concern with regard to federalism is the distribution of legislative power. In a common law country one has in addition to discern also the jurisdiction of the courts and in particular to decide how conflicts among different court jurisdictions have to be solved. As in common law countries the courts are also law-makers, this distribution of court jurisdiction is of central interest. One has in particular to look also into the question of which courts will continue with the traditional common law cases. In the US, for instance, the states have remained to be the traditional common law courts.
3 Basic Differences Between the Two Systems

3.1 The Hierarchy of Norms

Public law, according to the European tradition, is perceived as a hierarchy of norms developing out of the constitution, by statutes and bills, decrees and ordinances or agency rules depending each on its mother-statute and all of them depending on the constitution, which can be compared to the first “galaxy” developed out of the “big bang”. This idea of the “Stufenordnung”, the hierarchical order of legal norms according to Kelsen, was the basis for the establishment of constitutional review in continental Europe. According to this understanding, the source of the law is the authority of the sovereign and not the reason or the wisdom of court precedents.

Common law developed out of the Old Saxon and then Norman traditions. After the invasion of the Normans, the Saxon courts still were asked to decide on controversies. However, only the Norman common law courts were fully credible in the view of the people, since only the sentences of those courts were executed. Thus, people referred more and more to the Norman courts. This old history explains two important elements for the understanding of the common law tradition:

First: The law was decided by the courts and it depended on the tradition and the precedents of the specific courts. Thus law was not a unit, but it was linked to the court that had the jurisdiction to decide on the specific writ. The idea of a unified legal system, which includes all possible legal rights and obligations, is not familiar to the common law tradition.

One important consequence of this is to be seen in the fact that according to the common law tradition international treaties are not part of domestic law. They can only be within the jurisdiction of the domestic courts if international treaties are incorporated by legislation. Thus for a long time the British courts could not implement the European Charter of Human Rights until the enactment of the Human Rights Act in 1998. In Israel, the Supreme Court, although applying the Hague Law on War as customary law, has no power to implement the Geneva Conventions because they have never been incorporated by the Knesset. Whenever a treaty is concluded with a country of the common law system, the treaty must be incorporated into domestic law if it is to be applied by the courts. One important exception is United States. According to Section Two of the constitution on the scope of the judicial power, the constitution clearly provides the monistic concept of direct applicability of

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international treaties. (This is one of the articles the Swiss founding fathers copied from the US Constitution) This is, to my knowledge, the only exception with regard to common law countries. One has to be aware of a catch 22, which is the power of the Senate approving a treaty with a two thirds majority. The Senate decides by approving the treaty which provisions are self-executing!

Second: According to the concept of common law, a right or obligation can only be created by the judge and a sentence of the court. The continental view, that already statutes contain rights and obligations, is not familiar to the common law tradition. Thus a human right may be a directive for the court in order to respect it within its decision. However, it only an enforceable right if it has been decided by the court.

It might well be that for this reason it is easier to accept the specific jurisdiction of the traditional customary courts in an African country with a common law tradition than in an African country with civil law tradition committed to a concept of unity of the law.

3.2 The Napoleonic Public Law Concept

Napoleon constructed a new realm of legal norms, which he called public law, not to be controlled by, and therefore separated from, the traditional private law. This decision of Napoleon has probably had the most far reaching consequences for the different developments and different legal cultures between countries with a common law and countries with a civil law system. By separating public law from private law, Napoleon aimed at an efficient administration, which he installed as the state-instrument to change the feudal society into a liberal society.¹³ The state - according to his opinion - could only be an efficient instrument for social engineering if the state administration would not be under the jurisdiction of the traditional and conservative courts and judges.¹⁴

Thus the construction of public law had a very pragmatic and political reason: to give more power to the executive and the administration. Administrative courts have been established in the different civil law countries, though they still have very limited power with regard to their jurisdiction over the state administration. They lack decisive remedies to enforce their decisions against public agencies that are not willing to follow their commands. They can only quash administrative acts of


administrative authorities. There is no contempt of court possible, neither with regard to administrative authorities nor to civil servants. On the other hand, citizens are still perceived as subjects and not as partners of the administration. The “public law” gives the administrative authority the power to issue unilateral decisions or administrative acts with almost the same obligatory force and authority as court judgments.

3.3 Notion of Authority

Having its roots in medieval Church law, which was based on the ideology of the “king by the grace of God”, the very notion of hierarchy in the sense that higher instances decide better, know better, understand better and judge more justly, became crucial for the European legal culture. Thus the level of the authority to issue norms, or administrative decisions or even judgments is even more important than the content. What is important is not what has been decided but who has decided. It is not the procedure which guaranties legitimacy, “good law” and justice, but it is the higher instance which is closer to the roots of justice than agencies on a deeper level of state-hierarchy.

This leads to a different concept of law compared to the common law view. According to the European understanding, the one who in the right should win the case. It is the judge who has to know what the rights and obligations of the defendant are. The law and its knowledge come from the authority. This position of the authority probably goes back to the Middle Ages tradition of the authority of the Catholic Church. According to the self-understanding of this period, the highest authority is the closest to God. Thus truth and justice are best guaranteed by the highest authority. The judge most close to the highest authority thus can at best find the law, wisdom and justice.

As soon as the “King by the grace of God” was replaced by the people, the authority representing the people became the highest sovereign body. Thus the French Assemblée Nationale is the very holder of the sovereignty of the nation and the highest unquestionable and unaccountable authority.

The view of the common law tradition is quite different. According to this perception, the one who wins the case is right. Rights and obligations are not given by the law, they are determined in cases decided by the court, and with an adversarial procedure. Already in the 17th century the courts decided criminal cases with a jury randomly chosen from among the common people. This jury was the connection between the people (democracy) and the King (or the judge, as a servant of the crown). Thus the judge was not considered as the only one who knows what is just. Only together with the jury, could he decide who is right and thus wins the case. With the jury trial the procedure became of primary importance. The parties had to prove their case and bring evidence to the jury, which decided only based on evidence brought to the court. Equal chances of
the parties, which were adversaries on equal footing, were the primary aim to be achieved by just procedures. Thus, the procedure before the jury became the very guarantee of justice. For this reason, the jury trial is the best guarantee of democracy because the jurors are chosen randomly among the common people. Elections may be corrupted or misused by populist propaganda but the choice of the jurors can not be corrupted.

Thus, for instance, in the United States labor law made by the legislature was criticized as being much more partisan in the interest of the employers. However, this one-sidedness could be corrected with court sentences made by the jurors and the judge. As the sentence of the court, based on the contempt of court, could be executed and in extreme cases the court could even send a governor not fulfilling its orders to prison, the credibility into the democratic system was re-established.

Based on this high importance of court decisions, the fact finding procedure is the indispensable precondition for any sentence and has become the primary focus of justice in the common law tradition. Education of procedure is of highest importance for any lawyer in a common law country, while in civil law countries the main focus of education is on substantive and not on procedural law.

Moreover, this common law perception found, in particular in the United States, a new ideological basis in connection with Calvinism, according to which, the fate of every human being in the other world is pre-decided. However, one can get a sign of one’s future fate in the other world already in this world. If for, instance, a person is successful in this life, he/she will also be successful in the other world. This faith makes success a symbol of the grace of God. Thus, the one who wins a case is not only in the right but is successful and the outcome of the trial is a sign of grace of God, that is, of justice! Thus the outcome of a case if both parties had equal chances in the procedure is in conformity with justice. This is the basis of today’s legal realism in the US and of the judge as law-maker.

With the French Revolution, the King by the grace of God was replaced by the sovereign nation or people, which was enabled as the highest instance to decide what is just, good and correct. Thus, the democratic sovereign became the only source of the law and the parliament as legislature received the “monopoly” of law making within the nation-state. The realm of the law is limited to general democratically approved legislative norms. The judge as authority to create law has been abolished. Thus the common law idea of democracy also being guaranteed by the jury trial has become not at all familiar to the European legal culture. From this results a different understanding of democracy, democracy which has to legitimate the legislature but not the courts. The courts are legitimated by the legislature.

Taking into account these different perceptions, one has to acknowledge that the making of a new constitutional basis in a country with a civil law
tradition is easier than in a country with a common law tradition. In the civil law system, the constitution can establish a legislature, which from scratch can design and establish a new legal system. The revolution in the common law tradition will always be somehow limited, as the court system can not easily be replaced. The court will remain law makers that justify their sentences by taking into account the old traditional wisdom of natural justice established by the British courts through centuries.

One should also consider that in a country with a common law tradition, the traditional courts cannot be mutated into a legislative body, a proposal made by the Koffi Annan proposal for the solution of the conflict in Cyprus. According to this solution, the Supreme Court would have become the super-mediator with legislative and electoral competences in all stalemate situations. A common law court has to stick to its traditional function, that is, to decide on cases and controversies.

3.4 Prerogative Writs

According to common law, remedies available to the subjects defending their interests with regard to the administration, are determined by the writs which give the power to the court to decide on certain specific issues. The traditional writs of the courts were the common law writs and in particular the writ of injunction. Based on a writ of injunction the court can order the defendant, who may be a civil servant, to pursue a given purpose or to abstain from a certain intended activity. If the order needs to be executed, the court can punish the defendant for not pursuing the court’s order by ruling them to be in contempt of court.

The main problem with regard to such writs was the fact that writs against the servants of the Crown were in early history not available, as the court was also installed by the Crown and could thus not order or prohibit any activity to a servant of the Crown. These writs have been introduced only slowly. They are called prerogative writs because they are special orders given to the court in general by the Lord Chancellor, originally on behalf of the Crown. Based on these writs the court is given the power to order specific measures to other servants of the Crown (e.g. head of a prison, police etc.), to review specific decisions, to provide certain measures or to prohibit an intended activity. The first and most important prerogative writ was the writ of *habeas corpus*, followed by the writ of *mandamus* and then the writ of *certiorari*.

As already mentioned, the prerogative writs were first given to the court by the Lord Chancellor. However, some of these writs, in particular the writ of *habeas corpus*, became part of the traditional writs to be decided by the courts without a specific mandate from the Chancellor. Since these writs were given to the ordinary courts, the writ, once introduced, gave the subject as the plaintiff equal procedural chances and opportunities with regard to its defendant, the public administration. The administration and private party are on equal footing in such a procedure.
In addition, the court had the ordinary powers to execute the order with the contempt of court, that is, the possibility to punish the civil servant if he would not fulfill the order. For this reason, the defendant in a case against the administration was not – as in civil law countries – the authority or the administrative office but a specific civil servant responsible for executing the orders of the court.

On the continent, the courts were never given the power to order or to prohibit special measures or activities to the civil servants. The authority of the state could not be sued in a traditional private law court except for damages if the authority acted as a private person. Even today, the administrative courts can not issue any order to a civil servant or a public body. They are not given the power of contempt of court, that is, the power to punish an administrative official for not fulfilling the orders of the court.

In the Watergate scandal, for instance, the judge of a federal district court (lowest instance) could order President Nixon to hand over his famous tapes. Such an order would not be possible, for instance, by any Swiss court. In any administrative case it is not the individual person which can be sued before the administrative tribunal but only the authority, i.e. the office of the President but not the President as a person. The administrative court thus only has the power to review administrative decisions and, in case the decision is considered to be *ultra vires*, to quash these decisions. This remedy is close to the prerogative remedy of *certiorari*.

### 3.4.1 Writ of Habeas Corpus

The writ of *habeas corpus* gives the judge the power to order a civil servant (usually the head of a prison or the police) to bring the defendant to the court and to justify their arrest. If the court considers the police have acted *ultra vires* it will release the prisoner. The writ of *habeas corpus* is the oldest, most traditional and most important of all prerogative writs. It was several times enshrined as a basic freedom and has it roots in the *Magna Charta* in the *Habeas Corpus* Act of 1679. In early times the writ of *habeas corpus* had to be granted by the Lord Chancellor. Later the *habeas corpus* became a writ only to be decided by the court.

*Habeas corpus* is considered to be the core of human rights in common law countries. As the dignity of men in continental law has become the central and basic human right, so did *habeas corpus* become in the common law system. According to this perception, a country that does not grant *habeas corpus* has no real commitment with regard to human rights.

This essential focus on procedural human rights is typical for the common law perception of rights. As already mentioned, in the common law perception the one who wins the case is right, and according to the
continental European perception the one who is right should win the case. If rights and justice depend on the ruling of the court in a specific case, the right to guaranteed access to the court is the most essential, as without access to justice there is no right and in particular no human right.

Today the writ of *habeas corpus* is available against any restriction of personal liberty by the state administration: imprisonment, custody, enforced delivery to a psychiatric clinic etc.

The procedure is an oral procedure. The judge has to see the defendant in person, while in the continental law system such procedures are in most cases written procedures.

Several years ago, when I had the opportunity to visit the Chief Justice of the Supreme Court of Israel, I saw several persons in poor clothes waiting in the corridor. As I was later told, those persons were all prisoners asking for *habeas corpus*. They were waiting to see the judge of the Supreme Court who was charge of their case. In what civil law country would a prisoner have the opportunity to defend him/herself before the judge of the Supreme Court?

In any constitutional procedure of a country with common law tradition, *habeas corpus* must be given the first and most important guarantee, which of course includes the independence of the courts and the freedom of well educated and trained lawyers. Habeas corpus is the core of the rule of law in those countries.

The reason why the Bush administration kept the al-Qaeda prisoners in Guantanamo was to avoid the obligation to respect their *habeas corpus* rights. They wanted to exclude any American jurisdiction over those prisoners. In Hamidi v. Rumsfeld the Supreme Court however decided on June 12 2004: “*In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen’s core rights to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator.*” Thus the Supreme Court held that the constitutional jurisdiction of the court is not limited to the territory of the US but extends even to Guantanamo.

**3.4.2 Mandamus**

The writ of *mandamus* grants the court the power to order or to prohibit certain measures or actions to a civil servant. Originally it was used a writ to order specific action to local authorities, and in particular to the police. Later the writ was also granted to private persons to require or prohibit specific measures or rulings of the administration, or even of the executive. Today the writ of *mandamus* is replaced by the common law writ of injunction.
In the famous case Marbury v. Madison (1804) Chief Justice Marshall had to decide on a writ of *mandamus* against the president, who should be ordered to engage Marbury as a civil servant according to the statute and to his nomination by the former president. In the other famous case, Brown v. Board of Education, the writ was an injunction to order a school that traditionally accepted only white children to also accept Afro-American children. The writ can also be used to issue a decree or a directive, or to abolish decrees, such as the directive ordering doctors not to give a prescription to teenagers for birth control medication.

When I went to Israel as a visiting professor, I was asked to help the Swiss charity Caritas who were having difficulty getting a license to build a children’s hospital in Bethlehem. In a civil law country one would have to find political means in order to change the attitude of the authorities. In a common law country *mandamus* is the best available legal remedy, which enables the plaintiff to require a license for building this hospital to be issued. We thus initiated a court procedure based on *mandamus* in order to get this license.

### 3.4.3 Writ of Certiorari

*Certiorari* is used as a writ to quash a specific decision of the administration. In these procedures the court reviews whether an administrative decision has been made *ultra vires*, that is, whether it has acted without specific power provided in the legislation, or granted based on prerogative or residual powers.

The court does not examine the discretionary power of the administration. It only controls the misuse of discretionary power and the violation of natural justice (due process). With this writ, for instance, public licenses or other decisions which are close to the European concept of the administrative act may be quashed. Contrary to the European civil law system, unlawful decisions are null and void. In the continental system, one has to contest the unlawfulness of the administrative decisions within a certain time limit. After this time has expired, the decision will be valid and its unlawful contents will be healed. This would be against the basic philosophy of common law. An act made *ultra vires* can never become *intra vires*. It remains unlawful and is from its very beginning considered to be void.

If the court rules for the plaintiff that the decision is unlawful, it quashes the license, grant or whatever other type of administrative decision.

### 3.5 Due Process / Natural Justice

The basic principles of due process or of natural justice as developed by British jurisprudence are the rights to have access to a court, for an independent judge, to have access to all evidence, to the principle of *audiatur et alter pars*, *nemo judex in causa sua*, etc. In some cases, and in particular in the US Constitution, due process also includes the right to
a jury trial. These principles were developed over centuries, mainly in criminal cases. The basic difference between procedures in the common law and continental law system is the totally different approach to fact finding.

The main purpose of a procedure is to give the best guarantees for optimal fact finding, taking into account the opposing interests of the different parties. The fact that common law countries are much more opposed to the principle of Swiss banking secrecy is certainly also due to the infringement of this secrecy into the traditional power of the court to require all evidence necessary required by the parties and necessary to investigate the truth. This is apart from the fact that the distinction of civil law between criminal behavior and tax-evasion as only violating administrative orders is contrary to the concept of criminal law of the common law countries.

The criminal proceedings in a common law country are based on the idea that the prosecutor defending the interest of the state is the adversary of the defendant and that both parties are on an equal footing. The prosecutor has to convince all members of the jury of his view of the facts, since a verdict of the jury requires unanimity. Thus, both parties are considered to be adversaries with equal chances before the jury.

In the 1970s the International Red Cross, which was visiting the detainees in the apartheid regime in South Africa, concluded a treaty with the government that would guarantee the immunity of the Red Cross delegates from court trials. In particular, they wanted to be excluded as witnesses before the court. For the Committee of the Red Cross it was very difficult to understand that an agreement that was signed with the government did not bind the courts. The courts insisted on their right to call delegates of the Red Cross to be witnesses in criminal cases. For the members of the ICRC familiar with the continental law system such a division of powers was not understandable.

The continental law system is based, for criminal trials and also administrative decisions, on the idea that the administration, and in particular the prosecutor, are defending the higher state interest and as the defender of the public interest he/she should have a special status as plaintiff in the proceedings and be privileged with regard to the status of the defendant. As protector of the public interest, the prosecutor has also to include the interest of the defendant in this public interest. Thus he should have already established the facts before the trial, facts that then can be reviewed in the proceedings before the court. This concept of fact-finding by the state prosecutor is called the inquisitory principle.

Additionally, the prosecutor can not on their own decide to abstain from the prosecution of a specific crime. All crimes are to be officially prosecuted. Thus the prosecutor can not propose either a deal with the defendant to release him or her if he/she accepts to be a witness in an other case, or threaten the defendant with high punishment if he/she
does not confess the facts according to the assumption of the prosecutor.

Based on the credibility the law gives to the prosecutor as protector of the public interest, the procedure provides more or less privileges for the plaintiff representing the state in criminal procedures. However, the European Convention on Human Rights has provided some basic principles which have substantially improved the right of a defendant in a criminal and in some instances also in an administrative law case.

It would be interesting to analyze the rules for the proceedings in the special international criminal court in The Hague, which has to proceed according to a mixture of the common law and civil law tradition.

### 3.6 The Continental European System

#### 3.6.1 The Legislature as the Only Law Maker

The Continental system started with the French Revolution. According to the declaration of human rights, all law that is the expression of the volonté générale is determined by the legislature, the assemblée nationale. The court is only the body that applies the law. The power to make the law has totally shifted from the court to the legislature.

The second most important step towards an autonomous new legal system was made, as already mentioned, by Napoleon. He provided for the whole administration a new type of law, the public law, which was not any more under the jurisdiction of the traditional courts.

#### 3.6.2 Power of the Administration

Civil servants of the public administration protecting the public interest by administrative proceedings (part of public law) have thus to be provided with the power to execute and to enforce public law decisions considered to be in the common interest. Thus, public law provides the administration with the power to implement and to enforce their decisions implementing public law statutes and even to punish people who disobey their decisions or the obligations or prohibitions regulated by public law statutes. Administrative decisions have thus a value similar to a sentence ruled by the judge as they are enforceable. A tax bill, for instance, can be enforced by the bankruptcy office on the same basis as a sentence of the court established in an adversary process between private parties and ruled by a judge. Unlike a court sentence, however, the implementation of a statute by an administrative decision (acte administrative) established by administrative proceedings is not the result of a court procedure with an adversarial trial. It is up to the administration to find the facts, to establish the “truth” and to decide according to its own findings what is in the common interest. This fact finding is inquisitorial, as it is up to the administration to decide what evidence is necessary and proper to know
the truth. This power to decide on the facts\textsuperscript{15} gives the administration a privileged position with regard to any legal decision.

When a couple of years ago the security council in Turkey decided to put Kurdish members of parliament in jail, one of the defendants was accused of having contacts with the PKK in Syria. However, he claimed that all telephone calls were made with his son, who is studying in Syria. He proposed witnesses to prove that this fact is correct. The court refused this evidence, on the ground that the court does not need further evidence as it believes its secret services. This is a typical procedure based on the inquisitorial system, contrary to the adversary system. Also in Swiss law on administrative procedure, the authority decides, according to article 33, which evidence proposed by the defendant is necessary.

Mainly for this reason, the police as the prolonged arm of the executive have much more powers with regard to the subjects than in a country with a common law tradition. The police can arrest, investigate, and use force according to their own assessment of the situation. They do not need a court decision in order to arrest people or to use force. In many civil law countries the right use of weapons by the police is regulated either by interior directives or by the special statutes of the police. In common law countries the police do not have the right to use their weapons or to injure private persons any more than the right of any person to defend themselves. One has to note, though, that the possibilities to use weapons for self-defense legally, for instance in the case of trespassing private property, are much wider than in civil law countries.

In Switzerland the administrative procedures provide some principles of natural justice for the subjects with regard to the administration’s fact finding. According to these principles they have the so called “right to be heard”. This does not mean a guarantee of oral and public proceedings. It only gives the subjects the right to propose evidence, to know the relevant documents and to submit their view of the facts to the administration. However the principle \textit{nemo judex in causa sua} does not apply in these proceedings.

Once the administration has decided, those who are subjects of the decision have the right, but also the burden, to complain and to require that the decision be reviewed either by a higher authority, or by an administrative tribunal or administrative court. If they do not question the decision within a certain time limit, the decision becomes valid although it may have been unlawful or \textit{ultra vires}. The system is based on the fiction that the administration as protector of the public interest enjoys in principle the benefit of the doubt.

\textsuperscript{15} Swiss Law on Administrative Procedure, Art. 12
According to Swiss procedure on the decision of whether a asylum seeker is granted the status of a refugee, the relevant statute has even enlarged the benefit of the doubt on behalf of the administration as the authority does not even have to investigate whether the asylum seeker is in danger, but only to establish whether the defendant claiming the status of a refugee is credible or not. Thus when an asylum seeker makes whatever contradictory statements in the proceedings the statute empowers the administration to deny their credibility\textsuperscript{16} and to refuse the status of refugee.

\textbf{3.6.3 Administrative Tribunal: Conseil d’Etat and Administrative Courts}

In order to be sure that the administration functions reasonably and properly Napoleon, 200 years ago, set up in France a special body to be called \textit{Conseil d’Etat}. This new authority had to give advice to the government with regard to legislative and administrative decisions. Today this body has become the most important tribunal on administrative issues and has been copied in many states influenced by the French administrative law concept.

The \textit{Conseil d’Etat} was installed in order to advise the government on good administration. After a while it also started to take up hear complaints of the citizens against the administration. Of course it could not finally decide on theses complaints, but only advise the government how to decide. Nevertheless, the high quality of the members of the \textit{Conseil d’Etat} made it become an absolutely credible authority with regard to decisions made by the administration.

In 1874 (similarly to the \textit{conseil constitutionel} in 1971!) the \textit{Conseil d’Etat} issued the first proper decision on an administrative case and thus changed into a proper administrative tribunal, which remained one of the most important authorities of the last two decades. In fact, as the \textit{Conseil d’Etat} had no clear advice, nor a legal regulation on its jurisdiction and procedure, it developed with its own jurisprudence all basic principles of French administrative law such as the principle of proportionality (similar to the reasonable test in the common law courts), the principle of \textit{excès de pouvoir} (similar to the \textit{ultra vires} jurisdiction of common law courts) and the concept of the administrative act as an administrative decision with the value of a court sentence to be executed with administrative

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\textsuperscript{16} Art. 7 Nachweis der Flüchtlingseigenschaft
\textsuperscript{1} Wer um Asyl nachsucht, muss die Flüchtlingseigenschaft nachweisen oder zumindest glaubhaft machen.
\textsuperscript{2} Glaubhaft gemacht ist die Flüchtlingseigenschaft, wenn die Behörde ihr Vorhandensein mit überwiegender Wahrscheinlichkeit für gegeben hält.
\textsuperscript{3} Unglaubhaft sind insbesondere Vorbringen, die in wesentlichen Punkten zu wenig begründet oder in sich widersprüchlich sind, den Tatsachen nicht entsprechen oder massgeblich auf gefälschte oder verfälschte Beweismittel abgestützt werden.
force if necessary. (This institution has no similarity in the common law tradition). The main remedy against administrative acts is the “recours pour excès de pouvoir”. Today the Conseil d’Etat has become in many instances the final court of appeal in cases decided by lower administrative courts installed by the respective statutes.

The French institution of administrative acts, as well as the main principles of administrative law, influenced German theory of administrative law in the 19th century. However, Germany, which was also under the British influence, was more inclined to introduce a special administrative court instead of a French Conseil d’Etat. When considering better legal protection against misuse of administration, Germany focused on the subjective rights of the individual, which could best be protected by an independent court. Thus it installed specific administrative courts which in fact are more independent than the French Conseil d’Etat. In addition, they are clearly considered to be part of the judicial branch. The remedy available to the subjects is the complaint of recourse against the administrative act (Verwaltungsgerichtsbeschwerde).

3.6.4 Administrative Act

This administrative act in fact became the decisive unique institution of administrative law of all civil law countries. First it was considered as a pre-condition in order to bring a case to the Conseil d’Etat. Without any administrative act nobody could get a “writ” against the Conseil d’Etat. It was the requirement for standing and legitimacy. Then the administrative act was designed to be the precondition of public enforcement. Later the Conseil d’Etat developed procedural requirements for the enactment and the publication of the administrative act. Today the administrative act has become the central figure of modern administrative law in civil law countries. Licenses, public grants, employment decisions, the withdrawal of a drivers license, but even a letter that indicates to a private person some rights or obligations can be considered as an administrative act and thus be quashed in an administrative law decision.

The administrative act has also become the almost exclusive precondition for a complaint to an administrative tribunal. So called factual administrative activities (Realakte), which may also be harmful for the subjects can not be sued in an administrative court. Only if the harm causes damages can one sue the administration, but only for compensation. There is now one slight possibility to have an internal complaint on informal measures of the administration based on Article 13 of the European Human Rights Convention.

3.6.5 Influence on the Administrative Law of Civil Law Countries

The most innovative and creative jurisprudence of the Conseil d’Etat, in particular during the 19th century, has to a large extent influenced the administrative law in most other continental European countries. In Germany the reception was introduced by the famous scholar Rudolf
Meyer and then it influenced the decisions of the early courts of the empire, then Weimar Republic and today of the administrative courts of the Länder. Through Germany it then also influenced Swiss administrative law based on the reception of Fritz Fleiner and later Max Imboden.

But neither Germany nor Switzerland were inclined to introduce a similar body to the French Conseil d’Etat. In particular, the northern part of Germany had strong links to the UK and was thus more influenced by the King’s Bench jurisprudence. The southern part of Germany, however, took over more or less the French system. Nevertheless, the institution of a more independent administrative court was much more convenient to the German tradition. Thus the Germans introduced the more independent administrative court with the jurisdiction to decide on suits against the administration.

After the Second World War, Germany introduced, in Article 19 of the Basic Law, a guarantee to protect all subjective rights (similar to the old common law understanding of property rights) finally by a court decision. For these reasons German administrative law made great developments after the Second World War and at least in theory has become a most important leader with regard to this scholarly discipline.

Indeed, the administrative courts have developed in cooperation with administrative law scholars an impressive theory of administrative law, which still has its roots in the French system but became rather independent and most complex based on the German system of the guaranteed right of the Basic Law to have all infringements of rights be decided finally by a administrative court.

In Switzerland, the German concept mixed with the French principles has been introduced. However, the Swiss had no constitutional guarantee to get a court protection in all cases in which their rights might be violated. Thus it took the Swiss development of administrative law a very long time to adapt to the modern requirements of a general protection against misuse of administrative powers and general right to have access to a court with regard to administrative disputes.

It was only the decisions of the European Court of Human Rights that finally initiated a real revolution of administrative law and of the court protection in all legal disputes by an administrative court. This guarantee is now enshrined in the new article 29a of the constitution. But this article, although adopted by the sovereign several years ago, will only enter into force in 2006 with the new statute on administrative court protection.

3.6.6 The European Court of Human Rights

As already mentioned with regard to the Swiss case, the European Convention on Human Rights, certainly influenced by Anglo-Saxon jurisprudence, provides in its article 6 a general right to have access to the court in all cases in which civil rights have been violated. The Swiss,
when ratifying this convention, made a general reservation with regard to the implementation of this article in the Swiss administrative law system. However, in the famous Belilos case, the court overruled this reservation with the argument that it is against the very principle of human rights to make general reservations.

Thus, the Swiss had to review the entire jurisdiction of the administrative courts on the cantonal and federal level. Since 1990 the protection of citizens by administrative courts has largely improved.

3.6.7 “Ministre Juge”

The French concept of administrative law and of protection of subjects against misuse of administrative power did historically, and does even today, to a certain extent, give the power to decide on administrative law complaints to the administration itself. Thus in some instances the administration itself has the power to decide ultimately on complaints and in some instances it decides both as first and second instance, with the possibility to have a final appeal to the Conseil d’Etat or to the tribunal administratif. This concept is based on the idea that the principle of separation of powers requires that only the administration reviews the legality of its own decisions. In particular, when a decision is appealed by the subject it should be reviewed, at least in the first instance, by the administration. This system, which has been largely followed by the Swiss, is called ministre juge as it in fact gives to the minister or its administration judicial powers and judicial functions.

3.7 The Main Principles of Administrative Law Decisions

3.7.1 Principle of Legality or Ultra Vires

The main principles developed in the common law and in the continental administrative law courts that have to be observed by the administration are quite similar, although the label may be rather different.

The principle that the administration should not act beyond the law is called ultra vires in Britain. In France this principle has even opened the basic remedy: Le recours pour excès de pouvoir. In Germany and Switzerland it is used as one of the basic principles. With regard to this principle, one has to be aware, though, that the statute directing the administration has a different position and thus also impact in the common law compared to civil law tradition. In the common law tradition the statute limits governmental power. As the Administration has a traditional “Crown” prerogative, with the Crown as holder of the residual power and as final fountain of justice, the statute in principle limits the already existing power. According to continental law, the statute not only limits the power of the administration, it also empowers the administration. With regard to the spending power, for instance, one can see that the common law administration, and in particular the American
President, has an almost unlimited spending power, while according to Swiss administrative law each decision for a public grant needs a basis in the statute.

3.7.2 The Principle of Proportionality or the Reasonable Test
Probably the most important principle with regard to administrative law in the continent is the principle of proportionality. This principle corresponds with the reasonable test in the tradition of UK administrative law. But the British judge not only controls the reasonable implementation of a statute, they have for centuries also had the power to examine the reasonableness of the statute itself. Such control is excluded for the Federal Administrative Court in Switzerland, which has no jurisdiction over the statutes adopted by the people.

3.7.3 Good Faith or Estoppels
Further principles are the principle of good faith, or in the UK tradition estoppel, which however is used much more restrictively than in continental law. Thus, the Swiss Constitution provides explicitly in article 9 that everybody has the right to be treated according to the rules of good faith. Finally, as in all systems, the prohibition of arbitrary treatment is upheld in both traditions, although probably the reasonable test can also overrule some of arbitrary measures of the government.

4 Judiciary and legal education

4.1 Legitimacy
As the judge, particularly in the US, has to protect citizens’ inalienable rights, the legitimacy of the judiciary is consequently often based on those “pre-constitutional” rights. This concept - very often invoked in discussions with American judges - certainly does not correspond to the traditional European understanding of the function and the power of the courts. According to the civil law understanding, the court derives its legitimacy only from the constitution and even more from the statutes adopted by the parliament. Thus the decision of a Supreme Court to establish constitutional review just based on the rule of law as basic legitimacy, as in Marbury v. Madison, is unthinkable within the continental legal tradition. Men, according to the continental view, are not guided by the law but by the legislature, which is the source and fountain of the law.

For a very long period Israel has controlled the Occupied Territories with its military power. According to the tradition of most countries, the citizens of such occupied territories would never have access to the court of the military occupation. But in cases that came to the Supreme Court of Israel, the court had to find a solution that would reasonably at least
give limited protection to those citizens. It accepted jurisdiction over those territories based on the idea that within those territories also the rule of law has reign and it is only the Supreme Court that can protect the citizens against military forces violating their basic rights. Such a concept of legitimacy was clearly rejected by the German Constitutional court, which was asked to give the victims of German mass killings in Greece some compensation after the war.

4.2 Different Perception of Jurisprudence

The different perception of the court also has consequences for our understanding of jurisprudence. The interdependence of economy and law, and legal realism, are influential philosophies mainly in the United States because they are directly related to the creative power of the judge. Jurisprudence in Europe deals much more with the normative power of the constitution and statutes than with the power of the court. Economy and law, for instance, are important relationships for the political legislature. They may give additional understanding of the statutes for researchers, but an analysis of the relationship has no real impact on court decisions.

Jurisprudence, or legal philosophy as it is called in Europe, is a science that seeks a better understanding of the law made by constitution and legislation. In the United States, the law is also made by the judge. The view of the law under the auspices of costs and benefit is a tool for the judge as a law maker. A European judge who applies and interprets legislative norms does not need such kinds of tools. And with regard to the legislature, such concepts based on economy are much more part of the political decision making process influenced by the different party ideologies.

4.3 Legal Education

It is well known that American society is much more competitive than European society. The ideology behind is not only based on Adam Smith’s invisible hand, but just as much on the Calvinist conviction that competition guaranties not only the selection of the fittest but also the selection of the morally most valuable. This has consequences for the understanding of the very function of the entire judicial system, including the adversary principle in criminal law. The trial procedure has to offer equal chances to the parties competing for their right before a jury. The party that wins is in the right and has justice on its side. This system is much more competitive than the judicial system according to the continental legal systems. According to the civil law perception, the party
that is in the right should win the case.\textsuperscript{17} Thus the rules of the procedure before the court have to help the judge to find justice and to let the party who is in the right win the case. Justice is not considered to be a result of the case, but as the source of the rights to be found by the judge.

This has also clear consequences on legal education. European law schools have to teach the students what the law is and how they can find the law with regard to concrete cases. American law schools, on the other side, have to train their students in order to empower them to become good winning lawyers. The American law teacher seems to be much more a trainer who has to make winning lawyers and therefore train the students in all skills necessary to win a case.

5 Globalization, Particularly the Idea of Universality

5.1 Universality

The universality of human rights, and in particular of the of rule of law, is considered by some colleagues as a pre-positive principle that has its roots in the United Nations Charter but also in the very fact of the leadership of western democracies, lead by the United States. Adversaries of the principle of universality of the rule of law and human rights contest it as a principle that enables postcolonial control by the rich over the poor countries. For their advocates, the rule of law and human rights are to be implemented on the whole globe based on the natural law principle of limited government. The liberal conviction that all human beings are equal is the very pillar of this philosophy, which advocates the equality of all human beings as being part of the family of the “\textit{homo sapiens}”, contrary to animals which have no or very limited intellectual and moral capacities. If all human beings are equal, they must in consequence have basic equal rights. Whoever contests the universality of human rights also contests, according to this philosophy, the principle of equality.

On the other side, one has to admit with the older and later Wittgenstein, that the reality of the diversity of human beings is created and fostered by culture, language, tradition and religion. Does this diversity also require reconsideration of the principle of universality or does the rule of law apply not withstanding the fundamental diversities based on culture, language, economy, history and religion?

If one takes this fundamental controversy, which has become more ideological than scientific, into account, one has – it seems to me – to

\footnotesize{\textsuperscript{17} See DAVID KENNEDY, \textit{A Rotation in Contemporary Legal Scholarship}. In : CH. JOERGES/D. M. TRUBEK (eds.), \textit{Critical Legal Thought : An American – German Debate}, 353-396, Baden-Baden (Nomos) 1989.}
come to the following conclusion. A comparative discourse should mainly focus on the following issue: On what grounds and to what extent are particularities with regards to human rights universally acceptable? Or, to put it in other terms: Which human rights are so essential, that they have to be applied by all cultures, religions and political societies? This discourse on universal rights would be more helpful than to seek universality in general, which will always be contested as being a result of the liberalism that has its roots in proselytizing Christianity.

5.2 Globalization

The globalization of the economy, environmental protection, communication, financial markets etc. has important and far-reaching effects on the legal system. The most fundamental impact of globalization is its effect on the importance of state territory. Territory, the indispensable pre-condition for the building of the 19th century nation state, is fading away by internationalization and almost does not matter anymore. As, in particular the jurisdiction of the state, and also its legal system according to the European concept, is much more linked to the territory, the effect of globalization on these systems may be even more fundamental in Europe than in the US or in other common law countries. The continental perception of the very state and its power is based on territory. Sovereignty, democracy, legislation, jurisdiction of courts, social security etc: all of these essential elements of the state are mainly linked to the state territory.

The geometric symbol of the middle ages was the pyramid. The symbol of the industrial society was the wheels turning around in a big factory. The symbol of the internet society may become the net. Within this net it will be important to have some political centers which can respond to the will of the citizens. Only then can legitimate governments guarantee the social peace indispensable for economic welfare. Thus, networks which depend only on the consumer and the market will implode without the counterpart of a political entity. However, it will be the task of comparative constitutional law to establish new possibilities for networking between political entities and market networks.

The New World Order has also fostered “new public management” (NPM) as a modern competitive tool for the administration of public services. Administrative law in continental Europe was mainly concerned about the “how” and not about the “what”. NPM requires, on the other hand, that administration should be guided by strategic aims and not by detailed ordinances regulating the “how”. Thus NPM will have an impact on the continental law principle of legality and court control. American administrative law, which focused much more on rule making and due process, and not on detailed prescriptions guaranteeing legality, may more easily adapt to new more competitive public services.
The effects can be seen clearly in the world of the internet. In Europe hate speech is not protected by freedom of speech. How can European minorities be protected against Nazi propaganda put on a Californian server and spread through the Internet to Europe? An additional issue of common concern is freedom of religion. Europeans, which have developed state-Church relationship through centuries of cruel religious wars, have a different perception with regard to freedom of religion than American immigrants who fled the religious prosecution in Europe and decided, for their religious peace, that Congress shall not establish any religion. This may explain that scientology has a very different standing in the US than in Europe, and in particular in Germany.

An important additional challenge that is perceived differently on either side of the Atlantic Ocean is migration. Immigration countries have legal difficulties coping with their native population. Immigrants accept the melting pot concept to overcome their diversities. European states, made by homogeneous and native nations, have different attitudes with regard to migration. This leads not only to different citizenship rights, but much more to fundamental issues of state and national legitimacy, which is *de facto* the very reason for the brutal ethnic conflicts and minority discrimination.

6 New Issues and Analytical Tools:

With regard to the South and to the formerly communist countries, mainly those of the former Soviet Union, the World Bank has established seven basic principles of good governance. Thus the World Bank demands:

- Accountability of government officials through clearly formulated and transparent processes;
- Legitimacy of the government is regularly established through some well defined open process of public choice such as elections and referenda;
- Safety and security of citizens is assured;
- The rule of law prevails;
- Public agencies are responsive to the needs of the public;
- Social and economic development is promoted for the benefit of all citizens in an equitable manner;
- Information is readily available through freedom of association, freedom of expression, freedom of the press, and so on.\textsuperscript{18}

Since the 1990s the World Bank also promotes decentralization as a necessary tool for good governance. “The old Bank was very involved in supporting the centralization of governments. The new Bank is helping governments retain its important central role, while devolving many of its functions to lower level governments.”\textsuperscript{19}

This paper should have made clear that, in particular, the rule of law principle is viewed and implemented quite differently according to the tradition of common law as compared to the tradition of continental law. Also viewed differently are access to the court, the remedies available, the procedure and fact finding, the power of the court and the position and status of the administration, including the police. It is extremely difficult to assess, with regard to a concrete case, the real significance of the implementation of the rule of law in either of the countries. In common law countries one has, in particular, to analyze the education of judges and lawyers as well as the financial burden for any party to defend its interests before the court.

In civil law countries the most sensitive issue is the independence of the judiciary. In countries where the principle of the ministre juge is still prevalent, opening up access to administrative courts should have priority. In any case, one has to investigate all relevant details in order to assess the possibilities of concrete improvement.

We have not examined in this paper the importance of the institution of the ombudsperson, an institution with its roots in the early legal history of Sweden and going back to the beginning of the 19\textsuperscript{th} century. It seems to me that this institution, if it is well designed with the independence of the office, with its right to investigate all administrative activities on its own initiative, with the possibility to sue civil servants for criminal activity (e.g. corruption) and with the right of every citizen to have free access to the office and its accountability to a multi-party parliament, should deserve more attention, also by the Breton Wood Institutions, especially with regard to its potential for improvement of the rule of law principle.

Finally the issue of decentralization will also have a different impact in a country with a common law tradition and one with a civil law tradition. In the common law tradition, for instance, the central government always


has to enforce central obligations against resisting local authorities with the writ of *mandamus*. In the civil law tradition, the “*préfet*”, and in some instances even the mayor, is directly dependent on the minister of the interior.

With regard to common law countries, one has to investigate the concept of the local police power. Unfortunately the British usually did not implement their own police concept in their colonies. If the former colonies would establish a local police similar to the UK, under a chief constable with almost the same independence as a judge and mainly accountable to the county council, the situation with regard to torture and corruption might be rather different.

Decentralization as such can not be considered as positive or negative for the development of the specific country. The main question is how decentralization is implemented. In a civil law country, decentralization needs to be implemented with the right of local authorities to legislate in specific areas. It needs independence of the local authorities with regard to the implementation of central law. One should ask whether the final accountability of local authorities with regard to expenditures should not depend on local democracy. Research done by the World Bank has come to the conclusion that only such decentralization would diminish at least heavy corruption. From the Swiss case, we know though that the small corruption of local authorities can easily take place in local municipalities.

Different approaches are required with regard to decentralization in common law countries. One should examine the possibilities of local authorities to issue bylaws and to find out to what extent this is possible within the competence of the parliament. The very Blackstonian concept of the absolute sovereignty of the Westminster Parliament may be the main problem for any decentralization concept. For instance, in Sri Lanka the 13th amendment of the constitution, while providing for a strong decentralization, still leaves the central power the possibility to control or unilaterally revoke the local government. The separation of legislative competences between provincial and central government are not clearly defined and the courts to be installed will not have a full independent jurisdiction.

When we extend the comparative approach to the South and to the East, we have to be aware of some additional important challenges. The first challenge for comparative legal jurisprudence is to establish evidence that principles that have been developed in Western democracies, based on Christian philosophy and Enlightenment culture, can also be integrated into legal traditions that have totally different cultural and religious roots. Is decentralization, for instance, an argument in a country like France based on a legal culture with total equality of rights? Is the legitimacy of government only a question of some kind of democracy or is it not much more an issue linked to demos, nation and ethnicity? Can an immigration
country achieve legitimacy with regard to the Native population just by democracy?

Rule of Law, accountability, transparency, democracy, decentralization are constitutional principles that will implement a worldwide harmonization of constitutional and administrative law. A key question is: To what extent will such principles only be implemented on paper and to what extent will they change political, social and cultural reality? These principles were established within the specific cultures of countries committed to the constitutionalism of the 17th century. Will former colonies and former communist countries internalize these goals which were fundamental for the West or will they only confess them in order to gain new credits of IMF and World Bank?

Even more striking is the question to what extent those *prima facie* obvious principles can be imported into a country divided by an ethnically fragmented society. To whom is a government accountable: only to the ethnic majority or also to the minority? What is the need of a public in an internally divided society? To what extent can the freedom of the press be an instrument to stir up hatred between already divided communities?

The history of mankind teaches us that sustainable harmonization can never have success based on a one way policy, it will achieve broad acceptance only if it is an amalgam of different cultures. The very challenge of comparative public law today thus is not only to find unity and universality of principles but also its diversity and to work out the possibilities that should enable all parts to promote diversities for the happiness of all human beings. This endeavor, however, will only gain credibility if it is not believed to be just another instrument to promote one sided interests of the creditors to the detriment of the debtors. Thus it is the very challenge of comparative science not only to seek evidence and arguments for the universality of Western values but also to uncover the values of other cultures that should influence our modern and globalized world.

### 7 Conclusions

1. The common law tradition sees law as an instrument only to limit state government, whereas according to the Continental tradition, it limits but also empowers state government. If the constitution is seen as an instrument not only to limit state power but also to empower state agencies to change the society, it will have a different position with regard to development and to a peace process.

2. If one sees the state as the Leviathan and root or fountain of justice, the symbol of state sovereignty means much more than if one has the position that the state should be ruled by law. Thus according to the
The first concept of sovereignty, a people or nation would be prepared to accept any sacrifice in order to have established this sovereignty which will be the fountain of justice for the specific nation.

3. The American Revolution and its justification by Thomas Jefferson has influenced the history of decolonization and is still influential on all ethnic communities claiming the right of self-determination.

4. It is crucial to know what the understanding of the label “rule of law” is. Even totalitarian or communist system may proclaim to be in favor of the rule of law. In their meaning, the rule of law means nothing but obedience to the existing positive law. In the common law tradition it means that inalienable rights have to be respected even by the sovereign.

5. In a country with a public law system, one should carefully investigate the remedies available to the citizens, the jurisdiction and the power of the court and in particular the independence of the courts.