Comparative Law Summary

Diritto Comparato
Università di Torino
30 pag.

COMPARATIVE LAW

1.
AIMS OF COMPARATIVE LAW

Concept: essentially the comparison of different legal systems of the world; it may operate on a larger scale (spirit & style of different legal systems) or on a smaller scale (the way different systems deal with a single institution or specific legal problem); it must not be confused with international law or legal history, as they are different although interconnected disciplines; it may work either on diachronic level (vertical comparative law which assesses legal matters even from different times and also considering the historical legal evolution) or a synchronic level (horizontal comparative law which simply compares current legal matters in different places); we can generally say it resolves differences in laws of peoples at similar stages of social, cultural and economic development.

Aims: 1) knowledge, i.e. discovery of models for preventing or resolving social conflicts;
2) dissolve national prejudices;
3) reforming law through transplants.

Functions: 1) Aid to legislators (two levels of analysis to use transplants of legal models to reform the law: whether it proved satisfactory at home & whether it would work elsewhere);
2) Tool for interpretation (if a matter isn't regulated in a national system, it is possible to look at how the same matter is regulated in parallel jurisdictions, i.e. *Lex alii loci*);
3) Uniform law (identify a common core, e.g. US Uniform Commercial Code / EU Law).

2.
METHODS OF COMPARATIVE LAW

Functionalism: comparing the different institutions which, even under different names and/or categories, perform and/or fulfill the same functions in different legal systems and cultures, stating legal problems without reference to the concepts of one's own legal system; this is the basic method for comparative law, i.e. the method a comparative lawyer should use.

Factual approach: "Cornell Seminars", 50s, by R.B. Schlesinger; this method states that we shall not compare categories and concepts but facts and situations and the way these are sought in different legal systems, *e.g. medical malpractice → France = contractual breach; US = tort of negligence. Other example, when offers are binding → Germany: offeror bound (cannot withdraw) during reasonable period (art. 145 BGB); UK: Offeror may withdraw at any time 'til offer has been accepted*.

Wigmore's comparative law method: The loose term "comparative law" → 3 modes of reasoning

1. Describing the other legal systems and the matters they regulate as facts; what?
2. Tracing the evolution of the way they regulate those matters in different systems; why?
3. Analyze the policies and relative merits of different solutions; what's better and why?

Zweigert und Koetz: two important German authors who worked to establish Comparative Law as an academic discipline, as a branch of legal science. We start from facts and we find out the ways in which different laws confront those facts, i.e. legal answers, but is this enough to say it is a legal science? The next step for that would be to build a system, i.e. to have comparative law developed systemically, to have a framework for analysis for all facts and situations. Also, to be fully considered a scientific enterprise, comparative law should develop a special syntax and vocabulary. *E.g. How do you cope with the problem of transferring the property of a moveable?* The comparatist legal answer should be more systematically developed into a coherent system of concepts & categories.

The Italian theory: R. Sacco tried to systematize comparative legal studies through the specialist vocabulary of legal formats. A legal format is a feature of a legal systems that performs a particular function which is variable from a system to another. The 3 main legal formats of a legal systems are:

1. Statutes → as legislation, the rules we find in written, for example in a code of law;
2. Doctrines → as justifications of why rules are as they are, *e.g. why is contract an agreement*;
3. Case law → as jurisprudence, the collection of actual decisions made by judges, by courts.

When we do legal theory, we presume that statues, doctrines and case law are coherent, e.g. *what is the meaning of the first amendment of American Constitution? of course it is what the US Supreme Court says it is, and that it is obviously coherent with what the constitution says.* When we do comparative law, though, we cannot presume they are so coherent and consistent: there might be gaps between what the statute says, what the doctrine states and what case law actually is, indeed. This can be seen going back to the example of medical malpractice, where the "but" is very essential:

- France → medical malpractice is regarded as contractual matter, but the obligation arising from the contracts are "obligations de moyens", which means a doctor is not promising you to give you a result, but rather to use her best effort, to operate at her best; therefore the proof of breach you need is that she didn't operate at her best, i.e. evidence of negligence.
- US → medical malpractice is considered a tort, but according to the doctrine of *res ispa loquitur*, you need proof of damage, as that is equivalent to evidence of fault of the doctor.

Results: comparative law is supposed to look for more precise definition of similarities & differences. For example, considering France and United States:

- Routine cases → generally proof of damage is equal to evidence of negligence.
- Non routine cases → e.g. medical malpractice: proof of doctor's fault is needed.
- Level of Statutes → different systems: France = statute (Code); US = not (Common law).
- Level of Doctrines → different systems: France = contractual breach; US = tort of negligence.
- Level of Cases → basically, same operative rules.

Two levels of the law: the enterprise of comparative law is represented by the discovery of 2 levels, i.e. 1. Linguistic → principles, doctrines, theories; 2. Decided cases or operative rules → solutions. The two levels are interconnected although totally independent from each other, which means that:

- similar solutions may be expressed with opposite concepts and languages;
- conversely, opposite solutions may be conveyed through similar concepts.

3.
COMPARATIVE LAW IN 1900

Paris 1900: the Congress held in Paris is considered the landmark which started the academic and scientific enterprise of comparative law. It has been symbolically planned at the beginning of the century as a sign of progress, by the French government with the Ministerial Order of Nov. 27, 1899 which entrusted the *Société de Législation Comparée* to organize the congress; it was considered a meeting of the "*Savants du Monde*", i.e. a gathering of the all the major lawyers of the world.

Organization and ideas: the greatest emphasis was given to *general theory* (jurisprudence) and methods to be adopted to reach this new kind of legal knowledge, which is supposed to be attained by comparing the very national experiences; the first task of the congress was to which methods most appropriate, with the main idea that a legal text is nothing without interpretation and that interpretation is nothing without consequences, which means that we cannot compare laws just looking at the codes or statutes, but we must investigate how these texts are interpreted, and that interpretation is not just a theoretical problem but it is to be appreciated from a legal stance through its consequences – we can say we must judge interpretation on the basis of its consequences.

Aims and purposes: firstly, comparative law must go beyond the text in which the law seems to be embodied in order to reach, appreciate and evaluate legal practical consequences; secondly, it aims to produce a Uniform Law, distinguishing juridical forms and practical consequences (substance).

Models: how can we produce a uniform law through comparison? The idea is that we can take the best model and adapt it to *"national, racial, and environmental conditions and important cultural traditions"*, said the congressman in Paris in 1900. Of course we wouldn't associate "racial" with "best model" now, anyhow the idea is that we can identify the best model and adapt it to local conditions; this search for the best model was needed to arrive at a common law of humankind, i.e. *le Droit Commun de l'Humanité* (*civililsée* they said, although again we wouldn't say that nowadays).

Participants: the very Eurocentric, ethnocentric, and especially francocentric and imperialist conference can also easily be grasped if we look at the participants, i.e. 35 lawyers from France, 12 from Italy, 9 from Germany, 4 from Belgium, 2 from Canada, 2 from England, 2 from Switzerland, 1 from Austria, 1 from the Netherlands, 1 from Norway, 1 from Romania, 1 from Russia, 1 from Spain, 1 from USA, 1 from Turkey & 1 from Haiti. No representatives from other Asian or African countries.

Lambert: made the general report and focused on the idea that there was no uniform comparative law method and that a comparative lawyer should master at least three different methods:

1. ethnological → to appreciate diversity of "primitive" law;
2. historical → to understand the evolving nature of the law;
3. dogmatic → to create the legal forms that would most properly satisfy social demands.

Saleilles: concluded the congress stressing the point of evolutive legal harmony and stating that comparative law must try to signal this, meaning that:

1. it is not an auxiliary science to any other branch of the law, but an independent science;
2. it aims to discover a constant convergence in legal evolution, i.e. it is more concerned with uncovering uniformities among different states and laws, rather than with what it should be.

Common Fund hypothesis: premise to the Saleilles' approach, to apply not only to civilized nations, but to all nations at all times; according to the common fund hypothesis, comparative law aims are:

1. TO DISCOVER the *general laws* that explained the birth, evolution and disappearance of legal institutions, e.g. *slavery → all nations passed through the stage of slavery, but which were the conditions giving rise to the legal institution of slavery, which forces determined the evolution of slavery, and what at the very end determined the disappearance of slavery?;*
2. TO DESIGN ideal types for each institution, to be applied in accordance to different cultures;
3. TO ACHIEVE a world uniform law, as the selection of the best models we may find worldwide.

Critique to Paris Congress approach: besides being Eurocentric and imperialistic, and the references to old and odd concepts like those of racial conditions and civilized nations, as already mentioned…

- It is UTOPIAN → it's impossible to think to produce a uniform global law through universities, science, knowledge and not through governments; it may be a dream, but it's not the realty.
- DIVERSITY is not only a fact, but it may also be a value → why do we wish to have a uniform law and is (also legal) uniformity so good at the end of the day? It may actually be very important that different legal systems and institutions exist, first of all from a practical standpoint, because otherwise there would not be any competition between legal regimes!

Advantages of uniform law: to reduce or avoid transaction costs, i.e. costs associated with reaching an agreement, e.g. *now if we must make a contract between a French firm and a German firm, as the laws are different and written in different languages and since there may also be issues when agreeing on which laws to use to regulate the contract, we will need a legal translator, a*

comparative lawyer and so on, *which takes time and money*; it's very important from an economic point of view.

Disadvantages of uniform law: to block the competition of different legal systems and also the possibility of experimenting different solutions; to prevent a positive appreciation of legal pluralism.

Legal pluralism: the majority of the main critiques to the Paris Congress approach to comparative law can be linked back to what we call legal pluralism, but what are the tenets of legal pluralism?

- The uniformity of laws is not feasible (it is utopian), nor is it desirable (diversity is a value);
- There is no unique evolution or universal language or hidden worldwide spread natural law of mankind or whatsoever; rather, there are many evolutions, i.e. nations are "*travelling on different tracks*" (Tarde); we cannot transplant the whole legal system of a country into another country and expect the latter to walk better; the world of a culture is not the same of another; we may call this hypothesis that of a pluriverse, as opposite to the universe idea.

St. Louis 1904: another conference on comparative law; it represents the let's say American reaction, response to the French approach to comparative law as an effort to produce a global uniform law; it has been planned by the American Bureau of Comparative Law which became institutionalized in 1907, and presided by a judge (not a professor as it was in Paris instead), Justice Brewer of the Supreme Court Of The United States; while at the Paris Congress the official language was French, at the World Exposition everything had to be translated into English. This struggle between Europeans and North Americans makes clear the importance comparative law was gaining.

American goals: the objectives of the American conference were much more practical than the ones discussed in Paris, namely 1) best method of regulating trial, 2) revision of conflict of laws i.e. international private law, and 3) to what extent should judicial action by courts of a foreign nation be recognized; this approach made it look auxiliary to international law & conflict of laws, though.

4.
ROMANO-GERMANIC LEGAL FAMILY

Structural hypothesis: the questions to be answered when assessing whether a group of different legal systems can be considered together as a legal family as they share structural similarity are:
1. Are the categories used by lawyers within this group of legal systems the same?
2. Is in this family the general conception of justice of the "legal rule" the same?
If the answer to both questions is positive, then there is a structural similarity between these laws. The laws of the Romano-Germanic family (by which we mean Italian law, French law, German law, Spanish law, Austrian law…) can be considered a legal family because of their structural similarity.

Same basic divisions: in all the Romano-Germanic family systems we find the same basic division between public and private law, i.e. a sharp distinction separating the sphere of relations between those who govern and those who are governed; the 'public interest' and the interests of private individuals cannot be weighed equally, they raise different problems and call for different approach.

Civil law: supposedly state-biased (especially from the English common law tradition point of view) as there exists a separate jurisdiction for administrative cases, therefore different judges to decide cases involving state actions, special judges of course deciding in favor of the state most of the times; the existence of separate jurisdictions is anyhow one of the key features of this legal family.

Rome: the ancient law of Rome had no constitutional or administrative law as such, there was not the modern separation between public and private law, which is derived from French practices later on; also criminal law in Roma developed only in the shadow of private law (if you think about the elements of a crime and of tort, like breach of duty, causation and damage, you may see that they are the same); also, public law in Rome was too closely bound up with politics; the senate was based on the importance of its members, there were no specific rules of succession, no law schools and organized legal studies, no unified code of laws, no imperial supreme court, no judiciary (they magistrates were politicians in career, e.g. *praetor*) – this highlights the evolution of modern law.

Justinian: really changed the roman law when have been created the imperial chancery (judges as administrators), the first law school in Bayreuth and the Corpus Juris (authoritative for all the empire) made of the Codex (all the laws in force), the Digest (opinions of authoritative lawyers), the Novellae (new laws enacted by Justinian) and the Institutiones (basically as a textbook for students).

France: departure from original Roman models, modern features of civil law derive from France.

French centralization of power and creation of modern sovereignty: XVI century, military revolution, a system of fortresses around France because of cannons rendering castles useless, therefore the court nobility lost its social function and power as well, paving the way to the centralization of power in the king; only one sovereign central power, strictly organized in the Royal Court, judges as part of the *Puissance Publique*, part of the state structure, no independent political role of other bodies.

Different branches: derived from the French experience…

- Constitutional law (State organization)
- Administrative law (government and Public Administration)
- Criminal law (punishment)
- Law of procedure (as separate)
- Private law
  - Commercial law
  - Civil law

Private law: University of Bologna in 1147, law studies based on the teaching of Justinian's Digest in Latin (same concepts and same vocabulary for all the nations of Europe); Paris Sorbonne the 2nd most important; also customs and merchant law transcribed into Latin, kind of assimilation of those customs into the roman law; Law of Obligations became the cornerstone of the civil law teachings.

Formation of jurists: transnational teaching (law taught in different nations the same concepts and with the vocabulary); centered in the academic institutions, in the University; the lawyers formed

an independent profession; especially important in the civil law has been the role assumed by Public Notaries, having the capacity to give form to private transactions and written documents using mostly Latin; importantly, judges slowly became State servants as part of the public administration.

Law of obligations: according to roman law, it is a legal bound allowing us to force someone to solve that obligation he assumed according to the to the positive rules of the state, i.e. the national laws; the major characteristic of having a law of obligations is the possibility to unify different domains of the law under the same concept or category; the same kind of legal bound, i.e. an obligation, may arise both from a contract or a tort, so we may treat, for instance, the obligation to pay damages for negligence in the same way in which we handle an obligation to pay under a contract of sale.

French revolution: deeply influenced the evolution of the civil law tradition and the modern concept of sovereignty, differently from the UK monarchy model, which did not go through such an event.

5.
THE FRENCH CODE (I)

Events of the French revolution:

- Poor conditions of the financial assets of the Crown forced the King to summon the national assembly 1789 (*Estates general*), made out of the Nobles, the Clergy and the Bourgeoisie, which resulted (instead of increasing the taxes) in the seize of power by the Bourgeoise, with the abolition of Feudalism and the nationalization of the goods of the Nobles and the Clergy;
- 1789-1792: creation of "Constitutional monarchy" (similar to the UK);
- 1792: war by other European Powers to reestablish the Ancient Regime, Victory of Valmy;
- 1793: Execution of the King Louis XVI after being condemned by the National Assembly;
- 1793-94: Reign of Terror, imposed by the Comm. of P. Safety, led by Jacobins & Robespierre;
- 1795: Directory assumed control of France, Robespierre executed, elections suspended, debts repudiated, Catholic clergy persecuted, France made significant military conquests;
- 1799-1815: coup d'état by Napoleon Bonaparte against the Directory; created a new institution, the Consulate, and appointed himself First Consul and then the only one, so eventually Emperor of the French; complete Reform of State and Law, despite the collapse of the Army in the 1812 war vs Russia and the defeat in 1815 vs UK and Prussia at Waterloo.

Summary of the periods of the French revolution:

- 1789 – 1792: Constitutional Monarchy;
- 1792-1794: First Republic & Reign of Terror;
- 1795-1799: Directory;
- 1799 – 1815: Napoleonic Reforms.

Code Civil 1804: major product of the Napoleonic Reforms; revolution of the law; made after roman templates (idea of Napoleon as Justinian); the ideal was to render law easily knowable to all citizens; a commission of eminent jurists was appointed (among which most importantly Portalis, i.e. the real drafter) but also Napoleon himself attended most of the meetings; commission appointed in 1800, ended in 1801, then after further revision and study, eventually the code entered into force in 1804.

Portalis preliminary address: in order to appreciate the French civil code as the basis of modern civil legal systems we need to grasp the speech through which he presented it to the national assembly.

- "Thought it useful to begin our work with a preliminary book, *Of law & legislation in general*";
- "Law is universal reason, supreme reason based on the very nature of things";
- "Legislation is, or ought only to be, law reduced to positive rules, to specific precepts";
- "Diverse peoples coexist only under the rule of law. The members of a city are governed, as men, by law, and as citizens, by legislation. Natural law and law of nations differ not at all in their substance, only in their application. Reason, as it governs all men for all time, is called natural law, and it is called the law of nations as it governs the relations among peoples";
- Still, he had to admit that "In reviewing the definitions that most jurisconsults have given law, we noticed how flawed these definitions are. They do not allow us at all to appreciate the difference that exists between a moral principle and a State law. In every city, the law is a solemn declaration of the intent of the sovereign power with regard to a matter of common interest. All laws pertain to persons or property, & property for the use of persons".

Spirit of the French civil code: negative view of judge-made law in favor of legislation; prohibiting judges from deciding a case by way of introducing a general rule; the creation of general rules is an exercise of legislative and not of judicial power; judicial power and interpretation must just fill the gaps; interpretation must be literal (based on the exact wording and meaning of those words); problems that cannot be solved by means of literal interpretation must be addressed through consulting legislative history and using analogy; judge as a *bouche de la lois*, i.e. oracles of the Law.

6.
THE FRENCH CODE (II)

Structure of the codes: the French code is a kind of a parallel of Justinian institutes.
Justinian's Institutes divided in three major sections → persons; things; actions.
Napoleonic Code → persons; property; acquisition of property (all contracts and torts).

Branches of the law (Portalis):

- The relationships of those who govern with those who are governed, and of each citizen with every other, are the concern of constitutional and political laws (PUBLIC LAW);
- Civil laws govern the relationships, natural or contractual, forced or voluntary, necessary or convenient, that bind every individual to one or more other individuals (PRIVATE LAW);

- The civil code comes under the protection of political laws; it must be harmonious with them. It would be a great wrong were there to be conflict in the maxims that govern men (PRINCIPLE OF UNITY: we have different branches but this branches shall be harmonious, e.g. we can't have a socialist constitutional law and a liberal code as there would be conflict).

Criminal law: shall defend persons and property; penal laws are not so much a particular type of laws as they are the sanction of all others; they do not regulate, *per se*, the relationships among men, but the relationships of each man to the laws enacted for the benefit of all (e.g. property).

Portalis and the Code:

- Laws, strictly speaking, differ from mere regulations; it is the function of laws to set down, in every sphere, the fundamental rules and to determine the basic conventions.
- The particulars of enforcement, the provisional or incidental precautionary measures, the transitory or inconstant objects, anything that requires more the vigilance of administering authority than the intervention of instituting or creating power is the concern of regulations.
- Regulations are acts of magistracy, and laws are acts of sovereignty.
- To recap, law = pure reason governing all men in all times & all places; legislation = enacting principles as the law of a particular state; regulation = what we today call administrative law.

Principles of the Code:

- The framers determined the various effects of the law, it permits or it prohibits;
- It orders, it establishes, it remedies, it punishes or it rewards;
- It is binding, without distinction, on all those who live under its rule;
- Even foreigners, during their residency, are the fortuitous subjects of the laws of the State;
- To inhabit the jurisdiction is to submit to its sovereignty;
- That which is not contrary to the laws is lawful, if it is not explicitly forbidden then it is allowed (this may seem trivial but it is a very liberal principle introduced by the French code);
- Laws have no retroactive effect, law can lay down rules only for the future, e.g. we cannot punish a conduct which is now deemed as criminal if the law was not enacted at the time.

Judiciary: the judiciary pyramid which is now very common was at the time a complete revolution.

- *Tribunals of 1° Instance*: establish facts and apply the appropriate law, in all major cities;
- *Courts of Appeal*: review the facts and check if the law was properly applied and constructed;
- *One Supreme Court of Cassation*: controls the interpretation, can no longer check the facts.

Property: e.g. art 516 "All property is moveable or immoveable"; gives an idea of how the French civil code was structured, i.e. it was not written for lawyers but to be easily readable by the citizens.

Contract, art. 1104: A contract is an agreement which binds one or more persons towards another or several others to give, to do, or not to do something / *Le contrat c'est un convention par laquelle une ou plusieurs personnes s'oblige envers une ou plusieurs autres personnes a donner, a faire ou ne pas faire quelque chose.*

Contract, art. 1108: *Quatre conditions sont essentiels à la validité d'une convention:*

- *Le consentement de la partie qui s'oblige;*
- *Sa capacité de contracter;*
- *Un objet certain qui en enforme la matière de l'engagement;*
- *Un cause licite de l'obligation.*

Four conditions are essential to the validity of an agreement:

- The consent of the party who binds himself;
- His capacity to contract;
- A certain object forming the matter of the contract;
- A lawful cause in the bond.

Tort, art. 1382-1383: Every action of men whatsoever which occasions injury to another, binds him through whose fault it happened to reparation thereof. Every one is responsible for the damage of which he is the cause, not only by his own act, but also by his negligence or by his imprudence.

7.
THE GERMAN MODEL

German legal evolution: we shall consider German legal evolution as a totally different template of civil law from the French; two historical backgrounds are needed to understand the evolution of law in Germany: 1) the spread of Roman legal studies and 2) the role assumed by the German emperor.

Roman law reception: (especially Italian) universities were teaching Justinian texts and roman law principles, students from Bologna took service with princes, as appointed judges etc.; this deeply contributed to spread of roman law as the general law; new Law schools founded; 1495 Emperor established the Chamber of Justice of the Holy Roman Empire, half members had to be law doctors.

Legal profession: trained doctors of law prevailed, judicial advisers' opinion obtained force of law.

Romantic age: Savigny's legal theory, law = spirit of the people; Roman law incorporated in German history; Germany as successor of the Roman Empire; building popular Romano-Germanic legal spirit, of which the Roman law professors were the interpreters, and the key of the spread of roman law.

Historical school: founded by Savigny; opposing popular spirit vs natural law, popular spirit vs rational law, popular spirit vs foreign (French) law, local vs global; German law as the perfect model.

Dogmatic/pandectist school: starting from history, the study of Roman Law and its evolution within the German Empire, as a system of concepts; dogma = definition; sources = pandects and Digest.

Towards the code: professor Windhscheid, author of the Pandektenslehere (pandects theory), developed the idea of having a code centered on a general part of the law, as a preliminary book, with NOT so much principles, BUT definitions; wills, contracts can be summarized into the definition of an Act of intention (*Rechtgeschaeft* in German, translatable as *Acte juridique* in French); that general part became the 1st book of the newly drafted German civil code, *Buergerliches Gesetzbuch*.

Act of intention: declaration of intention that something should happen in legal terms; it can be unilateral, e.g. a testament, or bilateral, e.g. a contract; in this way different fields of the law could be unified in a general part of civil law; an act of alienation can be a subtype of an act of intention, being the transfer of property or possession accompanied by an agreement between of the parties.

Subjective right: the sphere of legal action where the intention of a subject prevails over the other's.
Legal formalism: according to the pandectist theory, a law is a public declaration by a legitimate (e.g. legislative, judiciary) authority that something has the value of law; despite this formal scheme, the role of Jurists (*JuristenRecht*) was very important and authoritative in the production of law.

Minority schools: alternative view of the law, redefining the concepts of the pandectists; Jhering and the School of Interest → right is interest protected by the law; not intention and concepts but politics and interests (Left); e.g. possession and property are interests protected by the state, they can be limited in the name of national interest as it prevails over private interest; contract is not a act of intention producing legal effects, but a social act approved by the state giving it legal effects; interpretation should not be strict or limited to words, but policy oriented, purposive, i.e. political.

German Empire towards the Code:

- 1812 → War of national liberation vs Napoleon giving Germans the idea of a German Nation;
- 1815 → Victory (*Belle Aliance*): Prussia pre-dominance;
- 1866 → War against Austria giving Prussia the control of south of Germany;
- 1870 → Invasion of France leading to the II Empire;
- 1873 → Legislative Authority to the Reich to draft a Code;
- 1888 → 1° draft and revision;
- 1896 → Final draft: four years to be studied by the legal professionals;
- January 1° 1900 → Enactment of the BGB.

8.
DIFFUSION OF EUROPEAN CODES

What is diffusion: it suggests definitional issues of motivation, processes, outcomes. Especially with respect to the last issue (outcomes), "diffusion" also suggests an affinity with a concept much in use recently: "the convergence of law and of legal systems". Today, in the context of globalization, we suppose that legal systems of the world are converging, are becoming more similar to one another.

Diffusion and globalization: associated with globalization or regionalization of national economies, and the *acceptance* of common standard of international human rights potentially binding the state.

Diffusion and harmonization: one thing is unification of law (e.g. political unity in Germany, which has been reached through a civil code), and another one is the harmonization of law (i.e. that is reached not through unification but by rendering the application and interpretation of legal concepts similar in methods and possibly in outcomes). Still, both are intentional practices, consciously articulated and consciously engaged in "convergence". The theory of convergence of legal systems suggests both a process (or tendency) and a result, capturing the underlying elements of inevitability and contingency that accompany, facilitate, or hinder those conscious efforts.

Forms of diffusion: two principal forms of diffusion of law in the early stages of the modern era → The first is the diffusion of law that accompanied the dissolution of the shadow of the Holy Roman Empire and the arrival of the Napoleonic Period on the European continent at the turn of the 19th century, which of course marked the creation of a newer structure of the law which call modern law (in a European narrative) and then started the diffusion of these new models all around the world.

Colonization: the second principal form of diffusion in early modern times was that accompanying colonialism, which patently transplanted legal rules and standards of modern European law into other areas of the world, including the idea of protection of human rights and freedom of markets.

Diffusion of the Code Napoleon: a major example of the diffusion of European models abroad is that of the French civil code; *"l'exportation du Code civil de 1804 est un phénomène majeur de l'histoire juridique universelle, le constat du rayonnement sans égal du Code Napoléon est-il unanime."* What was French was becoming universal. Louis-Edmond Beaulieu, observe que *"pareille expansion des lois d'un peuple n'a eu d'égale que la diffusion des lois romaines"* (such expansion of the law of a people has no parallel but the spread of Roman law → French Code as the modern equivalent of the Ancient Roman Law. This attitude is shared at a certain point not only by French but also by German authors, e.g. according to Zweigert and Heinz Kötz, "other great codes came into force in Central and Western Europe at the end of 18th and the beginning of the 19th centuries, but beyond doubt the French Code civil is intellectually the most significant and historically the most fertile.

Three main causes for the diffusion of the French civil code:

1. Military Conquest → Belgium, NL, Rhine Confederation, Baden, Frankfurt, Hamburg, Switzerland, Northern Italy 1802 and Naples 1809, Spain, Poland + some countries accepted and maintained the legal models of the code civil even after the French were defeated;
2. Imperialism → Algeria, Lebanon, Syria, Cameroun, Togo + also after the collapse of the empire many countries maintained that law, even while re-elaborating it in renewed codes.
3. Prestige / Ascendancy → soft power exercised by French qualification, *la conquête intellectuelle, parfois aussi sentimentale*, a kind of intellectual (rather than military) conquest, e.g. South American when they obtained independence from Spain (Bolivia

1831, Argentina 1869, Chile and Paraguay 1889) also because of the code's political (liberal) print.

Diffusion of French law in North America: we may find French legislation also in Morth America and especially in Louisiana where during times (1808, 1825, 1870) pieces of French legislation were adopted, and in Quebec where a French-like code was adopted in 1866. This two areas are almost insular areas within the common law system of the United States and also of Canada -> French legislation was maintained in these ex-French colonies as a matter of identity.

Why a successful story? Was it military? At the beginning military conquest was a major factor, but it survived also afterwards, so it was not mere imposition. Was it political? The reason why the French civil code succeeded so much is certainly also that it was a liberal and egalitarian code; still, it survived in socialist countries as Poland and Romania too. Can we speak of intrinsic qualities? *Ses qualités de forme, à la clarté, à la simplicité et à la concision de sa langue*. Form and language, its clarity the fact it was very simple and concise, resisting translation, are a major factor of its success.

Zweigert u. Koetz: according to Zweigert and Koetz, "one must not suppose, however, that the Code civil was received in these countries as the result of a careful evaluation of its merits, in the way that a customer in a shop might choose the goods which best suited him." = no intrinsic qualities.

Paul Koschaker: according to him "the reception of foreign law is not so much a 'question of quality' as a 'question of powers': reception occurs when the law being received is in a position of power, at least intellectually & culturally, as being the law of country which still enjoys political soft power".

Soft power: it is the ability to attract and co-opt, rather than coerce (hard power); it is the ability to shape the preferences of others through appeal and attraction; a defining feature of soft power is that it is non-coercive; the currency of soft power is culture, political values, and foreign policies.

Joseph Nye: Harvard University, he wrote a book in 1990 called *Bound to Lead: The Changing Nature of American Power*, in which he says "when one country gets other countries to want what it wants might be called co-optive or soft power in contrast with the hard or command power of ordering others to do what it wants." Another book from 2004 called *Soft Power: The Means to Success in World Politics*, had a great impact all over world especially in the context of globalization, and also had great impact on Chinese politics: General Secretary Hu Jintao, the 17th Central Committee of the Chinese Communist Party, devoted a whole plenary session to the issue of culture, declaring in the end that it was now a national goal to build their country into "a socialist cultural superpower."

China: today this is not only an American project, but Chinese too; in 2014, Xi said, "We should increase soft power, give a good Chinese narrative, better communicate our message to the world."

Political seduction: Nye argues that soft power is more than influence, since that can rest on the hard power of threats too; it is more than just persuasion or the ability to move people by

argument (still, that is an important part); it is the ability to attract, and attraction often leads to acquiescence.

9.
AMERICANIZATION OF THE LAW

The globalisation of law and legal thought → 3 globalizations:

- *Classical Legal Thought (1850 – 1914)*
  as a liberal attack on pre-modern policy making;
- *Socially oriented legal thought (1900 – 1968)*
  as a reaction to laissez faire and a function of the rise of political parties and trade unions;
- *Universalistic legal thought (1945 – 2000)*
  "Modern Legal Consciousness" as a reaction to the "institutionalised social" as discipline.

Classical Legal Thought (1850 – 1914): had no essence; law as a system of spheres of autonomy for private or public actors; within the boundaries of spheres defined by legal reasoning understood as a scientific practice; prestige of German Legal Scholarship.

Social Legal Thought (1900 – 1945): again a way of thinking without an essence, but as rethinking law as a purposive activity, and as a regulatory mechanism.

Modern Legal Consciousness (1945-2000): gradual extension of the rule of law; understood firstly as property rights in the market vs State intervention, and secondly as Human rights in politics vs Discretion and Abuse; prestige assumed by the American Culture.

The "thing" that globalized: was not the view of law of a particular political ideology (CLT could be right / left liberal according to balance between public and private interests, Social could be socialist, social democratic, Catholic or even fascist, MLC right/left wing libertarians); not a particular body of legal rules, a mode of thought (consciousness of jurists, how we see ourselves & construct our job).

1st Globalization: law seen as a system, having a strong internal structural coherence; two main traits firstly distinction between private and public and secondly commitment to legal interpretive formalism, combined in "The Will Theory" → *The Will Theory*: law's a set of rational derivations from the notion that governments should protect the right of legal persons; the meaning of the law is helping them to realize their wills restrained only as necessary to allow others to do the same → technique of Legal Analysis based on deduction → *Deduction*: legal scientists can and should elaborate the positive legal rules composing the system, on the premise of its internal coherence (right, will, fault…); the hero figure was the law professor. | *Cultural*: tradition / modernity dichotomy; traditional societies / modern societies; Savigny Historical School; law of a country inherently political but could be developed in a scientific manner. | *Private law*: the core of the law; public law as the law of the state, less scientific; administrative law as that of bureaucracy; distinction between market law / family law; the marginalization of labor law; Classical Legal Thought globalized because it had so little to say.

2nd Globalization: critique of abuse of deduction in legal method, individualistic in substance, the social as an abstraction, to replace "will, right, fault"… Saleilles, Lambert, the goal was to save liberalism from itself; urbanization, industrialization, organizational society, globalization of markets and consequent crisis of financial markets producing the Great Depression, war understood as the product of failures of Int'l order based on sovereignty; from "is" to "ought" → labor law, regulation of urban areas, regulation of financial markets, new Institutions of Int'l Law: The League of Nations. | *Change of consciousness:* understand jurists to operate as active interpreters, not simply passive interpreters logically compelled to liberal conclusions → anti-formalism, the "living law" / just written texts. | *The Welfare State:* the great offspring of the 2° globalization → social rights (unemployment, accidents, health, pensions…) | *1968 Critique of the Social:* the social had become institutionalized, an entrenched and oppressive status quo; critique of the is -> ought as social conceptualism, leading to direct policy analysis → the dominant rhetoric of critique was civil libertarian and permitted a de facto alliance of left and right" | *Critique*: public administrators as implicitly authoritarian manipulators of vacuous general standards and empty expertise; a seismic cultural and political shift | *Discredit*: US Vietnam war, 2,000,000 deaths, USSR invasion of Prague and Afghanistan, gradual discredit of third worldism (Red Guards, authoritarian Algeria), discredit of radicalism (Black Panthers, Red Brigades, Baader-Meinhoff Gang), Pan-Arabism in the 1967 Israeli war and Munich assassination of Olympic Athletes, Pan-Africanism and kleptocracy.

3rd Globalization: on a brutal critique of its predecessor, the Social; no discernible large integrating concept; parallel to the will theory; coexistence of transformed elements of CLT and the Social; "dusk being not yet fallen on modernity the owl of Minerva has not been able to take flight". | *Combination*: neo-formalism, policy analysis, producing rules that are ad hoc compromises, the hero figure became the Judge | Human Rights: to play the same role in contemporary legal consciousness that private rights played in the 1st globalization and social rights in 2nd; will, right, fault; food, housing, work, health; identities, body → political, as long as human (prepolitical) operating as universals is at once natural and positive | Constitutional Courts: a clear sign of US influence after 1945 → Italy, Japan, Germany; Cold War victory; US courts as models; international institutions = legal capitulations | *Prestige*: seems to operate as the more relevant category of understanding the dominance of US style policy analysis, also in the work of EU Commission | Judge: the centrality of the judge combines with the problematic status of juristic method; from Law & Logic to Law & Society to Law & Politics; judge simultaneously represents law vs sovereign politics and an usurper; doing politics "by other means".
Conclusion: it is not possible to reduce law to politics; if war is politics by other means, and politics is war by other means, reduction is anyway impossible; if law is politics it is so by other means → existential dilemmas of undecidability.

10. CONSTITUTIONAL IDENTITY

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The aim of this lesson is considering constitutions from a specific perspective, so we will deal with the relationship between constitutions and "constitutional identity", and the main question is: what comes first, the Constitution or the constitutional identity?

The constitution is a supreme law that establishes, organizes and empowers the government and determines how other laws are made and implemented. It both organizes & constrains power.

Generally speaking, what is "identity"? what are some words we associate with the word "identity"?
→ the traits, beliefs, etc., that make a particular person or group of people different from others…
→ name, character, personality, nationality, religion, age, gender, individuality, uniqueness, status…

This lecture is based on the following source: **M. Rosenfeld**, *Constitutional Identity*, in M. Rosenfeld – A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, OUP, 2012, pp. 756-776.

CONSTITUTIONAL IDENTITY AS A CONTROVERSIAL CONCEPT: **constitutional identity** is based on:
- actual provisions of the constitution (e.g. presidential or parliamentary regime);
- relation between the constitution and the culture in which it operates;
- relation between the identity of the constitution and other relevant identities (e.g. national, religious, ideological).

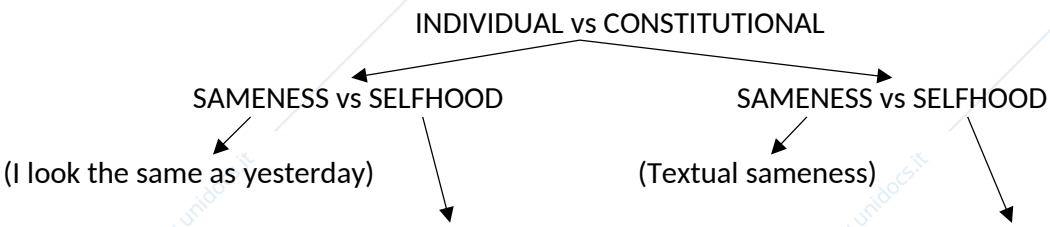
COMMON IDENTITY AMONG DIFFERENT CONSTITUTIONS: **constitutionalism** is based on:
- definition and limitation of the powers of government;
- commitment to adherence to the rule of law;
- protection of fundamental rights.

All constitutions that comply with those prescriptions can be said to share a **common identity**. *E.g. C. SPA art. 21; C. ITA art. 17; FL GER. art. 8 → The right to peaceful unarmed assembly is recognized…*

THREE LAYERS OF CONSTITUTIONAL IDENTITIES:
- the identity derived from having (or not having) a constitution;
- the content of a constitution providing distinct elements of identity (e.g. federalism, rights);
- the context in which a constitution operates playing a significant role in shaping its identity.

CONSTITUTIONAL IDENTITY AND CHANGE:
- Constitutional Identity is a dynamic concept (a state of flux);
- Constitutional Identity is influenced by constitutional changes/revisions/ amendments;
- Constitutional Identity is influenced by constitutional interpretation.

SAMENESS VS SELFHOOD & INDIVIDUAL VS CONSTITUTIONAL PERSPECTIVE:



(Despite physical changes and changes in feelings and emotions, I remained myself) (Organic process of adaptation and growth that preserves identity)

Sameness and selfhood both complement (interpretative selfhood and textual sameness → distinct constitutional identity) and contradict (textual sameness can seemingly contradict evolving sense of selfhood, shaped by interpretation) each other. Basically, sameness means "I look the same every day", while selfhood means "despite changes I have remained myself".

Ex. Sameness → 200+ years the text of US constitution remained the same (except 27 amendments).
Ex. Selfhood → interpretations of US constitution have evolved its collective identity.

NATIONAL IDENTITY:
Nation = community of people sharing culture, religion, history, language or ethnicity.

CONSTITUTIONAL IDENTITY VS NATIONAL IDENTITY: **National** and **constitutional** communities differ although they may **overlap** and comprise the same exact membership or closely intertwined ones. **Constitutional identity** both **conflicts** with national identity and is also, in part, **consistent** with it. Generally, constitutional identity always remains in a **dynamic flux** with other relevant identities.

CONSTITUTIONAL IDENTITY BETWEEN SCHOLARS AND COURTS:

- **Troper**: constitutional identity results from a process of extraction of certain principles which can be asserted as essential and as such distinguishable from other constitutional norms;
- **Rosenfeld**: filling voids is a way of building a constitutional identity;
- European Court of Justice (**ECJ**): common constitutional traditions of the EU member states.

THE PLACE AND FUNCTION OF CONSTITUTIONAL IDENTITY: Opposite visions: constitutional identity located **within** the constitution (Troper) ≠ constitutional identity located **among** constitutions (ECJ).

THE IDENTITY OF CONSTITUTIONAL MODELS: **Rosenfeld** distinguishes **seven** distinct **constitutional models**, which are constructed with reference to actual historical experience:

1. **German** constitutional model (the model is built upon the concept of self-governance by and for a single homogenous ethnic group | the model imagines the existence of pre-political bond: common language, culture, ethnicity, religion | the ethnic-based nation is conceived as indivisible, homogeneous and formed prior to the adoption of any constitution);
2. **French** constitutional model (the nation is built upon the demos with the ethnos receding to the point of becoming almost invisible | the model is grounded on democratic self-governance for a polity of equal citizens bound together by a social contract | the political framework gives an effective voice to the people as a whole);
3. **American** constitutional model (the model is closer to the French than to the German nut whereas the French model requires an existing nation, the American model does not | a key feature of the American constitutional model is the role that Constitution and

constitutional identity have had in transforming over time a diverse multi-ethnic & multicultural population into a veritable people and into a unified distinct nation that cohere into a dynamic polity);

4. **British** constitutional model (the model is an immanent constitutionalism that emerges gradually by means of a process of accretion | this gradualism and organic growth is due to many factors peculiar to Britain and its history);
5. **Spanish** constitutional model (the model sets a framework for a multiethnic polity, a proper balance between national unity and a meaningful measure of autonomy to ethnic communities, such as the Basques and the Catalans);
6. **European transnational** constitutional model (still work in progress | the attempt to endow the European Nation with a formal constitution ended in failure – referendum in France and in the Netherlands. The EU appears to lack a sufficient common ethnos or identity.
7. **Post-colonial constitutional** model (Constitutions adopted by former colonies in Africa and Asia that achieved independence after WW2 | both the constitutional order and identity of the newly independent former colony are elaborated in a dialectical process involving an ongoing struggle between absorption and rejection of the former colonizers' identities).

CONSTITUTIONAL IDENTITIES AND CONSTITUTION-MAKING PROCESSES: Constitutional identity depends not only on the constitutional model involved, but also on the type of constitution-making that led to its adoption, e.g. if constitution-making is preceded by violent revolution, the relationship of the new constitutional order to pre-constitutional identity would be different than if there had been a peaceful transition. **Rosenfeld** distinguishes **six different models** of constitution-making:

1. **Revolution-based** model (France, USA. How much and what of the past is destroyed?);
2. **Invisible** model (UK. No formal division between constitution-making and legislating);
3. **War-based** model (Germany, Japan. Transition imposed by the victors);
4. **Pact-based (conventional) transitional** model (Spain. Negotiation and subsequent pact);
5. **Transnational** model (2004 EU rejected Treaty-Constitution. Treaty or a constitution?);
6. **Internationally-grounded model** (Afghanistan in 2005. Supervision by the international community: the UN undertook positive interventions).

IDENTITY THROUGH CONSTITUTIONAL INTERPRETATION: **Rosenfeld** finds **three different cases**:

A) Interpretation produces constitutional identity and is at the same time shaped by the latter;
B) The adjudicator deliberately appeals to constitutional identity to guide his interpretation;
C) The adjudicator is unaware that his interpretation is influenced, or his decision triggered, by factors rooted in constitutional identity.

Example of case A → the US Supreme Court decision on Roe v Wade (1973) recognized for the first time a constitutional right to abortion in the face of total textual and precedential silence on question. That sentence generated a different image of American constitutional identity and had a significant impact on the constitutional identity of the United States.
Example of case B → German Holocaust Denial Case (1994). The Holocaust denial was (and is) criminalized in Germany. The German Federal Constitutional Court held the criminal prohibition against Holocaust denial to be constitutional, emphasizing that to hold otherwise would deprive Jews living in Germany full integration in the larger community.

Example of case C → US Supreme Court decision Lynch v Donnelly (1984). The Court decided that public display of a Nativity scene in a city's Christmas set was constitutional. The Court's majority trivialized the nativity, by stressing its display in the context of commercial and other national secular traditions now associated with the Christmas holiday.

CONSTITUTIONAL INTERPRETATION & TWO OPPOSED VISIONS → EXCLUSIVISM VS UNIVERSALISM:

- **Exclusivism**: The Constitution must remain pure and free from foreign influence or contamination. The exclusivist view promotes a national identity focus on **divergences;**
- **Universalism**: There is a convergence of norms and values, at least among advanced democracies, which makes constitutional cross-fertilization attractive and often beneficial. The universalist view promotes a national identity focus on **convergences**.

CONCLUSION: What comes first? C or CI? It depends: sometimes maybe C, sometimes maybe CI.

11.
PREAMBLES IN COMPARATIVE PERSPECTIVE

Aim
↓
considering constitutions from a specific perspective
↓
constitutional preambles as potential mirrors of constitutional identity:
merging of constitutional, *pre-constitutional*, *extra-constitutional "materials"*

Example: *We the People of the United States, in Order to form a more perfect Union […] do ordain and establish this Constitution for the United States of America.* [US Constitution, 1787]

Generally speaking, what is a **preamble**? What are some words we associate with this word?
→ overture, preliminary/opening remarks, prelude, prologue, preface, introduction, incipit…
→ a preamble can have a big variety of functions: disorientation, time and place, alert… (sometimes the preamble serves to anticipate, present, emphasize the text that follows; contrarily, at other times to lessen its scope or to alert the reader to the limitations or weaknesses of what is to come.)

At first glance preambles are texts «sending out messages in all directions».

This lecture is based on the following sources: **L. Orgad**, *The Preamble in Constitutional Interpretation*, in *International Journal of Constitutional Law*, Vol. 8, Issue 4, October 2010, pp. 714-738 AND W. Voermans, M. Stremler and P. Cliteur, *Constitutional Preambles: A Comparative Analysis*, Cheltenham-Northampton, Edward Elgar Publishing, 2017 (quotations only).

CONSTITUTIONAL PREAMBLE (FORMAL): What is a preamble to a constitution and how can it be classified? ***Preamble = Introductory text that precedes the articles of a constitution.*** *In formal terms*, a preamble is the introduction to the constitution and usually bears the formal heading "Preamble" or some alternative, equivalent title, while in other cases it appears without a heading.

Examples of formal preambles are USA, 1787; FRANCE, 1958; SEYCHELLES, 1993; BOLIVIA, 2009.

U.S. CONSTITUTION (1787) → *"We the People of the United States, in Order to form a more perfect Union, establish Justice, Ensure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."*
CONSTITUTION OF FRANCE (1958) → *"The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the* ***Declaration of 1789****, confirmed and complemented by the* ***Preamble to the Constitution of 1946****, and to the rights and duties as defined in the* ***Charter for the Environment of 2004****. By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development."* Called matryoshka preamble as it refers to texts and documents that refer to other texts and documents.

CONSTITUTION OF THE REPUBLIC OF SEYCHELLES (1993) (rev. 2017) → *We, the People of Seychelles, GRATEFUL to Almighty God that we inhabit one of the most beautiful countries in the world; […] HEREBY adopt and confer upon ourselves this Constitution as the fundamental and supreme law of our Sovereign and Democratic Republic.*

CONSTITUTION OF (THE PLURINATIONAL STATE OF) BOLIVIA (2009) → *In ancient times mountains arose, rivers moved, and lakes were formed. Our Amazonia, our swamps, our highlands, and our plains and valleys were covered with greenery and flowers. We populated this sacred Mother Earth with different faces, and since that time we have understood the plurality that exists in all things and in our diversity as human beings and cultures. Thus, our peoples were formed, and we never knew racism until we were subjected to it during the terrible times of colonialism. […]*

CONSTITUTIONS WITHOUT FORMAL PREAMBLE: In Italy, the Constituent Assembly (1946-1947) discussed the possibility of including a preamble, but in the end, this option was discarded in order to prevent ambiguities in interpretation. On several occasions it was suggested by members of the Constituent Assembly to confine the most controversial provisions (e.g. those related to the protection of social rights and the actualization of welfare) to the preamble. Though, as we have said, in the end they decided not include a formal preamble. The argument was that the collocation of individual norms into the preamble could had been intended to dampen/reduce their effect.

CONSTITUTIONAL PREAMBLE (SUBSTANTIVE): Alongside a formal classification, it is possible to identify a preamble through its content. *In substantive terms*, a preamble does not require a specific location in the constitution but, rather, specific content. It presents the history behind the constitution's enactment, as well as the nation's core principles and values. Countries that do not have a formal preamble often include introductory articles that may be regarded, in substantive terms, as a preamble.

ISRAELI BASIC LAW: Human Dignity and Liberty (1992) → Articles 1 and 1A of read as follows:

"1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in spirit of the principles set forth in the Declaration of Establishment of the State of Israel.

1A. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state."

The articles are consonant with most of the substantive requirements of a preamble; they recognize the fundamental values of the state of Israel and its national character.

CONSTITUTION OF THE ITALIAN REPUBLIC (1948) → *Fundamental principles (articles 1-12)…*

The articles are consonant with most of the substantive requirements of a preamble; they recognize the fundamental values of the Italian state.

STATISTICS: The average number of words of a preamble is around 300. Still, the Iranian preamble counts 3249 words and the Chinese one counts 1162, while the shortest preamble is the Greek one: "*In the name of the Holy and Consubstantial and Indivisible Trinity*". Other significative statistics:

- Most of the constitutions in force, today, do have a preamble **(83 %);**
- Out of 190 constitutions, only 32 of them **(17%)** lack a preamble;
- The use of preambles is becoming **common practice;**
- The newer the constitution, the more likely it has a preamble; indeed, we can say one of the tendencies of so-called "global constitutionalism" (assuming that such a phenomenon exists) is the growing use of preambles in constitutional design and in constitutional adjudication.

INSIDE/OUTSIDE: Does the constitution **include** the preamble? It depends also on the wording: "the present constitution", "this constitution" or "the following constitution" lead to different solutions.

CONSTITUTIONAL CHANGES/AMENDMENTS: Can preambles be amended? Sometimes they do. Preambles have been added or amended in some countries either due to a popular demand (a bottom-up change) or because of a government-led constitutional design (a top- down change). Still, it depends on the constitutions. For example, Article 7B of the Constitution of Bangladesh states that BASIC PROVISIONS OF THE CONSTITUTION ARE NOT AMENDABLE.

LINGUISTIC STYLE: the possible modulation of the linguistic style of preambles can be distinguished as: **solemn**, **plain** and **legal,** depending on the way in which the phrases and terms are structured.

SOLEMN → ceremonial character, e.g. preamble of the French Constitution.
PLAIN → instead of using language apt for formal and exceptional moments, preambles speak in a way that is comprehensible for ordinary citizens, e.g. preamble of the Constitution of Ecuador.
LEGAL → many preambles use legal language: the technical language of lawyers, addressed at professionals (judges, civil servants, politicians, …), e.g. the preamble of the Constitution of Angola.

CONTENT: Preambles can be seen as constitutional ID cards, texts giving a lot of information about the traits of the constitution; but what is the main content of preambles? There a 3 different types:

- *Time, place and processes* (adoption of the constitution) → Preambles give information about the constitution-making processes; they define **who** the "we" is, **when** and **in what circumstances** "we" acted/ "we" wrote the constitution.
- *Connection of past-present-future* → Preambles include, typically, historical narratives of a state, a nation, or a people, telling specific stories that are rooted in language, heritage, and tradition. These stories shape the common identity ("we"). The reference is often to past events that influenced the establishment of the state. **The South African preamble**, for example, declares that the people of South Africa "recognize the injustices of our past," and "honor those who suffered for justice and freedom in our land." The preamble to the **Chinese Constitution** notes that "China is one of the countries with the longest histories in the world" and details Chinese history and the nation's achievements. The **Turkish preamble** mentions that the Turkish Constitution is established "in line with the concept of nationalism outlined and the reforms and principles" introduced by the republic's founder Atatürk.
- *Reference to ideals and general principles* → Preambles often outline a society's fundamental goals. These may be universal objectives, such as the advancement of justice, fraternity, and human rights; economic goals, such as providing for a socialist agenda or advancing a free market economy. A preamble may include references to God. Some preambles emphasize God's supremacy, such as the preambles to the Canadian Charter ("the supremacy of God") or the Swiss Constitution ("in the Name of Almighty God"). Other preambles refer to a religion: the Greek preamble refers to the Holy Trinity; in the Irish preamble, the Holy Trinity is mentioned as final end and source of authority to which all actions of "men and states must be referred.

LYRICAL CONSTITUTIONALISM: Preambles are good examples of "lyrical constitutionalism". That is to say, a constitutionalism aimed more towards creating and maintaining **idyllic, symbolic and identity tension** than to generating clear and defined prescriptions. They lead to emotional reactions, they set the tone and can even contribute to enhancing the actual effectiveness of constitutional texts by facilitating cohesion and identification.

IDEALISM VS REALITY: Preambles belong to the **"nobler"** parts of constitutions, rather than to the more **"efficient"** ones. In the field of tension between the poles of **idealism and harsh reality**, the large majority of preambular formulas appears to aspire towards idealism.

THE ADDRESSES (to whom do preambles "speak"?): main addressee of a constitutional preamble is the public i.e. "the **primary** addressees of preambles … are the citizens (or the people as a whole)". Possible presence of **secondary** or even more specific recipients: "people who have to work with the constitution and have to apply it", "groups of people to which the constitution is directed" and "specific groups of people outside the country". The **"world community"** is a further potential addressee. Today's preambles serve a broad promotional function. Indeed, "states may try to convince the international community (including donors and investors…) of their credibility".

FUNCTIONS OF CONSTITUTIONAL PREAMBLES

Constitutional preambles can explain, clarify the relationship between the constitutional text and the facts and the history, i.e. the constitutional-making process. In a certain way, constitutional preambles are at the crossroad between law and facts, legal-political texts and "historical magma", what is written and what is assumed, pre-constitutional and extra-constitutional materials.

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PRIMARY FUNCTIONS OF CONSTITUTIONAL PREAMBLES: what **functions** do const. preambles have?

- explain the reasons for adopting that constitution;
- include/exclude people/principles;
- compensate and balance the constitutional text that follows;
- be performative (e.g. wedding formula, i.e. not just saying but doing → consequences)

EXPLAIN THE REASONS FOR ADOPTING THAT CONSTITUTION: every law should be **justified**; the preamble may describe the nation's historical origins and its *«raison d'être»* and/or justify the adoption of the constitution → why we adopt the constitution – We were **X**, we are **Y**, we will be **Z**. A good example of a constitutional preamble explaining the reasons and the justifications for the adoption of the constitution is the constitutional preamble of the Constitution of South Africa.

Generally speaking, preambles tend to the answer to the following questions: **Who** is speaking? **Who** is the subject? In **what direction** does he/she move? Indeed, most preambles specify the **source** of sovereignty. In some cases, sovereign power overlaps with the people **("we the people of . . .")**. This is a relatively neutral term with which most of the population can usually identify. Another phrase relates to the source of sovereignty as stemming from a particular nation (the "**Lithuanian Nation,"** the "**Spanish Nation**," …).

THE EU EXPERIENCE vs THE US EXPERIENCE → On December 1, 2009, the **Treaty of Lisbon** entered into force, and in that case it was first necessary to determine who speaks for EU citizens: the **states** themselves, the **parliaments**, or the **citizens**. It was decided to refer to the **heads of the state**—his Majesty the King of the Belgians, the president of the Czech Republic, her Majesty the Queen of Denmark, and so on—as the entities ratifying the treaty. In the preamble to the Lisbon treaty, **the people of Europe do not "speak" directly as one political body**; no united "people of Europe" exists. By way of comparison, **in the United States**, one suggestion considered at the Philadelphia Convention had been to name the Union the **"United People and States of America."** The framers eventually adopted the phrase **"We the people of the United States"** because they were uncertain how many states would join, and this term was more flexible. Yet, in Europe, it seems that adding a new member state would require amending the preamble in order to insert another head of state.

INCLUDE/EXCLUDE PEOPLE/PRINCIPLES: Preambles can encourage cohesion or exacerbate divisions, and are called upon to serve as a device of national consolidation or to reconcile past wrongs. Consensual preambles tend **to unite** people, while disputable preambles tend **to divide**

people (e.g. when a preamble reflects only the story of a dominant group). A good example is the Constitution of Macedonia. The preamble to the 1991 Constitution established **Macedonia** as "the national state of the Macedonian people" and referred at length to their history, culture, and identity. The preamble stated that Macedonia was founded in order to serve as the "national state of the **Macedonian people**" as well as **other nationalities** that reside therein. The preamble secured full equality for all citizens, yet the Albanian minority opposed the nationalistic statements in the preamble and, in particular, the reference to Albanians as a national minority.

COMPENSATE AND BALANCE THE CONSTITUTIONAL TEXT THAT FOLLOWS: The purpose of the preamble is also to mitigate the **harshness** of the constitution that follows. Constitution of USA vs Constitution of France → the two preambles differ because they have dissimilar goals and different "compensating" capacities. The **United States preamble** confers inspiration to a regulatory instrument (i.e. the US Constitution), which would otherwise only find its core characteristics in prudence and mistrust. In **France**, on the contrary, the preamble compensates for the tone of the Constitution (characterized by considerable novelties regarding the form of government) and links it to the past and to the French constitutional heritage.

BE PERFORMATIVE: constitutional preambles are sometimes **performative expressions** that not only tell, but also **"do things with words"** e.g. India, USA ("we the people do ordain and establish…").
WEAK POINTS AND INCONGRUENCES OF CONSTITUTIONAL PREAMBLES: It seems reasonable to approach such introductory texts with some caution, in the belief that they contain only partial truths, are inevitably imperfect, and are possibly filled with stale clichés and rhetorical platitudes.
Three types of inconsistency:

- **"Lying" or incongruous preambles**, which **do not appear to be perfectly consistent with the text that follows**. This can happen, for example, when the preamble makes solid references to more or less defined divinities, but the constitution that follows contains provisions which sanction religious freedom. We find a good example in Canada, where courts have not granted the Canadian preamble legal force, and some scholars have opposed granting it any legal weight, inter alia because of the alleged contradiction between the supremacy of God and the rule of law and because the preamble contradicts some clauses of the Charter.
- **Inconsistencies between preambles of neighboring countries**, e.g. Kosovo and Serbia.
- **Inconsistency between what preambles proclaim versus reality**. One thing that is astonishing is the widespread appeal of constitutional preambles to the rule of law, democracy and political pluralism. The comparison between the already-mentioned ideals and harsh realities (see the *Democracy Index* developed by the *Economist's Intelligence Unit*) would reveal many dramatic surprises, e.g. the Democratic Republic of the Congo.

CONSTITUTIONAL PREAMBLES AND LEGAL REVIEW (LEGAL STATUS OF PREAMBLES): What role does the preamble play in constitutional adjudication? Can judges **use preambles** to nullify or disapply laws? A global survey of the function of preambles shows a **growing trend** toward its having greater binding force—either independently, as a substantive source of rights, or combined with other constitutional provisions or as a guide for constitutional interpretation. It depends on the preamble:

- **Soft** preambles → USA (the U.S. preamble, which generally does not enjoy binding legal status, remains the exception rather than the rule);

- **Hard** preambles → France (preambles can also be legally binding constitutional clauses and serve as independent sources for rights and obligations)
- **«Supporting»** preambles → Germany, South Africa (in most cases preambles seem to play a "supporting role" to other constitutional provisions; it is much less common for a preamble to be awarded a full and autonomous rank).

SOFT PREAMBLES → U.S. CONSTITUTIONAL PREAMBLE: The **current** preamble differs from the **original** introduced in 1787 at the Philadelphia Convention. The original preamble did not include the famous phrase "We the people of the United States" but, rather, designated the states as the source of authority; also, it did not specify the Constitution's objectives. The original preamble stated, simply, that: "*We the people **of the States** of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity*". The text was changed by the Committee of Style. The preamble refers to the people as the source of authority and outlines six lofty goals: *"To form a **more perfect Union**, establish **Justice**, insure **domestic Tranquility**, provide for the **common defense**, promote the **general Welfare**; and secure the **Blessings of Liberty**."* Despite its central role in education and in the public debate, courts have rarely been inclined to rely upon the preamble. **Courts have rejected, repeatedly, the argument that constitutional rights or limitations can be inferred directly from the preamble**. The classic case establishing its nonbinding nature was decided in 1905. In this case, a convicted defendant challenged the constitutionality of a statute adopted by the state of Massachusetts that, in his view, contradicted rights protected by the preamble. Rejecting this argument, Justice Harlan noted:

"Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution, and as such as may be implied from those so granted" **(Jacobson v. Massachusetts 1905)** → PREAMBLE HAS NO LEGAL STATUS!

Nevertheless, U.S. courts have invoked the preamble in constitutional interpretation. Although the references are inconsistent, rhetorical, and far from conferring independent constitutional rights, they still provide the preamble with **some constitutional weight**. Despite these references, the U.S. preamble is not, by and large, a decisive factor in constitutional interpretation.

HARD PREAMBLES → FRENCH CONSTITUTIONAL PREAMBLE (1958): *"The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the **Declaration of 1789**, confirmed and complemented by the **Preamble to the Constitution of 1946**, and to the rights and duties as defined in the **Charter for the Environment of 2004**. By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development."* In this case the preamble has been used to **constitutionalize unenumerated rights**. The founding fathers of the Fifth Republic did not include a bill of rights in the Constitution. Instead, they drafted a preamble referring to two previous documents: the

Declaration on the Rights of Man and of the Citizen of 1789, and to the preamble to the Constitution of the Fourth Republic of 1946. The preamble to the 1958 Constitution did not originally enjoy binding legal force nor was it even considered an integral part of the Constitution. On July 16, 1971, the *Conseil Constitutionnel* recognized the preamble's binding force as an independent legal source of human rights. For the first time, the Conseil found an act passed by the French Parliament to be unconstitutional because it contradicted freedom of association, one of the "fundamental principles recognized by the laws of the Republic" (these fundamental principles were not mentioned in the 1958 Constitution but in the preamble to the 1946 Constitution → we can see the effects of the "matryoshka preamble"). In later decisions, the Council held that the preamble to the 1946 Constitution enjoys legal force and constitutes an independent source of rights. Interestingly, at the time it was drafted, the 1946 preamble did not enjoy any legal status. Thus, the *Conseil Constitutionnel*, through a reference to the 1946 preamble in the 1958 preamble, effectively granted the 1946 preamble a higher status than it had previously enjoyed. **Although not explicitly enumerated in the 1958 Constitution, the rights to strike, freedom of association, privacy, education, freedom of conscience, freedom of movement, and due process were all thereby recognized as constitutionally protected rights.** Some of these rights, such as freedom of association, were not even listed in the 1946 preamble but were incorporated by affirming the doctrine of the "fundamental principles recognized by the laws of the Republic," anchored in the 1946 preamble.

« *Vu la Constitution, et notamment son préambule…* » i.e. « given the Constitution, and in particular its preamble » (Décision n° 71-44 DC Conseil Constitutionnel) → PREAMBLE HAS LEGAL STATUS!

The 1971 decision was France's Marbury v. Madison. It applied an interesting method of judicial interpretation according to which the 1946 preamble, the 1789 declaration, and the fundamental principles of the Republic were all granted constitutional legal status ex post facto.

SUPPORTING PREAMBLES → SOUTH AFRICAN CONSTITUTIONAL PREAMBLE: When several interpretations exist, courts prefer the option consonant with the preamble. Section 39 of the South African Constitution declares that, when interpreting the Bill of Rights, the courts "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom"—words that appear in the preamble. South Africa's Constitutional Court has confirmed the preamble's status **as a guide when interpreting the Bill of Rights**. While the preamble is not an independent source of rights, it is an inspiration for those rights.

SUPPORTING PREAMBLES → GERMAN CONSTITUTIONAL PREAMBLE: On June 30, 2009, the German Constitutional Court decided that, in principle, no incompatibility exists between the German *Grundgesetz* and the Treaty of Lisbon and thus laid the groundwork for completion of the ratification process. The Lisbon treaty grants the EU powers in matters of foreign and security policy and obliges member states to participate in European integration. The question was if the treaty overrides the German constitutional order in a way that requires a constitutional amendment. The Court held that the treaty does not violate German sovereignty, although its confirmation does require some legislation processes. It referred to article 23(1) of the Basic Law as well as to the preamble taking note of the latter's intent "to serve world peace as an equal partner in a unified Europe."

CONCLUSION: Do Constitutions need preambles? It depends: we should, from time to time, and case by case, evaluate whether it is better (or even necessary) to write a constitutional preamble.

13.
CONSTITUTIONAL REVIEW IN COMPARATIVE PERSPECTIVE

This lecture is based on the following sources: **C. Saunders**, *Courts with Constitutional Jurisdiction*, in **R. Masterman**, **R. Schuetze** (eds.), *The Cambridge Companion to Comparative Constitutional Law*, CUP, 2019, pp. 414-417 AND **M. Cappelletti**, *Judicial Review in Comparative Perspective*, in «California Law Review», oct. 1970, Vol. 58, No. 5, pp. 1017-1034.

Generally speaking, what are some words we associate with the word **"review"**?
→ assessment, analysis, evaluation, appraisal, examination, investigation, scrutiny, inquiry, check…

Scrutiny *of what*? Scrutiny in relation *to what*?

Law and Statutes — Constitution

CONSTITUTIONAL REVIEW: We could define constitutional review "*the power of a court (or another judicial/political body) to determine if a* ***law or official government act*** *is legal according to the* ***Constitution***" or "*the power of a court* ***to determine the constitutionality of legislation***". Constitutional review can be considered the third stage of a three-stage process: 1) to write a constitution, primarily conceived as a codification of individual and social values, 2) to give a rigid character to modern constitutions, conferring a relative immutability on the superior law and the values it enshrines, and 3) to provide a means for guaranteeing government's obedience to the constitution, separate from the legislative power itself, embodied in the active work of the judges, or, in some countries and relative systems, of a special constitutional court.
CONSTITUTIONAL REVIEW – WHY? Both **formal/theoretical** reasons and **practical** reasons.

THE FORMAL/THEORETICAL STATUS OF THE CONSTITUTION

Constitution as Supreme/Paramount Law
Laws / Statutes (primary legislation)
Other Regulations/ Rules (secondary legislation, administrative rules)

From a formal/theoretical point of view constitutional review is a particular way to guarantee supremacy of the constitution over other laws and statues. The only way to maintain the constitution's supremacy is to limit: 1) absolute power of the law, 2) "tyranny of the majority" (of the Parliament), & 3) Parliaments and Executives. All modern constitutions reject parliamentary supremacy in favor of constitutional review. **Parliamentary supremacy** means that parliament itself makes the ultimate determination about whether one of its own enactments violates the constitution – it is like asking a fox to guard the chicken-coop. A system constitutional review contributes to shape a real **"constitutional" democracy** as opposed to the concept of **"simple" democracy**. "Constitutional democracy" is a model of state and democracy that **rejects**

the dogmas of legislative sovereignty, prioritizes **fundamental rights**, and, indeed, requires a mode of **constitutional review**. In the world of the twenty-first century, most states have adopted codified constitutions with superior legal status, which are likely to empower one or more courts, expressly or by implication, to evaluate the validity or applicability of legislation by reference to the constitution. Most of the states or polities of the world have courts with a constitutional jurisdiction.

THE PRACTICAL/CONCRETE USES OF THE CONSTITUTION

From a practical viewpoint, we can: 1) **protect rights** through constitutional review, 2) **limit power** through constitutional review, & 3) **distribute power** between central/federal & local bodies.

Secondary effects → Define **Constitutional Identity** through Constitutional Review, *e.g. Roe v. Wade* (U.S., 1973, The Supreme Court ruled that a state law that banned abortions was unconstitutional).

COMMON LAW VS CIVIL LAW: There is a degree of correlation between the legal system and the choice of diffuse or centralized review, insofar as diffuse review tends to be associated with common law legal systems and centralized review with the civil law. Typically in **common law** states, **any court** can apply the constitution, together with other sources of law, although sometimes constitutional jurisdiction is confined to higher courts. In older common law constitutions, in particular, the authority for constitutional review is often **assumed** to be a function of the courts, rather than explicitly **authorized**. In common law systems this power of the courts is linked to their task of determining cases and controversies. The power of constitutional review is conferred on a generalist court. Constitutional review is now also practiced under the constitutions of **most, although not all, civil law states**. In the civil law tradition, courts must be specifically empowered to decide cases by referencing the constitution. The power of constitutional review is conferred on a constitutional court.

TWO GENERAL MODELS OF CONSTITUTIONAL REVIEW:
US model → One model is provided by the United States and it is called **Decentralized/ Dispersed / Diffuse** system of constitutional review → apex courts and, generally, some other courts as well, resolve legal disputes by reference to all sources of law, of which the constitution is one → judicial review by conferring the power of constitutional review on a generalist court.
Kelsenian model → The other model was developed by the Austrian jurist Hans Kelsen after the First World War and it is called **Centralized** system of constitutional review → centralized review confers on a Constitutional Court or Tribunal what typically is a monopoly over the interpretation and application of the constitution, at least in relation to legislation → judicial review by creating a constitutional court / constitutional tribunal.

STATISTICS: In 2005, of the 138 national systems of constitutional review either conforming to the American or the Kelsenian model, **85 (62%) were Kelsenian**. Constitutional Courts comprise the dominant organ of review in Europe, Africa and the Middle East, and have made inroads into Asia, South East Asia, and Latin America (where "mixed" systems of various types are common). Two of the world's most active and effective Constitutional Courts are found outside Europe, in Colombia and South Africa. The American model dominates primarily in North America and the Caribbean.

CONCRETE (PRACTICE) VS ABSTRACT (THEORY): **US Supreme Court** > the jurisdiction is constrained by the "case or controversy" requirement. **Most Constitutional Courts (Kelsenian model)** > may review statutes "in the abstract", before they have been enforced. Abstract review is typically justified as a means of eliminating unconstitutional legislation before they can do harm.

14.
DIFFUSE REVIEW

This lecture is based on the works of following authors: **C. Saunders** AND **M. Cappelletti.**

The **decentralized/ diffuse** model had its origin in the United States, where judicial review remains a most characteristic and unique institution. It is found primarily in several of Britain's former colonies, including **Canada, Australia, and India**. The American system has also been introduced in **Japan** under the current Constitution of 1947. **Germany** and **Italy**, where today we find the centralized rather than the decentralized system, also experimented briefly with the American type of control: Germany under the Weimar Constitution, and Italy from 1948 to 1956, i.e. from the adoption of its first "rigid" constitution until the Constitutional Court began to function.

MARBURY VS MADISON (1803): Supreme Court Case that established the principle of judicial review, granting courts the power to strike down laws and statutes that violate the Constitution. Marshall CJ: *"if … the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply"*. It is the function of the judiciary to interpret the laws in order to apply them in concrete cases. When two such laws are in conflict, it is the judge who must determine which law prevails and then apply it. When the conflict is between enactments of different normative force, the obvious criterion to be applied is that the higher law prevails: lex superior *derogat legi inferiori*. A constitutional norm, if the constitution is rigid, prevails over an ordinary legislative norm in conflict with it, just as ordinary legislation prevails over subordinate legislation, or, as the Germans would say, *Gesetze* prevail over *Verordnungen*. Hence, one must conclude that any judge, having to decide a case where an applicable legislative norm conflicts with the constitution, must disregard the former and apply the latter.
STARE DECISIS: In systems of diffuse review apex courts and, generally, some other courts as well, resolve legal disputes by reference to all sources of law, of which the constitution is one. In common law courts, which are the norm in a system of review of this kind, decisions of higher courts including the apex court bind all lower courts through a doctrine of precedent, reinforced by *stare decisis*. Under this doctrine, courts are bound to follow their own prior decisions and the precedents of higher courts in the same jurisdiction. The existence of a single supreme court, combined with the lower courts' duty to follow superior precedents, insures the uniformity of constitutional adjudication. To be sure, an American law that has not been applied because found unconstitutional by the Supreme Court remains on the books. Yet it becomes dead law, because *stare decisis* prevents its future application by lower courts. Since the Constitution is a superior law, the judge, having to decide a case where the applicable law is in his opinion unconstitutional, must give precedence to the Constitution. The judge does not invade the realm of the legislative power; he is not attempting to legislate. He simply disregards the "lower law" in the concrete cases. However, through the instrument of *stare decisis*, this "non-application" in the particular

case becomes in practice a genuine quashing of the unconstitutional law which is final, definite and valid for every future case. It becomes a true annulment of the law with, at least in theory, retroactive effects.

DIFFUSE REVIEW: The US model was the first and, for over a century, essentially the only model available. Constitutional review is dispersed through the judicial system: every court has the power to find primary legislation unconstitutional. Constitutional review is not confined to a specialized constitutional court (constitutional review is exercised by courts that also engage in other judicial activities, interpreting statutes and developing private law). Constitutional review is a category of the more general practice of ordinary legal interpretation. Constitutional review can be triggered by a wide range of litigants rather than a restricted list. Diffuse review is by no means confined to states with a common law legal system, but it is provided also by courts in parts of continental Europe including Switzerland and the Nordic states, a range of countries in Latin America and Japan.

APPOINTMENT AND COMPOSITION IN THE US / DECENTRALIZED MODEL OF JUDICIAL REVIEW:
In this model Constitutional review is not confined to a specialized constitutional court. There are some **implications for judicial selection**. Those who exercise constitutional review must have the capacity to engage in the ordinary legal interpretation. We can say that they should be judges first. "***The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish***. *The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*" (US Constitution, ARTICLE III, SECTION 1). "**The President** … shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he **shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States**, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." ." (US Constitution, ARTICLE II, SECTION 2).

DIFFUSION REVIEW = CONCRETE REVIEW: Diffuse review tends to be "concrete" because the Court's intervention constitutes **a phase of ordinary litigation taking place in the courts**.