DEVELOPMENTS

Looking Beyond the National Constitution - The Growing Role of Contemporary International Constitutional Law. Reflections on the First Vienna Workshop on International Constitutional Law

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A. Introduction

In a world of societies ever more closely interrelating to each other, lawyers face the challenge of crossing the borders of their national legal system and looking beyond its fundamental source of identity - the constitution. Having this thought in mind, Harald Eberhard, Konrad Lachmayer[1] and Gerhard Thallinger[2] organized the *First Vienna Workshop on International Constitutional Law* held on 20 and 21 May 2005, bringing together members of the academic community, legal officers in International Organizations and law students. The Workshop offered eight lectures[3] and fruitful discussions on the comparative analysis of constitutional law thus providing a new impetus to a field of law of steadily growing importance to which, so far, too little attention has been given.

As highlighted in Theo Öhlinger's lecture at the workshop, the creation of national States in 19th century Europe and the codification of the law in national codes directed the lawyer's focus from formerly universally applicable legal principles - whose origins date back even to Roman lawyers - to the positive law of their

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[3] The panelists included: Bedanna Bapuly, Austrian Acadamy of Sciences; Jürgen Busch, Austrian Exchange Service; Iris Eisenberger, University of Vienna; Anna Gamper, University of Innsbruck; Niraj Nathwani, European Monitoring Centre on Racism and Xenophobia; Theo Öhlinger, University of Vienna; Franz Reimer, University of Freiburg (Germany); Michael Schoiswohl, United Nations Assistance Mission in Afghanistan. A program of the workshop is available at: www.univie.ac.at/icl.

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respective state.[4] As a consequence, comparative constitutional law lost much of its significance in a Europe divided into national States. However, as observed by Jürgen Busch, the present process of European integration led to the creation of a supranational entity which exercises powers similar to those exercised by governments, thus ending the relative isolation of national legal systems from outward influence which has prevailed throughout the era of the Westphalian system.[5] As a consequence, the importance of international constitutional law is increasing again.

At the same time, in an integrating world the value of comparative constitutional law is also increasingly appreciated in a context of international law and even for the purpose of interpreting national law.

B. International Constitutional Law as a Means for Interpreting National Law

Comparative constitutional law has been regularly used by constitutional courts for the purpose of interpreting constitutions, especially in the context of human rights and general principles of constitutional law.[6] Already in 1958 the German *Bundesverfassungsgericht* (Federal Constitutional Court) based its decision in the *Lüth* case on references to the French *Déclaration des droits de l'homme et du citoyen* and United States case law.[7]

In recent years the United States Supreme Court has also taken a more favorable approach to applying international constitutional law as a means of interpretation.[8] In its opinion in the *Lawrence* v. *Texas* case the court explicitly referred to the case law of the European Court of Human Rights as well as to foreign positive law and concluded that state statutes prohibiting consensual homosexual intercourse among adults were unconstitutional.[9] The court clarified that, in interpreting the United

[4] *See* GEORGIOS TRANTAS, DIE ANWENDUNG DER RECHTSVERGLEICHUNG BEI DER UNTERSUCHUNG DES ÖFFENTLICHEN RECHTS 15-16 (1998).

[5] On the decline from the Westphalian system, see Joseph Nye, Jr., *What New World Order?* 70 FOREIGN AFFAIRS 83, 89-91 (Winter 1991).

[6] Christian Starck, *Rechtsvergleichung im öffentlichen Recht*, 52 JURISTEN ZEITUNG 1021, 1024 (1997).

[7] BVerfGE 7, 198 (208); *see* Jörg Manfred Mössner, *Rechtsvergleichung und Verfassungsrechtsprechung,* 99 ARCHIV DES ÖFFENTLICHEN RECHTS 193, 194 (1974).

[8] Karl-Peter Sommermann, *Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa*, 52 DIE ÖFFENTLICHE VERWALTUNG 1017, 1025-1026 (1999).

[9] Lawrence v. Texas, 539 U.S. 12, 16 (2003); *see* Vicki Jackson, *Yes please, I'd love to talk with you*, LEGAL AFFAIRS (July/August 2004), *available at* http://www.legalaffairs.org/issues/July-August-2004/feature_jackson_julaug04.html.

States' constitution, it has to take into consideration the context of an ever changing society.[10] Thus it rejected the argument that the constitutional judge was restricted to relying exclusively on the meaning of the text attributed to it in its historical context and thus was obliged to recur to a static, frozen-in-time interpretation of the constitution which would exclude any reference to international constitutional law.[11] The approach taken by the majority of the judges in *Lawrence* v. *Texas* provoked an intense debate in the United States on the utility of recurring to international constitutional law in constitutional jurisprudence.[12] However, a comparative analysis of foreign law is already warranted under the Eighth Amendment to the U.S. Constitution of 1791, which prohibits "cruel and unusual punishment." In order to determine this human rights standard, in two recent opinions the Supreme Court drew upon international constitutional law.[13] Two arguments commonly raised in the American debate on the utility of international constitutional law in constitutional jurisprudence are that the social/historical/political background of the referenced foreign law is not adequately taken into consideration and that foreign law lacks the democratic legitimization necessary for being considered a source of law.[14] However, international constitutional law does not constitute a *source of law* for constitutional jurisprudence, but instead is invoked as a common denominator of basic principles underlying many legal orders. Obviously, the conclusions drawn from the comparative analysis of foreign laws cannot justify a decision which contradicts the meaning of the text of the domestic constitution. The need to examine the social/historical/political background of foreign laws when they are referenced exemplifies that international constitutional law necessitates time-intense research and a sensitivity to the specifics of different legal systems that should already be raised during legal education.

In his workshop lecture, Theo Öhlinger spoke about the use of international constitutional law by the Austrian *Verfassungsgerichtshof* (Constitutional Court) in

[10] Lawrence v. Texas, 539 U.S. 18 (2003).

[11] *See, e.g.*, Grupo Mexicano v. Alliance Bond Fund, Inc., 119 U.S. 1967 (1999).

[12] *See, e.g.*, Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer at the American University Washington College of Law on 13 January 2005, transcript available at http://domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument; A decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication, Speech of U.S. Supreme Court Justice Ruth Ginsberg on 1 April 2005, transcript available at http://www.asil.org/events/AM05/ginsburg050401.html.

[13] Atkins v. Virginia, 536 U.S. 12 (2002); Roper v. Simmons, 543 U.S. 4 (2005).

[14] *See, e.g.*, Richard Posner, *No thanks. We already have our own laws*, Legal Affairs (July/August 2004), *available at* http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.html.

its case law. He pointed out that the Austrian Constitutional Court does not systematically and explicitly make use of comparative law but it did adopt, for instance, the legal reasoning of the German *Bundesverfassungsgericht* on the principle of the proportionality of infringements of human rights for the purpose of interpreting the provisions on human rights granted under Austrian constitutional law[15].

Bedanna Bapuly emphasized that the constitutional courts of several of the new European Union Member States referred to European Union law even before the date of their accession.[16] Furthermore, they tend to take into consideration the comparative case law of the old European Union's Member States' constitutional courts even more than those do themselves. The new European Union Member States' constitutional courts have repeatedly quoted Austrian constitutional law in their reasoning and are well familiar with the case law of the Austrian *Verfassungs-gerichtshof*. According to Bedanna Bapuly, nowadays all constitutional courts of the European Union Member States have close informal contacts and strongly network with each other, for instance by holding annual meetings.[17]

Recourse to foreign case law can present itself as particularly beneficial for constitutional courts when they are confronted with a legal question regulated in different legal systems in comparable ways, as this presents a spectrum of possible interpretations of the norm that is not available to lawyers who refuse to make use of comparative constitutional law.[18] This position was supported by Theo Öhlinger who spoke out in favor of recognizing comparative constitutional law as the fifth means of interpretation, complementary to the four traditional techniques developed by Friedrich Carl von Savigny.[19]

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[15] *See* Ludwig Adamovich, *Der Verfassungsgerichtshof der Republik Österreich. Geschichte - Gegenwart - Visionen*, 5 JOURNAL FÜR RECHTSPOLITIK 1, 5 (1997).

[16] For instance the constitutional courts of the Czech Republic and Hungary.

[17] Regular meetings are also held between members of European constitutional courts, the European Court of Justice, the European Court of Human Rights and the United States Supreme Court. *See* Alexandra Kemmerer, *Amerika steht Europas Recht ins Haus*, Frankfurter Allgemeine Zeitung, 21 May 2004, *available at* http://www.faz.net/s/RubC17179D529AB4E2BBEDB095D7C41F468/Doc~E52A2718D066D4EE28C885E4CED8463BA~ATpl~Ecommon~Scontent.html.

[18] Bernd Wieser, *Vom Wesen und Wert der Verfassungsrechtsvergleichung*, 5 JURIDIKUM 117, 119 (2004).

[19] *See* Peter Häberle, *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat. Zugleich zur Rechtsvergleichung als „fünfter" Auslegungsmethode*, 44 JURISTEN ZEITUNG 913, 916-918 (1989); Konrad Zweigert, *Rechtsvergleichung als universale Interpretationsmethode*, 15 RABELSZ 5, *passim* (1950).

By presenting a comparative analysis of the growing significance of the legal instruments of legal review and legal preview within the constitutional systems of several European States, Bedanna Bapuly argued that Europe is undergoing a process of a shift in influence, from the parliaments to the constitutional courts. In consequence, statutory law is becoming less dominant in comparison to general principles of law, which are primarily defined by courts. It can be concluded from this argument that when determining the exact scope of those general principles of law,[20] which can be found in many if not all European legal systems, constitutional courts should make extensive use of comparative constitutional law. As a result, international constitutional law will play an increasing role in the interpretation of national law.

C. International Constitutional Law in the Process of National Legislation

While not using comparative constitutional law for the purpose of interpreting the national constitutional documents, 19th century lawyers did apply international constitutional law in the process of drafting national laws and constitutions.[21] Some constitutional law texts, especially the 1787 Constitution of the United States of America and the French *Déclaration des droits de l'homme et du citoyen* of 1789 were even attributed a model role for numerous other constitutions.[22] Often, the drafters of basic laws paid particular attention to the constitutions of countries which had faced similar experiences in the past. For instance, the post-colonial Latin American constitutions were modeled on the United States' constitution entered into force nine years after the end of the War of Independence,[23] whereas the Portuguese and Spanish constitutions adopted in the 1970s after the end of the Salazar and Franco dictatorships were strongly influenced by the German *Grundgesetz* (Basic Law) drafted after the end of the Nazi regime[24]. At the same time, international constitutional law is still sometimes underappreciated in the process of the drafting of a new constitution. In the German constitutional reform debate of the early 1990s international constitutional law only played a minor role, as can be proven by the

[20] For example, the principle of proportionality of infringements of human rights and the principle of equal treatment.

[21] Bernd Wieser, *Vom Wesen und Wert der Verfassungsrechtsvergleichung*, 5 JURIDIKUM 117, 119 (2004); Christian Starck, *Rechtsvergleichung im öffentlichen Recht*, 52 JURISTEN ZEITUNG 1021, 1024 (1997).

[22] Karl-Peter Sommermann, *Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa*, 52 DIE ÖFFENTLICHE VERWALTUNG 1017, 1024 (1999).

[23] Ingo von Münch, *Einführung in die Verfassungsvergleichung*, 38 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 126, 133 (1973).

[24] Christian Starck, *Rechtsvergleichung im öffentlichen Recht*, 52 JURISTEN ZEITUNG 1021, 1024 (1997).

protocols of the meeting of the joint constitutional commission of the *Bundestag* (Federal Parliament) and the *Bundesrat* (Federal Council of the States).[25] With regard to Austria, Theo Öhlinger deplored that the *Österreich Konvent*, the assembly convened in 2003 and charged with the task of elaborating a draft for a comprehensive reform of constitutional law, could have made a more extensive use of comparative constitutional law.[26] As an explanation, he cited the fact that comparing law is a particularly time consuming technique. Difficulties in identifying and accessing the relevant legal texts of foreign States, including statutes, case law and commentaries, constitute further reasons for a limited recourse to international constitutional law by lawmakers.

Apart from the complexity of comparative studies in constitutional law and the need to invest a lot time in it, the language barrier can be cited as another obstacle for the use of international constitutional law. Equal terms used in different legal systems do not always have the same meaning[27] and in order to understand their specific significance they have to be analysed in their national legal context. It is obvious that highly developed legal skills are necessary for performing such a complex analysis, which is a prerequisite for benefiting from international constitutional law.

However, legislators unwilling to devote the necessary time and resources to a comparative analysis of foreign constitutions in the process of law making will sometimes face severe consequences. In his lecture at the workshop Franz Reimer gave a topical example by analyzing a recent decision of the European Court of Human Rights in which the Court condemned Great Britain for the incompatibility of its election law with the Convention for the Protection of Human Rights and Fundamental Freedoms.[28] If the court's Grand Chamber confirms this decision in the pending appeal, the legislators of several European States with similar election laws[29] will have to thoroughly examine the necessity of modifying their own laws

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[25] Karl-Peter Sommermann, *Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa*, 52 DIE ÖFFENTLICHE VERWALTUNG 1017, 1024 (1999).

[26] For an example of the application of the techniques of comparative constitutional law by the Österreich Konvent, *see*, *e.g.*, *Protokoll über die 1. Sitzung des Ausschusses 8 am 13. November 2003*, 5-6, accessible on the webpage www.konvent.gv.at.

[27] For an example, *see* Christian Starck, *Rechtsvergleichung im öffentlichen Recht*, 52 JURISTEN ZEITUNG 1021, 1026, 1026 (1997).

[28] Hirst v. the United Kingdom, App.No. 74025/01 (Eur. Court H.R. 30 March 2004), *at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Hirst%20%7C%20United%20%7C%20Kingdom&sessionid=3109375&skin=hudoc-en.

[29] Namely Austria, Luxemburg and, partially, France.

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by carefully comparing it to the British law. If they fail to perform such a comparative analysis and to draw the right conclusions therefrom, their States will probably soon face condemnations themselves. Franz Reimer's argument demonstrates that the obligation to respect human rights conventions common to several states strongly advises the use of international constitutional law for the purpose of ensuring that the national law does not transgress the normative framework for internal legislation established by those international treaties.

Generally, comparative constitutional law is a very useful tool for the national legislative process, as emphasized by Theo Öhlinger.[30] It offers to the constitutional legislator a reservoir of possible solutions to legal questions adopted in different legal systems as well as the opportunity to analyze the experiences foreign states have made in applying their national constitutional provisions. Thus, the national legislator is given an impetus to critically rethink national law, to identify its weaknesses and to use the best and most apt foreign law solutions as a source of inspiration for the amendment of the domestic constitutional system.

D. International Constitutional Law as a Prerequisite for European Integration

The area where the need to use international constitutional law is most striking is European integration. Enacting European regulations and directives enjoying primacy over national laws and being effective in twenty-five Member States necessitates a comparative analysis during the law making process of any European norm, with the purpose of finding out how it can be reconciled best with the legal systems of the Member States.[31] The use of comparative constitutional law is particularly significant when regulations are adopted because of their direct applicability[32] in all Member States for national authorities which are, at the same time, bound by their national constitution.

Furthermore, as Theo Öhlinger explained, international constitutional law can even be used to identify certain rules of European law. The human rights enshrined in the constitutional traditions common to the Member States have been recognized as general principles of Community law, thus making the common constitutional law

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[30] *See* Ludwig Adamovich, *Rechtsvergleichung im Verfassungsrecht*, *in* DEMOKRATIE UND SOZIALER RECHTSSTAAT IN EUROPA. FESTSCHRIFT FÜR THEO ÖHLINGER 200, 200 (Manfred Stelzer/ Barbara Weichselbaum eds., 2004).

[31] Meinhard Hilf, *Comparative Law and European Law*, *in* I ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 695, 697 (Rudolf Bernhardt ed., 1992).

[32] Treaty Establishing the European Community (as amended by the Treaty of Nice), 26 February 2001, Art. 249, OJ C 325 p.33 of 24 December 2002.

concepts of the Member States a source of European law.[33] Due to the fact that those principles are unwritten rules of law, their substance can only be identified by the means of comparative constitutional law. The Court of Justice of the European Communities has drawn on both a comparative analysis of the national constitutional texts as well as the international human rights instruments ratified by all Member States in order to define the general principles of Community law.[34]

The Court of Justice of the European Communities also uses comparative law for the purpose of interpreting the European integration treaties.[35] In fact, it constitutes a "working laboratory of comparative law"[36], which is composed of 25 judges from all Member States, each one of them being influenced by their respective national legal culture.

E. The Importance of International Constitutional Law for Public International Law

Even more than the Court of Justice of the European Communities, the International Court of Justice is a kaleidoscope of diverse legal thinking shaped by a multitude of legal systems. Its statute explicitly rules that it shall be composed in a way ensuring the representation of all legal systems of the world.[37]

Additionally, the Statute of the International Court of Justice refers to the general principles of law as a source of law.[38] The *travaux préparatoires* of the Statute of the Permanent Court of International Justice (which contained a similar provision that was later adopted by the Statute of the International Court of Justice) define those general principles of law as provisions of national law applicable *in foro domestico*.[39]

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[33] *See* Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 ECR 1125, para. 4; Treaty on European Union (as amended by the Treaty of Nice), 26 February 2001, Art. 6 para. 2, OJ C 325, p. 5 of 24 December 2002.

[34] JO SHAW, LAW OF THE EUROPEAN UNION 181-182, 189 (1996).

[35] Christian Starck, *Rechtsvergleichung im öffentlichen Recht*, 52 JURISTEN ZEITUNG 1021, 1024 (1997).

[36] Meinhard Hilf, *Comparative Law and European Law*, *in* I ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 695, 697 (Rudolf Bernhardt ed., 1992); Hans-Wolfram Daig, *Zur Rechtsvergleichung und Methodenlehre im Europäischen Gemeinschaftsrecht*, *in* FESTSCHRIFT FÜR KONRAD ZWEIGERT ZUM 70. GEBURTSTAG 395, 414 (Herbert Bernstein ed., 1981).

[37] Statute of the International Court of Justice, 26 June 1945, Art. 9, *reprinted in* INTERNATIONAL LAW – SELECTED DOCUMENTS 29, 31 (Barry Carter *et al*., eds., 2003).

[38] Statute of the International Court of Justice, 26 June 1945, Art. 38 para. 1 sub-para. C, *reprinted in* INTERNATIONAL LAW – SELECTED DOCUMENTS 29, 37 (Barry Carter *et al*., eds., 2003).

[39] PATRICK DAILLIER AND ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 346 (1999).

Therefore the general principles of law can only be identified by means of comparative law. For the determination of the content of general principles of law originating from national constitutional law, recourse has to be had to international constitutional law. For instance, the International Court of Justice based its decision that the right to the observance of the principle *ne bis in idem* exists under international law on an "analogy to national laws" and by referring to the "common practice of national legislatures"[40].

F. New Challenges for International Constitutional Law – International Assistance to Post-conflict Constitution Making

For international lawyers, international assistance to post-conflict constitution making is a new field of application of international constitutional law although the idea of providing legal advise to post-war societies during the process of establishing a democracy based on the rule of law already existed after the World War II when the United States military administration of Germany provided a compilation of comparative constitutional law texts to the parliamentary council in charge of drafting the German *Grundgesetz*.[41] As pointed out by Michael Schoiswohl, the focus of today's international legal assistance efforts in post-war nations like Afghanistan or Kosovo is to ease the continuing internal tensions within such heterogeneous societies by starting a national political debate on the normative framework of the common future, namely the new post-war constitution.

Taking into consideration the multitude of forms of constitutional processes,[42] the decision regarding which procedure will be followed in producing the post-conflict constitution is a particularly sensitive question. In this context, Michael Schoiswohl highlighted the antagonism between the fact that the decisions made in a constitutional process are at the heart of the internal politics of a sovereign nation and the wish to assure the constitution's respect of international human rights standards.

In Kosovo, the post-conflict constitution was issued as a regulation of the Special Representative of the Secretary General of the United Nations, basing its legitimacy

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[40] *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (Advisory Opinion), ICJ Report 1954, 46, 61.

[41] Münch, *Einführung in die Verfassungsvergleichung*, 38 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 126, 134 (1973).

[42] *See* Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO LAW REVIEW 191, *passim* (1995).

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mainly on the mandate to administer the territory entrusted to the United Nations by Security Council Resolution 1244 (1999).[43] In Afghanistan, following the "light foot" approach, the United Nations limited its role in being a partner, rather than a sovereign administrator. Consequently, in the 2001 *Bonn Agreement* concluded under the auspices of the United Nations a constitutional process rooted in Afghan tradition was chosen. It provided for the preparation of the constitution by a commission and its adoption by the *Loya Jirga*, an assembly of elders.

Michael Schoiswohl explained that the international community exercised strong political influence during the Afghan constitutional process. Furthermore, it contributed legal know-how through the United Nations staff, think-tanks, research projects, bilateral assistance and non governmental organizations. The proposals made by the foreign lawyers were mainly based on an extensive use of comparative constitutional law. Taking into consideration the Afghan religion and culture, particular attention was paid to the constitutional system of Islamic nations like Egypt.

According to Michael Schoiswohl, comparative constitutional law can also play a crucial role in surveying the implementation of a post-conflict constitution. In order to detect and to counter a regress of the rule of secular law, of human rights or national reconciliation in Afghanistan it could be particularly useful to examine the way other Islamic States define the relationship between liberal constitutional law and their traditional culture.

G. International Constitutional Law as a Valuable Tool of Scientific Research

Last – but definitely not least – the high capacity of international constitutional law for the academic analysis of single legal provisions or whole constitutional systems is to be highlighted. This crucial aspect of comparative constitutional law is presented in the last place in order to emphasize the importance of this field of law for legal practitioners and in order to counter the argument that comparative law still has to search for an audience outside academics[44].

In their lectures at the workshop, Anna Gamper and Niraj Nathwani exemplified the usefulness of international constitutional law for portraying contemporary trends common to different constitutional systems.

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[43] Constitutional Framework for Provisional Self-Government, 15 May 2001, UNMIK/REG/2001/9.

[44] *See, e.g.*, Basil Markesinis, *Comparative Law – A Subject in Search of an Audience*, 53 MODERN LAW REVIEW 1, 1 (1990).

Anna Gamper analyzed the current debate in legal politics in many States to reform or abolish the second chambers of their parliaments. In Italy a reform of the *Senato della Repubblica* (Senate of the Republic) is currently being planned and in Austria a remodelling of the *Bundesrat* was debated in the *Österreich Konvent*, without leading to a modification of the existing constitutional provisions so far. In the same way, the German *Bundesstaatsreformkommission*, a joint commission of *Bundestag* and *Bundesrat* charged with the elaboration of proposals for a reform of the German federal system, failed to reach an agreement.[45] In Belgium, Canada and Spain, the need to reform the second chambers of parliament is widely undisputed in their national political debates. Generally, second chambers which extensively use their powers to block legislation approved by the first chamber, like the German *Bundesrat*, tend to be criticized for being an impeding element in the law making process. At the same time, second chambers which have few powers and little political impact in the constitutional process like the Austrian *Bundesrat* often provoke efforts at their abolition because of their alleged inefficiency. Comparative constitutional law also shows that second chambers fulfil diverging functions in different national legal systems which are furthermore subject to changes over time. According to Anna Gamper the United States Senate is the prototype of the currently prevailing model of second chambers enabling the federal states to participate in the federal legislative process. Furthermore the United States second chamber has become a model for several other second chambers,[46] providing an example for the use of international constitutional law in the process of the elaboration of new constitutions. Finally, Anna Gamper spoke out in favour of conserving second chambers as the representation of the federal States' interests on the federal level is one of the sources of democratic legitimacy of the federation.

Whereas Anna Gamper used international constitutional law in order to compare institutions common to the constitutional systems of different States, Niraj Nathwani examined international constitutional law for the purpose of presenting an analysis of an issue pertinent to human rights. He showed that several European States used diverging arguments in order to justify the ban of the wearing of headscarves in schools. As pointed out by Iris Eisenberger, in some legal systems a distinction is drawn between ostentatious religious symbols (for instance large crosses, headscarves or kippas) and discreet religious symbols (like medallions, small crosses, the Star of David or the hand of Fatimah). Niraj Natwani explained that one of the most important arguments in France was the need to uphold the religious neutrality of the state (*laïcité*) whereas in Germany, in a judgement

[45] *See* Stefan Brink, *Unreformierter Föderalismus,* 37 ZEITSCHRIFT FÜR RECHTSPOLITIK 60, 60 (2005).

[46] Herbert Schambeck, *Zur Bedeutung des parlamentarischen Zweikammernsystems – eine rechtsvergleichende Analyse des „Bikameralismus"*, 11 JOURNAL FÜR RECHTSPOLITIK 87, 88 (2003).

justifying the denial of a teaching position to a woman who insisted on wearing the headscarf, the *Bundesverfassungsgericht* found that the religious symbolism of the headscarf is not attributable to the state.[47] Swiss authorities argued that the use of headscarves by teachers constitutes an obvious means of identification imposed on their pupils, implying that the students' negative religious freedom would be infringed. This argument was upheld by the European Court of Human Rights.[48] While this reasoning played a significant role in the ban of headscarves at the State University of Istanbul, that measure was also considered to be an adequate tool for protecting public order in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith.[49] It is evident that only comparative law can show the multitude of facets of the legal issue of banning the use of headscarves in schools and universities currently being debated in several European States.

H. Conclusion

International constitutional law nowadays has a multitude of fields of application. Therefore, it is important for legal practitioners and scholars dealing with constitutional law to be able to make use of this subject. In order to give them the necessary instruments, it would be desirable that the academic subject of comparative constitutional law be attributed a more important role in legal education. The *First Vienna Workshop on International Constitutional Law* made an important contribution to deepening the comparative constitutional law education of Viennese students interested in the subject. There is good reason to be confident, given the ever growing importance of this field of law, that this workshop will be an impetus for intensifying the academic education in and the use of international constitutional law.

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[47] Bundesverfassungsgericht, Ludin Case, Judgement of 24 September 2003, 2 BvR 1436/02, at para. 54, *available at* http://www.bverfg.de/entscheidungen/rs20030924-2bvr143602.htm; *See* Matthias Mahlmann, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, 4 GERMAN LAW JOURNAL 1099 (2003), at para. 11.

[48] Dahlab v. Switzerland, App. No. 42393/98 (Eur. Court H. R. 15 February 2001), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=dahlab&sessionid=3125432&skin=hudoc-en.

[49] Leyla Sahin v. Turkey, App. No. 44774/98 (Eur. Court H. R. 28 June 2004), at para. 99, 108-110, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=sahin&sessionid=3125432&skin=hudoc-en.