2 Constitutions Compared: Origins and Main Features

1. Overview

The current Constitutions of the United States, the Netherlands, France and Germany can be viewed as expressions of an effort to replace an old order with a new one. In the case of the US, the Constitution was to bring about a closer unification in the late 18th century of 13 newly independent colonies. In the case of Germany, the Basic Law was adopted as a partial reestablishment in 1949 of republican democratic statehood. France's present-day Constitution was meant as a far-reaching institutional overhaul in the late 1950s of battered state structures. The Dutch Constitution of 1814/1815 meant the restoration of a monarchy and, at the same time, the creation of a unitary and independent state after two decades of French domination; in the 1950s, the Charter for the Kingdom was adopted so as to establish a quasi-federal rather than colonial relation between the Netherlands proper and its overseas territories (former colonies). The constitution of the United Kingdom, meanwhile, is evolutionary in character. New features are added and powers shift within an extraordinarily stable institutional framework. The last truly revolutionary moment took place when, in 1688, Parliament deposed one King and installed another, establishing the lasting principle that Parliament is not subordinate to the crown. When Parliament and the King/Queen together make a statute, whereby the monarch gives assent to Acts of Parliament, the resulting law is the highest norm in the UK. This principle of legislative supremacy remains the cornerstone of the UK's modern constitution, even though, as shall be seen later, it sat uncomfortably with the country's membership of the European Union. And the EU has also evolved gradually through a process of treaty reforms and new treaties, and the gradual expansion from six original member states to 28 and since 2020 to the present 27 as an outcome of Brexit!

1.1. *The Notion of Sovereignty*

Who actually makes a constitution? The 'maker' of a constitution is not necessarily its physical author, but rather the entity from whose authority the constitution is derived. This authority resides with the *sovereign*: the original source of all public power from which all other power flows. Most constitutions derive their claim to authority from having been enacted by the people, a concept called popular sovereignty. This may be called the philosophical or moral claim to sovereignty, or the origins which it derives from.

Sovereignty as such is the ultimate power to exercise authority over oneself. For states this contains an internal and an external dimension. External sovereignty means the possibility for a state to exercise control over its population and territory without interference from outside. This concept had its breakthrough in the 1648 Peace of Westphalia that ended the Thirty Years' War in Europe, and it is still a fundamental concept in public international law. It is the *internal* sovereign, meanwhile, who is the original source of public authority within the state itself. Usually, one can identify who is the sovereign on the basis of the preamble to the constitution, if it has one. If the preamble, the declaratory introduction to the constitution, starts with 'The people ...' or 'We the People ...', or variations on that phrase, then it is clear that the constitution claims to be derived from popular will. The model are the famous first words of the US Constitution: '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'.

It should again be noted that sovereignty in this sense is a rather abstract notion. Even in those systems which claim that the people are the sovereign, it was not the people who actually wrote the constitutional document. Often the people did not even approve the document in a referendum. The German Basic Law, for example, came into force after having been ratified by the parliaments of the States, and yet it firmly points to the will of the people as its source in the preamble, provides that only the German people can again abolish it, and reiterates that all public power emanates from the people. The French Constitution, by contrast, actually *was* adopted by referendum in 1958, in fact by an overwhelming majority.

A more black-letter version of internal sovereignty relates to the ultimate fundamental constitutional authority: that is, who makes the national constitution? Usually that is the organ, branch or composite of organs which sets the fundamental rules. In the UK that is the Queen/King-in-Parliament through an Act of Parliament; in the US, Germany, France and the

Netherlands it would be the process of making constitutional amendments, occasionally with resort to a referendum. With regard to the EU, the sovereign is all the member states who jointly have to agree on treaty amendments.

1.1.1. Popular versus Royal Sovereignty

The notion of popular sovereignty, as endorsed by republican democracies, stands in marked contrast with the claim to sovereignty as expressed by monarchs. In absolutist systems, the original source of all public authority is, after all, the King/Queen. Often the monarch's sovereignty is coupled with a religious claim: s/he is then sovereign 'by the grace of God', or s/he exercises 'divine rights'. In such cases the monarch remains the sovereign even if s/he chooses to grant his/her people a constitution. Especially in the course of the 19th century, when the ideals of the French Revolution had spread across Europe, many monarchs decided to appease their people by enacting constitutions. A constitution was meant to limit and direct the use of power by public authority; yet these constitutions still derived their authority from the monarch him/herself, who could at any point change or repeal them. The documents thus became known as the *constitutions octroyées*, or 'imposed constitutions'. Historical examples include the charter offered (in vain) to the French Third Estate by King Louis XVI in 1789; the Prussian constitution unilaterally enacted by King Frederick William IV after having rejected the constitution offered to him by the revolutionary National Assembly in 1849; or the constitution enacted by Tsar Nicholas II of Russia in 1906. Revolutions that established republics would do away with this royal sovereignty. As regards surviving monarchies, even as the personal powers of kings/queens and grand-dukes have in reality faded and become purely ceremonial in many countries in modern times, these monarchs are still often referred to as 'the sovereign'. But this is more a title or a symbol than an actual claim of their powers.

1.1.2. Popular versus National Sovereignty

There is a further subtlety to the notion of sovereignty as residing with the people. A distinction can be made between *popular* sovereignty, or sovereignty of the people, and *national* sovereignty, or sovereignty of the nation. National sovereignty was prominently proclaimed by the French Declaration of the Rights of Man in 1789. For practical purposes, national and popular sovereignty are often used synonymously. The difference, however, is that the people are a concrete and real entity, namely the existing population at any point in time, while the nation is a somewhat more abstract philosophical notion that does not coincide with the current population. In a system of

popular sovereignty, the sovereign population is able to exercise its will through, for example, a referendum to change the constitution. If the nation is the sovereign, then such possibility could be excluded, since the nation is an abstraction and is not able to act on its own. National sovereignty can only be exercised by the nation's representatives, in the manner laid down in the constitution. The representatives of the nation could be the people, but do not necessarily have to be the people.

To name a practical example, in Belgium sovereignty lies not with the people but with the nation. The nation is defined as comprising all Belgians who have ever lived, who live, and who will live in the future. Thus, the current population is not the nation. Who exactly *represents* the nation is laid down in the Constitution, and according to the Constitution the nation is represented by parliament – the nation, not just the voters. One of the consequences of this doctrinal principle is that it is justified to exclude binding referenda. After all, the Belgian population is neither the sovereign itself (the nation is) nor does it represent the nation (parliament does).

France considered a choice between popular and national sovereignty when drafting the post-war constitutions of 1946 and 1958. The compromise was to claim that 'national sovereignty belongs to the people, who exercise it through their representatives and by means of referendum.' The effect is that the principle of the sovereignty of the nation is preserved, but that the living population is capable of exercising such sovereign powers. This would justify how President Charles de Gaulle (president between 1959 and 1969) and his successors called for referenda amending the Constitution without following the regular amendment procedure that would have involved parliament. Since the people exercise sovereign powers one way or another, the procedural basis was less relevant.

1.1.3. Popular versus State Sovereignty

A potential conflict as regards popular sovereignty claims in a federal system lies in the claim of the individual States to continued sovereignty (in the meaning of independence). In the US, for example, the States gave life to the new Union in the first place, and without them the Union would not exist. In that sense, the term sovereignty sometimes reappears as a nominal remnant of the original autonomy and independence of the individual States. Thus, powers that are not delegated to the federal level are said to be 'sovereign' powers of the individual States. In modern reality, Union-friendly case law, and the practical consolidation of stable federal institutions supported by all-American national identity, as well as the Union's victory over the secessionist Confederates in the Civil War (1861-1865), have cemented the US order

whereby the sovereign people have set up a permanent federal system of government for the entire country, defining its powers in the Constitution. The German Basic Law of 1949, incidentally, is clearer on the sovereignty point from the start. While ratified by the parliaments of the individual States, whose existence preceded the modern federation by two years, and while enshrining federal principles, the Basic Law is explicitly based on the sovereignty of the German people. For the US, the civil war and pertinent case law of the Supreme Court denied the right of independence for individual States (no right of secession; *Texas* v. *White*, 74 U.S. (7 Wall.) 700 (1869)); in the same vein the German Constitutional Court has ruled that there is no constitutional right of secession for the *Länder* (BVerfG 16 December 2016, 2 BvR 349/16). A right to independence or secession of part of the territory of a State may exist, however, with the permission of that State; this explains the Scottish independence referendum of 2014 to which we referred earlier. This referendum was held with the explicit permission of the UK legislature, and its outcome would have been respected and honoured by it. Any new referendum or steps towards Scottish independence would require permission by the UK Parliament. This also held true for the events in Catalonia in the beginning of the 21st century: Spain being not a federal but unitary state found attempts to seek independence contrary to the Spanish constitution.

1.1.4. Parliamentary Sovereignty

The United Kingdom is famous for allocating sovereignty to Parliament. Parliament should be understood here as the King/Queen-in-Parliament, a construction whereby bills are adopted by Parliament and then receive royal assent from the monarch. Sovereignty of Parliament therefore, perhaps more accurately, means legislative supremacy (also called parliamentary supremacy). Acts of Parliament (statutes made by Parliament with royal assent) are the highest law of the land. Thus, there is no public authority, legislative or executive or judicial, national or regional or local, secular or ecclesiastical, that may invalidate Acts of Parliament. Only the King/Queen-in-Parliament him/herself may undo previous legislation. The scholar Albert Dicey coined the term 'sovereignty of Parliament' in 1885 to describe a founding principle of the UK constitutional system. 'Parliament' is shorthand for the Commons, Lords and the King/Queen acting together, because Parliament is considered the politically dominant institution. Since the late 17th century the monarch may not legislate without parliamentary approval; statute overrides royal prerogative and conventionally the monarch never refuses royal assent to bills. The King/Queen is notionally still called 'the

sovereign', but s/he is effectively bound by the will of Parliament. What is important here is that in any event UK constitutional law does not allocate sovereignty to the people. Of course, the electorate can determine the composition of the House of Commons and otherwise express its democratic will, but that is not the decisive point. As a matter of doctrine, sovereignty in the sense of supremacy is held by Parliament and the King/Queen acting together.

Parliamentary Sovereignty in the Age of Europeanization

The accession of the UK to the European Communities in 1973 required a number of compromises, rationalizations and doctrinal justifications regarding the status of European law in the UK. After all, it is difficult to maintain parliamentary sovereignty in the sense of legislative supremacy in a situation where European law could override domestic law in the UK and judges had to set aside Acts of Parliament for violations of European law. Parliament was legally still considered sovereign because Parliament agreed to be bound by European law itself. The reasoning was awkward and sat uncomfortably with other constitutional notions, such as the rule that later statutes prevail over earlier statutes. Yet it served as a pragmatic means to keep the fundamental principle of UK constitutional law intact during, but in spite of, EU membership.

And the doctrine holds true as an expression of internal sovereignty as implying the ultimate power under national constitutional law and that is still the King/Queen-in-Parliament since the UK Parliament may in an Act of Parliament indeed decide to exit the EU: Brexit! This doctrine also explains why the Supreme Court in the UK decided that the Brexit decision had to be taken by the legislature and that it was not enough for the government to simply claim to follow the outcome of the Brexit referendum, which was consultative in nature (*R (Miller)* v. *Secretary of State for Exiting the European Union* [2017] UKSC 5). Therefore, Parliament adopted the European Union (Notification of Withdrawal) Act 2017, which gave authorization to the government to submit the Article 50 TEU withdrawal notification; later, in 2018, Parliament adopted the European Union (Withdrawal) Act 2018, which laid down the rules with respect to Brexit itself and the measures necessary to guarantee a smooth transition. Under this Act, Parliament had to agree

with the Withdrawal Agreement between the EU and the UK, which finally happened at the end of 2019, facilitating formal Brexit as from 2020 (with 2020 being a transitional year allowing for an agreement about the relations between the EU and the UK to be negotiated, which ultimately was concluded at the end of 2020). The present relationship between the UK and EU is therefore now regulated under the latter agreement and general international law.
To confuse our discussion about sovereignty a bit further, the Brexit debate in the UK was, on the part of the Brexiteers, largely conducted on the claim of taking back control. The claim was that sovereignty was transferred largely to the EU, whereas Brexit proved it still remained with the UK.

Different Notions (Usages of the Term) of Sovereignty

1. To indicate the inviolability of a state and its presence in international legal relations
2. To indicate the hereditary monarch: the sovereign
3. To indicate the philosophical/theoretical foundation, underpinning the ultimate source of the state powers
4. To indicate what is the ultimate state authority: usually the constitution-maker
5. To indicate powers connected to state authority: sovereign powers
6. To indicate a notion that a state ought not to transfer too many powers to an international organization at the risk of losing sovereignty
7. To indicate a legal status (as in 1.), or a factual status that a state lost its grip on financial markets or has to abide by conditions imposed upon it by its lenders.

1.1.5. The Absence of Sovereignty

The complications of determining what sovereignty means, and where it resides, can in some cases actually be avoided altogether. The constitutional law of the Netherlands does not occupy itself with the question of sovereignty, in whatever meaning. In order not to be drawn into sectarian conflicts between republicans (for whom sovereignty lies with the people), royalists (for whom sovereignty lies with the monarch), and clericals (for whom sovereignty

lies with God), in their Constitution the Dutch have opted to simply leave the question open or simply not to pay any attention to it. Thus, the Dutch Constitution contains no preamble, where references to sovereignty would usually be found. The issue could have been clarified during the general constitutional overhaul of 1983, when the entire text was modernized, but it deliberately was not. The rules governing the relation between the monarch, the parliament and the government are still almost entirely defined by custom, not by the constitutional text. In effect, the Netherlands pragmatically functions as a democratic constitutional monarchy with a parliamentary system which is governed by the rule of law. Who is the Dutch sovereign is a question that is unresolved, but it is not perceived as one that needs urgent resolution. But no matter what, the ultimate fundamental authority is indeed the constitutional lawmaker (Government + Parliament, in two readings and the second reading with a two-thirds majority).

1.1.6. Sovereignty and European Integration

To those states that have joined and are a member of the European Union, the constitution is no longer limited to strictly national terms. In order to see the full picture, one cannot ignore the constitutional impact of a state's EU membership. European Union law is part of the member states' national law and deserves to be treated as such (see also Chapter 6).

Several approaches are possible with respect to the European Union. A very far-reaching approach would be to argue that the EU is, or has become, a state, and the member states form part of a larger federation. In that case, federal (i.e. European) law would override State (i.e. national) law as a matter of course. While intriguing, this approach goes too far: the EU comprises states, but it is not a state itself. Alternatively, one might argue that the EU is simply an international organization, based as it is on a set of international treaties, most notably the Treaty on European Union and the Treaty on the Functioning of the European Union. While such an approach would fit most easily with national constitutions, it would not be quite adequate as regards the effective pursuit of the organization's ambitious objectives. After all, as the European Court of Justice argued already in the early 1960s, if the European Union (then: Community) left it entirely up to the member states to decide how to embed European law in the national legal order, the uniform Union-wide application of European law could be frustrated. It would then depend on the member states whether or not to allow individuals to rely on European law in national courts, and whether or not to give European law precedence over national law. Yet the Union, especially its internal market but also other areas of integration, cannot function in the envisaged manner if it were

governed by such a 'normal' treaty-law regime. We must assume, so the European Court of Justice held, that the member states wanted their Union to work and have therefore given up parts of their sovereignty in favour of the EU, and that thus a normal treaty approach would not suffice: a new legal order, one of its own kind, has been created instead. What is special about this order is that EU law, according to the Court, is capable of generating direct effect in the member states, and has supremacy over all conflicting national provisions, irrespective of how member states otherwise treat international treaty commitments. Combined with the possibility for the Council – the representation of the member state governments at European level – to act by (qualified) majority, overriding individual member states, the European Union possesses characteristics that stand out in the world. The European Court of Justice case law about the member states having given up parts of their sovereignty (or possibly better: having given up some of their state powers) resembles the US Supreme Court's case law in the 19th century, where the Supreme Court used similar phrases and also claimed the supremacy of federal laws, in the newly formed federation.

Problems inevitably arise within the member states. How can a country still be sovereign if European law overrides it at every turn? How can the national constitution still be the supreme law if the European Court of Justice insists that European law overrides all national law, including constitutions? Is the national lawmaker not already a European lawmaker, transposing European law and acting domestically subject to European restraints? Is the national judge not already a European judge, applying European law on a day-to-day basis under the interpretative guidance of the European Court of Justice? On a different note, how can democracy be ensured when the national government is hard to control while acting in Brussels, and if that government can even be outvoted in the Council, whereas the legal effects of European decisions are nevertheless so far-reaching? Or how can the two levels of democracy – the European level on the one hand, and national democracy in each of the member states, on the other – be reconciled? This becomes particularly relevant when national elections lead to a majority in favour of policies which are against EU policies and agreements.

What remains uncontested is that the European Union only possesses those powers that the member states have conferred upon it (Art. 5(2) TEU), namely in a treaty that they have all voluntarily and unanimously ratified. Since in the European framework such treaties have domestic constitutional implications, unlike usual trade agreements, it might be appropriate to include a specific 'Europe clause' in the national constitution. Germany and France have such a clause; the Netherlands does not; the UK statute of accession to the (then)

European Economic Community was an ordinary piece of legislation on the face of it, but had extraordinary constitutional consequences. Yet even if a Europe clause is in place, it does not mean that the last word about supremacy is already spoken. From a national perspective, even a Europe-friendly constitution can still be a supreme constitution. The key is then to reconcile European claims to supremacy with national claims to sovereignty. One of the problems here is the different meanings of the notion of sovereignty. Some authors may argue that sovereignty does exist as long as there is still the power to exit the EU. Others argue that sovereignty is a conglomerate of powers and that when too many of those are transferred to an international organization such as the EU, this leads to a violation of the notion of sovereignty. The question in this approach evidently is: when do we witness 'too many' powers having been transferred? A phrase in this respect coined by the German Constitutional Court, without defining it precisely, is the notion of 'core sovereignty' (BVerfG 30 June 2009, 2/08, about the compatibility of the Lisbon Treaty with the German Constitution). All that we know presently is that as of yet it has not been infringed by the transfer of powers under EU law.

Another problem is the perceived absence of a full democratic underpinning of the EU and its policies, which do bind national parliaments and voters and governments. Authors have argued that far-reaching globalization or Europeanization conflicts with the notions of democracy and sovereignty and can therefore only have a limited impact. Whether that assumption holds true, specifically in the light of the EU, remains to be seen, as well as in the light of the fact that the EU may even enhance the joint efforts of the member states to put in place effective policies in a de facto globalized world. On the level of facts, sovereignty may then be enhanced, specifically for small states, when they join forces in a strong international organization, such as the EU. Irrespective of the outcome and arguments, however, a study, like this book, of European systems that does not take full account of their EU membership would be incomplete. We will therefore do so, all the more so since EU law has transformed national constitutional law in many ways and has had an impact on the division of constitutional powers on the national level and on the scope of those powers of the various actors.

1.2. *Parliamentary and Presidential Systems*

When comparing government–parliament relations in different systems, a very fundamental distinction can be drawn between *parliamentary* systems and *presidential* systems. In order to fall into either category, it is not enough

that a state has a parliament or a president. Thus, Germany has a Federal President, but it is in fact a parliamentary system; the US does have a parliament, but is nevertheless presidential. The defining feature of a presidential system is whether the head of the executive is elected with a mandate of his/her own, or whether s/he owes the continuation of his/her office to parliament and is therefore accountable to parliament in the sense of a confidence rule (see also Chapter 5).

In the US, both chambers of parliament, Congress, and the head of the executive, the President, each have their own mandate. The President owes his/her authority to being elected, and s/he is therefore not accountable to Congress in the sense of a confidence rule. This is not to say that parliament may not exercise oversight over the executive, but that no accountability in the sense of the existence of a confidence rule exists. Whether Congress has confidence in him/her or not, the President stays in power. The same applies to other presidential systems such as Mexico, Brazil or the Philippines.

In parliamentary systems, by contrast, the head of the executive is not directly elected, but stays in office because s/he enjoys the confidence or tolerance of the parliament. This applies to the Prime Minister of the Netherlands, the Prime Minister of the UK, and the Chancellor of Germany: all three can be voted out of office via a parliamentary vote of no confidence, albeit with different procedures. It should be noted that a vote of no confidence, or motion of censure, is not the same thing as impeachment in the US. Impeachment is a criminal trial for very serious criminal offences, whereby the Senate acts as a court of law. In order to oust a prime minister or chancellor in a parliamentary system, the parliament does not need to prove that s/he has committed a crime, let alone a serious crime. It is sufficient for the parliament to have lost confidence in the government or prime minister or their policies. In fact, parliament does not need to give any reasons for the censure at all. The principle of a parliamentary confidence rule applies to all other parliamentary systems in the world, for example Canada, Spain or Israel.

While the terminological labelling may imply that presidential systems have a particularly strong president, while parliamentary systems have a particularly strong parliament, in reality the opposite tends to be the case. True, while European prime ministers can theoretically be ousted more easily compared to the US President, they in fact wield far greater political power, at least domestically. That is because they are typically the heads of a loyal parliamentary majority, often also chair(wo)men of the main political party. Usually, the prime minister won the previous elections, allowing party members to obtain a seat in parliament who thereby owe allegiance to the