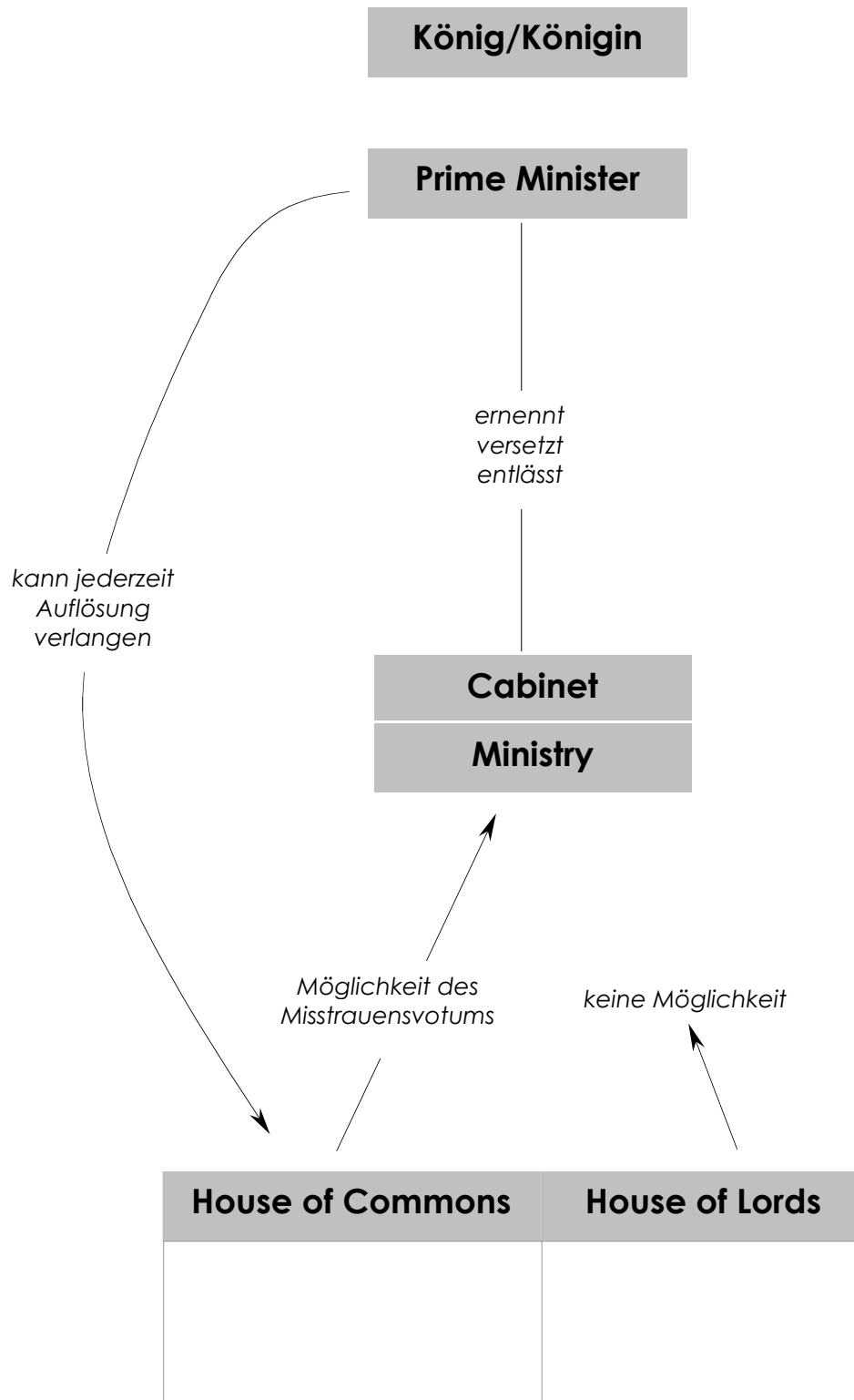


Grossbritannien



Verfassungsgeschichtliche Entwicklung Grossbritanniens

1. Sehr kontinuierliche Verfassungsentwicklung seit dem Mittelalter

- Kontinuität: abgesehen von den 2 Revolutionen (1642-1660 und 1688) überhaupt keine Unterbrechung
- Elementarer Gegensatz zu den kontinental-europäischen Staaten
- Keine Auswirkungen der Französischen Revolution
- Weitergeltung alter Rechtsquellen bis heute

2. Frühe, stufenweise verstärkte Verwirklichung des Vorranges des Parlamentes und der repräsentativen Demokratie

- Beibehaltung der Monarchie (ausgenommen 1649-1660) trotz Übertragung der Macht auf Parlament
- Einschränkung der Macht des Königs, nur vorübergehende Entwicklung zur absoluten Monarchie
- Grossbritannien = Wiege des Parlaments
- Parlament ursprünglich nur in beschränkter Masse eine Volksvertretung
- Nebeneinander von 2 Entwicklungen:
 - Zunahme der Kompetenzen des Parlaments
 - Verbreitung der demokratischen Basis des Parlaments durch Änderung des Wahlrechts für das Unterhaus

3. Frühe Verwirklichung des parlamentarischen Regierungssystems

Seit Ende des 18. Jahrhunderts (vgl. mit Kontinentaleuropa!):
Abhängigkeit der Regierung von der Mehrheit im Unterhaus

4. Keine geschriebene Verfassung

- Ungeschriebenes Recht und verschiedene Parlamentserlasse
- Keine Verfassung im formellen Sinn mit erhöhter Geltungskraft.
Ausnahme: Instrument of Government 1653

5. Frühe Anerkennung von Grundfreiheiten

- Stufenweise Entwicklung aus den Freiheiten des Mittelalters
- Keine Ausbildung von verfassungsmässigen Rechten oder absoluten Rechten
- Heute zum teil Regelung in verschiedenen Gesetzen
- Bedeutung des richterlichen Rechts

6. Bedeutung der englischen Verfassungsentwicklung für den modernen demokratischen Rechtsstaat

Englische Verfassung als Vorbild:

- a) Demokratie: Herrschaft des Parlaments als Volksvertretung (Fehlen von direkt-demokratischen Institutionen)
- b) Rechtsstaat:
 - Gewaltenteilung
 - Grundfreiheiten (Fehlen der Verfassungsgerichtsbarkeit)

Comparative Constitutional Law and Human Rights

Research Seminar UEA, October 4th, 2000

Two days ago, on October 2, the Human Rights Act (HRA) came into effect. This statute enshrines the rights and fundamental freedoms of the European Convention on Human Rights (Convention) into English law. Section 2 requires any court or tribunal determining a question which has arisen in connection with a Convention right to take into account the jurisprudence of the Strasbourg organs, and according to section 3, primary and subordinate legislation is to be read and given effect in a way which is compatible with the Convention rights. As the rules of the Convention guaranteeing basic rights have a much more open texture than most United Kingdom statutes, courts and lawyers will have to become accustomed to a new approach in interpreting statutes, even if the opinion, that the HRA “will radically alter the interpretation and use of all other legislation” (John Wadham/Helen Mountfield, *Human Rights Act 1998*, London 1999, p. 22), might be somewhat exaggerated. Besides, the traditional approach to interpretation has already been affected by British membership of the European Union (A.W.Bradley/K.D.Ewing, *Constitutional and Administrative Law*, 12th ed. 1997, p. 20). Some people obviously fear, and others may hope, that the HRA involves a considerable shift in power from parliament to judges.

All members of the Council of Europe which have ratified the Convention, i.e. practically all European states, have been faced with the problems of how to integrate the Convention into domestic law and how to strike an appropriate balance between courts and the political branches of government in the process of bringing these fundamental rights and freedoms “home” – to borrow an expression from the British Government’s White Paper, published in October 1997 (Cm 3782). It might therefore be useful to have a look at the constitutional practice concerning human rights in other European countries. Such a comparative analysis of different constitutional orders is the subject of comparative constitutional law.

In the first part of my presentation I shall say something about the objectives of comparative constitutional law. In the second part I would like to focus on the special importance and usefulness of a comparative approach in the field of human rights.

1. Objectives of Comparative Constitutional Law

As the name implies, comparative constitutional law endeavours to compare various constitutional orders. For example, scholars compare how a specific problem like the protection of individuals by independent courts is resolved in different legal systems, or they compare the working of a specific institution like parliament, or constitutional courts, in various countries. They must thereby extend beyond their own

understanding of terms and thought processes and attempt to evaluate foreign law according to its own structures and understandings, while simultaneously considering social realities.

At the University of Zurich I regularly teach course – three hours a week during the summer term – on “Foreign and Comparative Constitutional Law” (auslaendisches und vergleichendes Verfassungsrecht). I was pleased to have quite a number of Erasmus students this year. The countries I deal with in more detail are the United States, the United Kingdom, and three continental-European states, namely Germany, France and Italy. Swiss constitutional law is taught in another course, but taken into consideration when comparing different institutions and procedures. The students are required to read in advance decisions of the U.S. Supreme Court, the German Constitutional Court, the French Conseil Constitutionnel and the Italian Corte Costituzionale, all in the original texts, whereby the Italian and even the French decisions sometimes cause problems of comprehension, although French and Italian, next to German, are official Swiss languages. Students from the German speaking part of Switzerland usually prefer English to French. As the United Kingdom has no codified constitution unchangeable by ordinary legislation and therefore no constitutional court, I did not come across any decisions in the *Law Reports* which I found suitable for discussions in class – maybe you can make some suggestions. But I spend some time in trying to explain the impact of non-legal, constitutional conventions in your country, the interrelation of the doctrines of “parliamentary supremacy” and the rule of law, as well as your institutions of government, as the British model had a great influence in establishing the rule of law and in creating parliamentary systems of government world-wide.

The comparative analysis of foreign constitutional orders, through its “contrast effect”, contributes to a better understanding of our own legal system. This in turn enables a more sophisticated evaluation of the advantages and disadvantages of different models and solutions. Internet has made a lot of information, including the full texts of court decisions, much more easily accessible. Globalization has also seized the formerly national sanctuaries of law, far beyond the sphere of the European Union. Apart from scientific findings, comparative constitutional law pursues practical objectives. Thus it assists us in interpreting rules which, as in the case of human rights, are practically the same or very similar in different constitutions. Finally, comparative constitutional law provides the impulse for improving national law by carefully adopting institutions and procedures that have proven themselves elsewhere. For example, the Swiss two-chamber system adopted in 1848 at the creation of the Swiss Federal State, was designed after the American model with a House of Representatives and a Senate representing the member states. The institution of Parliamentary Ombudsman, created in Sweden 1809, now exists in more than 80 countries; the Danish model greatly influenced the respective New Zealand Bill, which in turn had a certain impact when the office of Parliamentary Commissioner for Administration was created in Great Britain in 1967. The Russians copied important elements of the French governmental system with a popularly elected president wielding wide-ranging executive powers and a separate government, dependent on the confidence of parliament. The German type of constitutional jurisdiction was a shining example for quite a number of countries. The great influence of the Italian Constitution and the German Basic Law upon the Spanish Constitution of 1978 is rather obvious. Far reaching receptions occurred in Middle and Eastern Europe

following the turning point in the year 1989. When reading the “Written Constitution for the United Kingdom”, drafted by the Institute for Public Policy Research, I was reminded of many similar provisions I had seen in various constitutions.

2. The Importance of Comparative Constitutional Law in the Field of Human Rights

In the area of fundamental rights of the individual, a sort of “European common constitutional law” has emerged (“gemeineuropaeisches Verfassungsrecht”, Peter Haeberle). There are, in my opinion, mainly three reasons for this phenomenon:

- Human rights are based on a common history and common values, determined by a number of developments and events: natural law teachings in the 17th and 18th centuries, the struggle for legislative supremacy in England that resulted in the acknowledgement of rights and liberties in the 17th century, the American bills of rights in the late 18th century, the French Revolution with the proclamation of human and citizens’ rights, which – by reference in the preamble – is part of the French constitution now in force and which inspired drafters of constitutions in many countries.
- The violation of human rights during the second world war strengthened the need for international protection. As a result, international organizations drafted conventions that guaranteed fundamental rights. The European Human Rights Convention from 1950 not only guarantees basic rights recognized by most European constitutions, but also provides for an effective mechanism in order to implement these rights against states that have violated the Convention. England made a most significant contribution in the process of internationalizing human rights. British legal tradition and the collaboration of eminent British statesmen and jurists left its mark when international pacts and conventions on human rights were drafted. Art. 5 and 6 of the European Convention concerning the rights to liberty and security and to a fair trial would be unthinkable without the English concept of Habeas corpus and standards of procedural fairness developed by British courts. Or, to quote QC Lord Lester who campaigned for many years to make the Convention part of UK law: “The Convention rights are not esoteric or alien to the common law, but part and parcel of our British heritage, deeply rooted in British political thought, the common law and our great constitutional charters” (The Times 2, Sept. 26, 2000).
- In the aftermath of the second world war constitutional courts were created or the jurisdiction of existing courts in constitutional matters was expanded in many European countries, often including the possibility of abstract judicial review. In the latter case, a court may review the constitutionality of legislation without a concrete case of application: if the court finds the legislation unconstitutional, the act will either not come to effect (French model of preventive judicial review) or it will be repealed (repressive judicial review, as for instance exercised by the German Constitutional Court). I suppose that such a power of a court would be regarded as horrifying by many English jurists and namely politicians. Not even the U.S. Supreme Court has the power to declare acts of Congress null and void based on an abstract judicial review; only in a concrete case or controversy might an American court reject the application of an unconstitutional statute.

The every day application of the European Convention by courts and tribunals on all levels is no doubt much more important than the rare occasions, in which constitutional courts repeal or disregard legislation they find to be unconstitutional. In my opinion, the most important achievement of the HRA is to make the rights and fundamental freedoms of the European Convention directly applicable in *domestic courts*, thus sparing many litigants to go to Strasbourg in order to secure their rights, long after the violation occurred. A speedy redress of human rights' violations is important for the victim, and taking a case to Strasbourg triggers a rather complicated and very time-consuming procedure, often lasting several years. Up to now the Convention was at most a source of inspiration for English judges interpreting ambiguous legislation or establishing the scope of the common law. Now, that the HRA has come to force, the rights of the Convention and the relevant Strasbourg jurisprudence will be a mandatory consideration, when this is required by the nature of the matter in controversy. Many courts in Europe have a long practise of applying the Convention, because in most of these countries treaties are incorporated as part of the domestic law by the mere fact of ratification; as long as they are – as in the case of the rights of the Convention – self-executing (i.e. intended to have direct internal effect) they do not, like in England and in some Scandinavian countries, require a transformation by legislative enactments such as the HRA into appropriate provisions of domestic law. Therefore there exists an abundance of national decisions concerning every single right of the Convention, and it might be helpful for British judges to not only consult the jurisprudence of the Strasbourg organs, but also that of national courts in other European countries on important issues arising under the Convention. This would be a situation in which comparative constitutional law may contribute to a better-informed exercise of judicial interpretation.

I shall conclude my presentation with two remarks concerning the way Swiss courts deal with the Convention, because I think they might be of interest from an English point of view:

- According to the practice of the Swiss Federal Tribunal, the rights and freedoms defined in the Convention are treated in the same way as fundamental rights enshrined in the Swiss constitution. The Convention guarantees a minimal standard. If the domestic law goes further in the protection of a human right, than it prevails (see Art. 53 of the Convention). But even when, as in most cases, the Convention does not afford more protection, the Federal Tribunal is anxious to determine the scope and the limits of an individual right by taking into account the respective provision of the Convention and it's interpretation. Therefore references to the Strasbourg jurisprudence are commonplace in Swiss constitutional decisions. Sometimes you might even find considerations about how national courts in another country interpret a Convention right. Some decisions from the German Constitutional Court and even works of German constitutional scholars have been quoted in decisions of the Swiss Federal Tribunal and have had a lasting effect on the development of Swiss fundamental rights doctrine. I believe that such an internationalization of human rights' court rulings has promoted the protection of the individual versus the state.

One of the greatest American judges, who incidentally adhered to judicial self-restraint, Justice Louis D. Brandeis, made the following observation some decades ago:

“Our Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth – of expansion and adaptation to new conditions.”

The same applies, maybe to a lesser degree, to the rights and freedoms of the Convention. A striking example is art. 6 (right to a fair trial): Its sphere of application has gradually been extended by way of judicial interpretation, giving the autonomous concepts of “civil rights” and of “criminal charges” a sense which clearly exceeds the original understanding. Similarly, the Strasbourg Court applies a more stringent standard than formerly in order to test whether a measure adopted by a member state “is necessary in a democratic society” and thus justifies a limitation of, for instance, freedom of expression (art. 10 para. 2 Convention) or freedom of assembly and association (art. 11 para. 2 Convention). In deciding such issues and applying a new test of “proportionality” in English courts, a comparative approach might be more adequate than clinging to aged precedents, with the risks of postponing justice and losing the case in Strasbourg.

- According to the HRA, the Convention (in contrast to Community law) cannot be used as to override primary legislation. If a statute cannot be interpreted in a way which is compatible with the Convention rights, it must be given effect, but the higher courts will have power to issue “declarations of incompatibility” and the government may legislate in a fast-track procedure in order to remedy the breach of the Convention (art. 4 and 10 + schedule 2). This rather complicated mechanism is, of course, a concession to the doctrine of parliamentary sovereignty, identified by Dicey and cherished as a sacred cow, or – to be more polite – as a principle feature of British constitutional law.

The framers of the Swiss constitution also feared a “government by judges” – a nightmare brought up even by opponents of the HRA like Lord Kingsland, the Shadow Lord Chancellor, or the former Home Secretary Michael Howard. The Swiss are devoted to a model not of “parliamentary supremacy”, but of “legislative supremacy”, influenced by the fact that all laws passed by the national parliament are subject to a referendum (a popular vote) if required by 50'000 citizens. Although the constitutional norms take precedence over all other legal rules, it is – according to this understanding, which I do not share – the duty and province of parliament, not of the courts, to secure that statutory law does not violate the constitution. Many regard a censorship of legislation by courts as a weakening of our semi-direct democracy. Art. 191 of the Swiss constitution declares that courts are bound by “federal laws and public international law”, thus excluding judicial review. This restriction has not been a significant obstacle to bringing the Convention “home”. As a rule an interpretation compatible with the Convention was possible, and in its most recent jurisprudence the Federal Tribunal even gives preference to the rights of the Convention when they collide with primary legislation – a practice which is justifiable in Switzerland (though not according to the HRA), as the mentioned art. 191 of the Swiss constitution also excludes public international law and not only domestic legislation from judicial review.

I am confident that the mechanism designated by the HRA will work: Courts should find the means of interpreting most rules of primary legislation in a way which is compatible with the Convention. Ministers in charge of a bill are required to make statements of compatibility (section 19) and will most probably try to avoid statements to the effect that in spite of an incompatibility with the Convention, the government nevertheless wishes Parliament to proceed with the bill. If all else fails, there is still the possibility for the higher courts to issue a declaration of incompatibility with the prospect of a swift remedy through legislative procedures. Experiences made in Scotland, where the Act has been in limited force since 1998, suggest that there is no need to fear that law and order will be jeopardized by a temporarily flood of challenges under the HRA. I cannot share the pessimism of a Scottish judge who predicted “a field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers” (The Times, October 2, 2000).