ORIGINAL SCIENTIFIC ARTICLE

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Comparing Constitutional Protection of Human Rights in Europe

What Can We Learn From Comparative Analysis?

The article aims to demonstrate the usefulness of comparative method in the field of constitutional law, in particular in the field of human rights provisions at the constitutional level. It tries to disprove the common assumption that the human rights provisions in different constitutions are almost identical and that the legal unification is in that respect almost complete. The analysis of the European constitutions unveils a somewhat different picture. In part, that assumption is correct. The vast majority of the constitutions incorporate what the authors have called a 'common core of human rights', some 20 provisions that can be found in almost all European constitutions (e.g. right to freedom, principle of equality, freedom of expression, freedom of assembly, freedom of association etc.). Equally important are, however, certain clusters of human rights provisions (or absence thereof) that are typical of certain groups of constitutions, but not of others. The authors have called these particular clusters of provisions or certain combinations of provision a constitutional profile. Based on the detailed analysis of the constitutions, four distinct constitutional profiles could arguably be recognised, which the authors have described as Nordic, Romanic, Germanic and Common Law group.

Keywords: constitutions, comparative law, constitutional law, human rights, legal families, constitutional profiles, Nordic legal group, Romanic legal group, Germanic legal group, common law

Primerjava ustavnega varstva človekovih pravic v evropskih ustavah – Kaj se lahko naučimo iz primerjalnopravne analize?

Razprava skuša pokazati koristnost primerjalnopravne metode na področju ustavnega prava, zlasti na področju ustavnopravnega varstva človekovih pravic. Ovreči skuša splošno sprejeto predpostavko, da so ustavne določbe o varstvu človekovih pravic v različnih ustavah med seboj skoraj enake in da je pravno poenotenje v tem pogledu domala zaključeno. Analiza evropskih ustav nam pokaže nekoliko drugačno sliko. V določenem obsegu predpostavka drži: pretežna večina ustav obsega 'skupno jedro človekovih pravic', kot so avtorji poimenovali približno 20 kategorij človekovih pravic, ki jih lahko najdemo v skoraj vseh evropskih ustavah (npr. pravica do svobode, načelo enakosti, svoboda izražanja, svoboda zbiranja in združevanja itd.). Enako pomembni pa so določeni sklopi določb o človekovih pravicah, ki so v določenih ustavah prisotni, v drugih pa jih zaman iščemo, in ustvarjajo pomembne razlike med ustavami. Obstoj in določena povezava takšnih sklopov človekovih pravic opredeljujejo nekaj tipičnih modelov ustavnega urejanja človekovih pravic, ki so ga avtorji imenovali ustavni profili. Podrobna analiza ustav razkrije štiri različne ustavne profile, ki so jih avtorji opisali kot nordijsko, romansko, germansko in common law skupino.

Ključne besede: ustave, primerjalno pravo, ustavno pravo, človekove pravice, pravne družine, ustavni profil, nordijska pravna skupina, romanska pravna skupina, germanska pravna skupina, common law pravna skupina.

INTRODUCTION

Comparative legal analysis often reaches far beyond its proclaimed goal – to compare. Mere comparison tells us little. It may alert us to the many differences that exist between various legal systems, and that in itself may serve a variety of practical purposes (Bogdan 1994: 28–39, David and Brierley 1985: 5–11). Frequently, this is the only use the comparative legal analysis is put to. That may be instructive and on some occasions even illuminating, but the real potential of comparative analysis lies beyond that necessary and even entertaining task. Comparison may reveal a more important layer of legal reality that too often attracts less attention. The ambition of this paper is to show to what use comparative legal analysis can be put to apart from the mere compiling of interesting information. Even though such attempts may fall short of the truth they strive to achieve, they may still provide fertile ground for yet other attempts that may prove to be more fortunate.

First step, however, is the gathering of data. The basis of hypotheses put forward in this article is a comprehensive survey of the constitutional protection of human rights entailed in the continent's written constitutions. Since the notion of 'Europe' is a contested one, the delimitation chosen was purely conventional. We focused on the EU countries and added those that form the EEA and Andorra. Such a group is in our view sufficiently homogenous. The countries in the group thus share enough of a common cultural and legal heritage for a comparison. Furthermore, possible results could be explained by some underlying traits rather than by pure coincidence or some vague anthropological truisms.

The data collected were analysed using a rather simple table in which the existence (or absence thereof) of constitutional protection of certain human rights was indicated by virtue of three symbols. A plus (+) denotes the existence of constitutional protection of a certain human right (or the existence of a constitutional regulation of a certain question, e.g. of citizenship), a minus (-), which signifies the absence of a constitutional protection of a human right (or an absence of the existence of a constitutional regulation of a certain question), and finally, symbol P which stands for *principle*, indicating that the constitution takes some notice of a value (e.g. Art. 19 of the Maltese Constitution, which states: »The State shall provide for the protection and development of artisan trades«), but stops short of stipulating a genuine and enforceable right.

Although one might be tempted to regard such an approach as simplistic and prompted solely by the fact that a project including postgraduate students had to resort to an undemanding research method, at least one advantage has to be

pointed out: such an approach provides one easily surveyable collection of information. This was the starting point of our analysis.

The information collected in this way gave rise to two basic hypotheses. The first was readily visible: some basic rights are protected in almost all constitutions. This cluster of basic human rights forms a *common core* of human rights protection shared by the European states. The second hypothesis was less easy to formulate. Our starting point was a quite widespread assumption that the field of human rights protection is governed by a boring uniformity. This assumption rests on a premise that the diversity of constitutional arrangements unveils itself almost exclusively on the plain of governmental structures. The meagre existing research demonstrates this in a rather unequivocal manner (e.g. Finer in Venter 2000: 25). We tried to challenge this assumption by stressing the fact that observable differences in constitutional protection of human rights nevertheless exist. These differences are, we claim, not mere coincidences, but amount to quite a distinct pattern. We have described such patterns as *constitutional profiles,* which are – we claim – idiosyncratic to groups of countries. Countries that share the same history, culture, legal system and/or historic experience, often share a distinct pattern of constitutional protection of human rights as well. In this article, we attempt to outline the basic traits of the existing constitutional profiles in Europe and try – to some extent – shedding some light on factors that might have contributed to their formation. Our analysis has revealed four different groups of countries with very similar constitutional characteristics (constitutional profiles): (1) Nordic group of countries, (2) Romanic group of countries, (3) Germanic group of countries and (4) Common law group of countries.

On the outset, a few caveats are in order. The analysis did not venture further than the textual analysis of the constitutional texts (or rather, their English translations) carried us. A reproach that our analysis is an »inchoate textual analysis« (Venter 2000: 43) is entirely justified. In truth, we did not nor would be able to carry through an analysis of »deeper layers of living constitutional law« (*ibid.*) including the interpretation of the constitutional provisions. Similarly, our analysis did not include the protection of the human rights afforded by laws, other regulations or precedents. And secondly, we did not try to explain everything (Bogdan 1994: 77). Thus, two countries – Austria and Liechtenstein were left unclassified.

1. COMMON CORE OF HUMAN RIGHTS

The first and rather obvious result of our analysis of human rights provisions in European constitutions is that some human rights provisions appear much more frequently in the constitutions than others. The list of these provisions is fairly extensive. It includes:

- freedom from torture (which can be found in 22 out of 32 analysed European constitutions),
- general principle of equality (equality before the law / right to non-discrimination) (found in 31 constitutions),
- right to liberty or freedom (found in 32 constitutions),
- legal principle *nullum crimen*, *nulla poena sine lege praevia et certa* (found in 27 constitutions),
- right to the inviolability of the home (found in 28 constitutions),
- right to the freedom of thought, conscience and religious belief (found in 32 constitutions),
- right to freedom of expression (found in 31 constitutions),
- right to freedom of assembly (found in 30 constitutions),
- right to freedom of association (found in 31 constitutions),
- right to administration of public affairs (found in 26 constitutions),
- right to vote and be elected (found in 32 constitutions),
- right to access to public office (found in 23 constitutions),
- right to petition (found in 24 constitutions),
- freedom to choose one's residence (found in 22 constitutions),
- right to (private) property (found in 30 constitutions),
- right to education (found in 26 constitutions),
- right to freedom of movement (found in 24 constitutions),
- right to social security (found in 27 constitutions).

These human rights form a common core of human rights protection in the European constitutions. The majority of them comes from the first generation of human rights and imposes the obligation on the state to refrain from certa-

in encroachments on the personal sphere of the individual. It is worth noting that a considerable part of these fundamental rights are political rights (at least historically), designed to achieve the political participation of the individual (the right to free expression, to association, to assembly, to administer public affairs, to vote and be elected, to access a public office and the right to petition). Only a handful of these rights, on the other hand, impose a positive obligation on the state, notably the right to education and the right to social security and, arguably, the general principle of equality (positive discrimination). Although this point is not to be exaggerated, we can discern the common values and the shared political heritage underlying the European constitutional thought. It is based on the liberal and individualistic tradition of the French Revolution, tempered only to a small degree with the values of the welfare state.

2. NORDIC GROUP

DENMARK, ICELAND, NORWAY, SWEDEN

All four countries lie in the north of Europe with the geographical core in the Scandinavian Peninsula. They border on each other with the exception of Iceland because of its position as a relatively remote island west of Scandinavia. Therefore, the connections between them, in the cultural and political sense, have always been very close (Zweigert and Kötz 1998: 277).

Denmark is known to be the oldest kingdom in Europe with about 1100 years of history (Ring and Ring-Olsen 1999: 22). The three Nordic kingdoms of Denmark, Norway, and Sweden were unified at the time of the Union of Kalmar (1397–1523) when Denmark played the leading role. On the other hand, Sweden conquered Finland in the 12th and 13th centuries and the latter formed a part of the Swedish empire until 1809 (Zweigert and Kötz 1998: 277–278). Iceland was an independent state from 930 till 1264, when it came under Norwegian rule. Both of the countries were included in the Danish kingdom at the end of the 14th century and Iceland became Danish province two centuries later (Ring and Ring-Olsen 1999: 27). The age of Napoleon broke the connections between Sweden and Finland on one side and between Denmark and Norway on the other. Finland was ceded to the Tsarist Russia in 1809 while Norway and Sweden formed the personal union in 1814 (Zweigert and Kötz 1998: 278).

More important changes occurred at the beginning of the 20th century. Norway seceded from the union with Sweden in 1905 and declared independence. Finland did the same a year after the breakdown of the Tsarist state. Also in

1918, Iceland entered into the personal union with Denmark and finally became completely independent in 1944.

The close interrelationship of the Nordic legal systems was explained already with some historical facts. Here we also have to mention the common history of legal systems. All the Nordic laws were based on old Germanic law with certain local variations. In the 12th century these rules began to be written down in form of numerous local or subsequent city laws. From the end of the 14th century the Danish law came into force in Norway and Iceland after they had become part of the kingdom of Denmark. The first comprehensive codes were produced by the late 17th and early 18th century in Denmark (1683), Norway (1687) and Sweden (1734). Already a century earlier Sweden established close contacts with the legal scholarship from the Continental Europe. Swedish nobleman law students were mostly trained in or influenced by German *Gemeines Recht,* and through that connection they were introduced to Roman law as well (Zweigert and Kötz 1998: 278–279). Nevertheless this never led to its extensive use as it did in Germany (Zweigert and Kötz 1998: 284). The main reason why Roman law never truly penetrated the Nordic countries even earlier was that these countries developed codifications based on their own legal traditions very early (Bogdan 1994: 89).

The Age of Napoleon brought big changes and broke the connections between all the Nordic countries. In 1809 Finland became part of the Russian state, although it had considerable autonomy as an independent Grand Duchy. Therefore, the Tsarist administration interfered very little with its legal system. Sweden, influenced by the success of the Napoleonic codification, fundamentally reformed its old law in 1826. At that time the same kind of modernisation occurred in Denmark as well, which was also heavily influenced by the French *Code civil* (Zweigert and Kötz 1998: 278–279).

Denmark, Norway, and Sweden started to co-operate closely in the field of legislation in the last third of the 19th century. In 1880 the unified law of negotiable instruments came into force simultaneously in all the three countries. From that point on until the Second World War, they had unified many laws on the spheres of trade, marine affairs, and many aspects of civil code (Zweigert and Kötz 1998: 280–281). The close co-operation between the countries has also continued after the Second World War. The Nordic council (*Nordisk Råd*) was established by the three countries in 1951 to discuss common political interests and questions. Finland and Iceland joined it later in that decade (Ring and Ring-Olsen 1999: 5).

One common question and dilemma about the Nordic law has to be mentioned. Some authors consider it a separate legal family, while others classify it as a part of the Continental European Civil Germanic legal family.

For example, Zweigert and Kötz (in Bogdan 1994: 88–89) discuss the Nordic law as an independent group, at the same level as Romanic, Germanic, Anglo-American, socialist and 'other' laws. Others like Arminjon, Nolde and Wolf (*ibid.*) classify it as an independent group and as one of the seven groups of the world: French, German, English, Russian, Moslem and Hindu. In Scandinavia, Malmström (*ibid.*) treated the Nordic law as an independent family of law within the Western law. Those views can be confirmed by the fact that Nordic legal systems have to some extent specific common characteristics, for instance that they are more practical and pragmatically orientated than German and French legal systems. On the other hand it exhibits great similarities with the legal systems belonging to the Civil Law legal family, while similarities with other legal systems are considerably weaker. For example, Sundberg (*ibid.*) considers the Nordic Law as a member of the Continental European legal family.

At the same time the internal separation into two groups, as a consequence of the aforementioned development of legal systems, is also known. The first group is the so called Western Scandinavian that consists of Denmark, Norway, and Iceland; the second is the Eastern Scandinavian group which includes Sweden and Finland (Ring and Ring-Olsen 1999: 3).

2.1 Constitutional Profile

The constitutions of the *Nordic legal family* cover almost exclusively only the first generation of human rights. The most common of them are actually civil and political rights which are also the oldest in those constitutions. Most of the remaining rights were added later with constitutional amendments. Despite these measures, many of the basic rights of this type are still missing.

This is also a special characteristic of the Nordic group. The human rights provisions that are *not* mentioned in (almost) any of the four countries are:

- right to life,
- right to personal and moral integrity (except in Sweden), dignity, development of personality, right to honour, right to security,
- recognition of legal person, *ne bis in idem*, right to access to court, right to legal remedy,
- prohibition of slavery and servitude, prohibition of forced and compulsory labour,
- and right to marriage and family.

Table 1: Categories of constitutional human rights provisions in the Nordic group that stand out in relation to other groups[1]

Country	Life	P&M Integrity		Dignity	Develop. of pers.	Honour	Security	Recog. of legal person	*Ne bis in idem*
		R	Pris.						
Norway	-	-	-	-	-	-	-	-	-
Denmark	-	-	-	-	-	-	-	-	-
Sweden	-	+	-	+	-	-	-	-	-
Iceland	-	-	-	-	-	-	-	-	-

Access to court	Legal Remedy	Slavery & Servitude	Forced & Compulsory Labour	Marriage & Family
-	-	-	-	-
-	+	-	-	-
-	-	-	-	-
-	-	-	+	-

Furthermore, there are almost no provisions speaking about the equality with the exception of the general right (not in Norway) and equal pay for equal work in Iceland. No provisions relating to criminal law are mentioned either; they were only noticed as a general category in the Danish constitution. The Norwegian constitution does not include any provisions relating to fair trial, while the rest of the group do, although without mentioning the presumption of innocence (except in Iceland) and rights of the accused person (except in Denmark).

There are only a few human rights that are mentioned in almost all constitutions of the Nordic legal family. The rest of the human rights included in the constitutions are significant only in the two countries with the highest number of important rights of the first generation - Iceland and Sweden: freedom from death penalty, right to personal and family life, and freedom of movement.

Political and civil rights from the common core of human rights are proportionally better covered. All of the constitutions, again with some occasional exceptions, include the following rights: freedom of expression, assembly, association,

1 The abbreviations used in the table are explained in the Appendix I, below.

administration of public affairs, vote, and access to public office. The general provision of the freedom to form trade unions is recognised only in Sweden and Iceland, and prohibition of censorship only in Denmark and Iceland.

The human rights belonging to the second or the third generation are only a few. The only two covered in all four countries are the right to property and provisions regarding expropriation. Further provisions that are included at least in two countries are: right to education and right to free education, right to work (mentioned with principles), right to social security, to free enterprise, to sound environment and the right of minorities.

In all the constitutions from our group, there is no mentioning of any kind of the right to special protection, right to private schools, right to creativity (generally), rights connected with work, right to asylum, and right to family and parenthood.

The most obvious and important common characteristics of the four analysed countries are the age, and the low share of considerable human rights guaranteed in the constitutions. Although all of the constitutions have been amended in the last three decades, they still include the lowest number of all generations of human rights provisions from all of our legal family groups. In this respect they resemble the Romanic legal family of countries which has also one of the oldest constitutional traditions in the world.

2.2 Hypothesis

The small amount of the human rights included in the Nordic legal family indicates the pre-French revolutionary understandings of constitutionality focusing predominantly on the structure of the government. This can be assumed from the fact that the Nordic countries have one of the oldest constitutional traditions in the world.

All the countries have amended their constitutions in the last three decades. The only exception is Sweden which actually adopted the new constitution in 1975; it has since then been left unaltered.

The biggest share of human rights in the Nordic legal family belongs to Iceland. That is the consequence of the extensive amendments in 1999 and especially 1995. About two thirds of the human rights analysed here (Ch. 7 of Icelandic constitution) were added or phrased in a manner significantly clearer and their wording modernised. This was the result of the internal and international criticism which related to the fact that the Constitution lacked various explicit provisions on human rights. The amendments were influenced by international treaties as well, in particular by the European Convention on Human Rights and

the International Covenant on Civil and Political Rights (Peaslee 1968: 449–458). All of the personal rights were extended or added anew. The articles added to the Human Rights Chapter are: 65/1–2, 66/1–4, 68/1–2, 69/1–2, 70, 76/3, and 77. The modernised and extended rights are included in articles 67, 71, and 73. The rest of them (72, 74, 75, and 76/1–2) were basically left intact.[2]

The human rights that existed in the Icelandic Constitution before the 1995 amendments were mostly political, civil, economical and social rights. The Constitution of Iceland dates back to 1944 when the country became independent from Denmark. Most of the provisions are much older, some of them even from 1874 when the country received its first written Constitution. The provisions concerning civil rights are among the oldest.[3]

Although the Norwegian Constitution was last amended in 2006, it contains only a few important human rights. The reason is that the Chapter 'Rights of Citizens and the Legislative Power', which includes the majority of human rights, has not been altered by the latest amendments.

In fact, the only change was basically the extension of Art. 110 that belongs to the 'General Provisions'. Consequently, it now also covers the rights of minorities (because of their indigenous Sami people), the right to sound environment and the responsibility of the State to respect and ensure human rights. These are known as the special rights and belong to the third generation of human rights. As in all other Nordic countries of this group, there are only few basic human rights protected by the Constitution. The rest of them belong to the civil, political, economic and social rights (Peaslee 1968: 686–705).

The case of the Constitution of Denmark is similar. The last amendment of 1988 did not change the Human Rights Chapter (Ch. 8). About half of human rights originates from the constitution of 1953 which is still valid today, and the rest of the rights were enshrined already in its previous constitution from 1849. Therefore, it guarantees more rights of the first and second generation than the Norwegian constitution.

The Constitution protects a few personal rights but covers also civil, political, economic, and social rights. Denmark had adopted and thereby strengthened the protection of certain human rights through supplementary legislation in order to fulfil its obligations according to international treaties like the European

2 Committee Against Torture, Consideration of Reports submitted by States Parties under Article 19 of the Convention: Iceland, 10 February 1998, U.N. Doc. CAT/C/37/Add.2 (1998). At: http://hei.unige.ch/humanrts/cat/iceland1998.html (4.6.2007).

3 *Ibid.*

Convention on Human Rights and the International Covenant on Civil and Political Rights.[4]

The Constitution of 1849 brought mostly the protection of civil and political rights, and about half of the rights connected with personality and life of a person. The latter phenomenon resembles to some extent the Constitution of Iceland of 1874. The rights adopted at that time were the following: the right to be brought before a judge within 24 hours; the right to freedom of the individual; the inviolability of one's dwelling and the right of property. It assured also freedom of expression, freedom to form associations, and freedom of assembly. According to the Constitution, everyone had the right to public assistance and free schooling. The courts achieved independence and the constitutional reform in 1915 introduced the universal suffrage as well. The new constitution of 1953 expanded the list of human rights to twice its size. Most of them covered economic and social rights, although some personal rights like fair trial and liberty were extended.[5]

The new Swedish Constitution was adopted in 1975. This fact explains why there are more human rights guaranteed in Sweden than in Denmark and Norway. The Constitution does not contain a separate bill of rights, but consists of separate acts: the Instrument of Government of 1974, the Act of Succession passed in 1810 and amended in 1979, the Freedom of the Press Act of 1949 and the Freedom of Expression Act of 1991.

Today, the Instrument of Government provides protection for civil, political, social and cultural rights, as well as for freedom of the press. The Instrument of Government from 1719 and 1720 represents Europe's first written Constitution. Before the new Instrument of Government the old version from 1809, valid until 1974, contained no human rights provisions at all. They were only found in the Freedom of the Press Act (Peaslee 1968: 847–872).[6]

At the end we can assume that the constitutions of the four countries represent the pre-French revolutionary understanding of constitutionality. This phenomenon can be detected from their historical evolution. Even nowadays the constitutions of the Nordic countries stress mostly the operating of the state institutions and civil rights, and do not set human rights at the first place.

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4 Human Rights Instruments, Core document forming part of the reports of States parties: Denmark, 29 June 1995. HRI/CORE/1/Add.58. At: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3de10cf40 (3. 6. 2007).

5 Constitution - Denmark – Official website of Denmark: http://www.denmark.dk/en/menu/AboutDenmark/GovernmentPolitics/Constitution (4. 6. 2007).

6 Human Rights Instruments, Core document forming part of the reports of States parties: Sweden, 27 May 2002. HRI/CORE/1/Add.4/Rev.1.
At: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3de0152b4 (3. 6. 2007)

3. ROMANIC GROUP

BELGIUM, FRANCE, ITALY, LUXEMBOURG, MONACO, THE NETHERLANDS

The group to be presented and analysed in the following pages consists of 6 European countries: France, Italy, Belgium, the Netherlands, Luxembourg and Monaco. One republic and one of the remaining great powers, one Mediterranean republic, one kingdom and parliamentary federal republic under constitutional monarch and three constitutional monarchies: one kingdom, one grand duchy and one principality. At first glance, it might seem that these countries have very little in common considering their different political systems, different historical experiences, different religious and ethnic structure of population and other relevant factors. However, a comparative analysis of the constitutional provisions regarding human rights has revealed several similarities between the countries in this group.

We cannot understand contents of a particular constitution without knowing the circumstances in which its provisions were written. We will therefore begin our analysis with an overview of the historical context of drafting and adopting of national constitutions in the discussed countries. The constitutional history of these six countries began in the last years of the 18th century and continued into the 19th century, when all these countries, with the exception of Monaco, promulgated their first national constitutions. Although these first constitutions were amended and revised several times in the last two centuries, they still provided the foundations for the present-day constitutional arrangements regarding human rights.

One of the first relevant documents on human rights is the French Declaration on the Rights of Man and Citizen, which was approved by the National Assembly on 26 August 1789 and is still considered to be one of the milestones in the evolution of the idea of human rights. Although the Declaration had no binding force, it had a huge influence not only on further development of the theory of human rights, but also on further relevant documents regarding human rights. The first national constitution, adopted in these countries, was the French Constitution, promulgated in Paris on 3 September 1791[7] (Ciccoteli in Blaustein and Sigler 1998: 81). This document legalised the French revolution and incorporated the Declaration on the Rights of Man and Citizen of 1789 – giving constitutional and

7 According to Ciccoteli (1988: 81) was the French Constitution in 1791 the world's third national constitution, following the one drafted in Philadelphia by four years and the Polish Constitution by four months. While it was in existence less than a year, it was at the time of its adoption the most important and influential constitution in history (Ciccoteli in Blaustein and Sigler 1988: 81).

legal effect to this relevant document (*ibid.*). The Constitution included several other human rights that were not mentioned in the Declaration although they nowadays represent the common core of human rights, e.g. the right to vote, freedom of assembly, the right to petition, freedom of movement. The Constitution also contained the first constitutional provision on economic and social rights[8] (*ibid.*). Despite several restrictions on these rights[9], the constitution incorporated more individual rights than even the U.S. Constitution of 1787 and other important contemporary documents (Ciccoteli in Blaustein and Sigler 1988: 82). The formulation of certain human rights in this constitution even exceeded most modern formulations.[10] Although this document was followed by two other revolutionary constitutions, it is evident, that the French Constitution from 1791 was at that time undoubtedly the most fundamental and far-reaching constitutional document regarding human rights, and has encompassed all the important theoretical and practical ideas of a widespread debate on this subject that took place in France. Its great influence can already be felt in the subsequent French constitution, also called Montagnard Constitution, adopted two years later, in 1793. An integral part of this constitution was also the new Declaration on Rights of Man and Citizen, which at first glance might seem similar to the Declaration from 1789. However, closer reading reveals that some provisions on human rights were taken from the Constitution of 1791, for example the right to assembly, the right to access to public office, the right to petition and provisions regarding the public system of education. This constitution was followed by the last revolutionary French Constitution, adopted in 1795.[11] It remained valid until Napoleon came to power in November 1799 and ended the French revolution.

At the very end of the 18th century France began another chapter of its history. Revolution was defeated and Napoleon began fulfilling his great ambitions – to build a great French empire across Europe. These military conquests and invasi-

8 Title I, section 3: »There shall be created and organized a general establishment of public relief in order to bring up abandoned children, relieve infirm paupers, and provide for the able-bodied poor who may not have been able to obtain it for themselves«.

9 The rights announced in the Declaration were guaranteed to all citizens, but political privileges such as voting and office holding were accorded to only those classified as 'active'. To achieve the preferred classification, a person had to be property owner or a taxpayer (Ciccoteli in Blaustein and Sigler 1988: 82).

10 For example the provision on freedom of speech and press surpasses the protection of the First Amendment to U.S. Constitution. Title I sets forth those »natural and civil rights« that the government was to guarantee. Pursuant to these rights, Section 3 reads: »Liberty to every man to speak, to write, to print and publish his ideas without having his writings subjected to any censorship or inspection before their publication.« (Ciccoteli in Blaustein and Sigler 1988: 82).

11 This constitution also contained provisions on human rights in the Declaration of Rights and Duties of Man and Citizen. Although this document was rather conservative and restrictive regarding human rights and has linked rights with several duties, we can still recognize great influence of the human rights provisions of the Constitution of 1791.

ons reached also all countries in this group – they became a part of the French territory and fell under the authority of French rulers. Furthermore, together with political and military supremacy France also spread its values, ideas, concepts, theories etc. Revolution has indeed ended, but ideas and values of the revolution remained very much alive, including the fundamental and – at the time – very radical concept of human rights. All of the countries in the group were influenced by this revolutionary concept of human rights as well, and subsequently included provisions on human rights in their first national constitutions.

One of the several countries that were influenced by these ideas was certainly the Netherlands. The country was invaded by the French revolutionary troops in 1795 and remained under the political and military predominance of France until 1813, when the Netherlands regained its independence (Alkema in Chorus 1999: 292). Alkema (*ibid.*) claims that all constitutional documents, adopted in this period, introduced revolutionary and Napoleonic ideas. Its first national constitution was adopted two years later, in 1815. This constitution incorporated several fundamental human rights: the right to petition, the protection of property and home, and freedom of the press (Alkema in Chorus 1999: 293).

But radical ideas and values of the French revolution reached other neighbouring countries as well. Like the Netherlands, Belgium was invaded and annexed by France in 1795. Yet with the defeat of Napoleon's army Belgium was separated from France and made part of the Netherlands by the Congress of Vienna in 1815. Only fifteen years later, on 4 October 1830 Belgium won its independence from the Dutch as a result of an uprising of the Belgian people.[12] The first national Belgian constitution was promulgated only few months later, on 7 February 1831.[13]

Similar fate of subjection to the domination of Revolutionary France befell Luxembourg. During Napoleon's reign Luxembourg became a part of the newly formed United Kingdom of the Netherlands, along with Belgium, in 1814. As a result of the Congress of Vienna in 1815, the country became personal property of the King of Netherlands. Luxembourg gained its independence from the Netherlands in 1839, but the personal union between Luxembourg and the Netherlands lasted until 1890.[14] Luxembourg promulgated its first constitution on 17 October 1868.[15]

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12 Federal portal of Belgian government: http://www.belgium.be/eportal/application?origin=navigationBanner.jsp&event=bea.portal.framework.internal.refresh&pageid=indexPage&navId=2452 (20. 6. 2007).

13 International Constitutional Law - Belgium Index: http://www.oefre.unibe.ch/law/icl/be__indx.html (20. 6. 2007).

14 Visit Luxembourg: http://www.visitluxembourg.com/history.htm (4. 6. 2007).

15 International Constitutional Law -Luxembourg Index: http://www.oefre.unibe.ch/law/icl/lu__indx.html

Italy was another country that experienced the French domination in the years of the French revolution, although Italian Peninsula was at that time still divided into different states. Italy attained political unification by official proclamation of the Kingdom of Italy in 1861. The new Kingdom was eager to stress the continuity with the previous Kingdom of Sardinia, and that is why their Charter Statuto Albertino (1848) was retained and became the first national constitution of unified Italy. This document (alongside others) provided for the protection of life, liberty and property as "sacred rights" (Monateri and Chiaves in Lena and Mattei 2002: 33).

The last country in this group also became a part of the French territory in the time of the French revolution. In 1793 the Principality Monaco was attached to the territory of the French Republic under the name of Fort Hercules. In 1814 the Grimaldis of Monaco were re-invested with all their rights. Since then Monaco was constantly under the protection of France or Italy. Its first national constitution was adopted on 5 January 1911 under Prince Albert I.[16]

The historical perspective of the analysis has clearly shown that all countries in the group have been under the political authority of the revolutionary and Napoleonic France, and have therefore been strongly influenced by contemporary ideas present in French public debates. Some of the elements, which contributed to the spread of these ideas, were unquestionably (aside from geographic closeness) also the great similarity of the languages spoken in these countries and the widespread use of the French language across these countries. Moreover, France spread its ideas in revolutionary and Napoleonic times through the Code Civil from 1804, which "was the civilian expression of the Declaration of Human Rights of 1789 and thus praises three main values: Equality, Freedom and Individual Willpower." (Delplanque 2004: 3). This French Civil Code – also called Code Napoleon – became the leading code of the *Romanic legal family*[17] and had an extraordinary influence in many neighbouring regions, including all countries in our group. Zweigert and Kötz (1998: 101) have emphasised that "between 1804 and 1812 the Code Civil came into force in many regions as the result of French military expansion eastwards under the revolutionary regimes and later under Napoleon; they were later to win or win back their sovereignty, but their law retained the impress

(20. 6. 2007).

16 Government of Principality of Monaco - History of Monaco: http://www.gouv.mc/devwww/wwwnew.nsf/1909!/x2Gb?OpenDocument&2Gb (4. 6. 2007).

17 Zweigert and Kötz (1998: 68-69) define Romanic legal family as legal family that consists of the following countries: France as a leading country and all the systems which adopted the French Civil Code (including Belgium, Luxembourg, the Netherlands, Italy and Monaco) along with Spain, Portugal and South America.

of the ideas of the French Code."[18] Strong influence of the French ideas can also be seen in the first national constitutions of other countries in the group that were promulgated in the first decades of the 19th century. Namely, all the countries included several provisions regarding human rights in their first constitutions, presumably still under the influence of the revolutionary and at the time quite radical concept of human rights.

3.1 Constitutional Profile

The aforementioned features of the constitutional history of all the countries in the analysed group have revealed that these countries share similar historical experience, geographic and linguistic closeness and the legal family. Furthermore, similarities can also be found by comparing constitutional provisions in the presently valid constitutions.

During the analysis of the constitutional provisions on human rights, the emphasis has been placed especially on the following categories of human rights which - when compared to the other analysed groups - stand out most clearly:

- right to life, freedom from death penalty, right to dignity and honour, freedom from torture and prohibition of inhuman and degrading treatment and punishment,
- general provisions relating to criminal law,
- right to petition,
- right to compensation,
- freedom of movement, extradition/expulsion, freedom to choose residence and right to asylum,
- special protection of women, mothers, minors, orphans and disabled.

The following table demonstrates the presence or absence of these categories of human rights in all of the constitutions in the group.

18 More on influence of the Civil Code from 1804 in other European and American countries in Zweigert and Kötz (1998: 98-118).

Table 2: Categories of constitutional human rights provisions in the Romanic group that stand out in relation to other groups[19]

Country	Life		Dignity	F. from torture	Honour	Prov.- Crim. law	*Nullum crimen*	*Ne bis in idem*	Petition
	R	ADP							
France	-	-	-	-	-	+	+	-	-
Luxemb.	-	+	-	-	-	+	+	-	+
Belgium	-	+	-	-	-	+	+	-	+
Nether.	-	+	-	-	-	-	+	-	+
Italy	-	+	-	-	-	+	+	-	P
Monaco	-	+	-	+	-	+	+	-	+

Compen.	Move.	Extradition/ expulsion	Asylum	F. to choose residence	Special protection				
					women	mothers	Minors	orph.	disabled
-	-	-	-	-	-	-	-	-	-
-	-	-	-	-	-	-	-	-	-
-	-	-	-	-	-	-	-	-	-
-	+	+	-	-	-	-	-	-	-
+	+	+	+	+	-	+	+	-	+
-	-	-	-	-	-	-	-	-	+

Another important characteristic of the analysed constitutions in this group is an apparent emphasis on constitutional provisions regarding human rights of the first generation and absence of the provisions regarding rights of a more recent date, especially of the so-called third generation of human rights. This is also one of the most important distinguishing characteristics of the Nordic group, which is in stark contrast to the Germanic group, where all generations of human rights are adequately represented.

Further special characteristic, which distinguishes this group from other analysed groups, is the absence of the right to life and other human rights connected with a person's life and personality, such as the right to personal and moral integrity, the right to dignity and honour, freedom from torture and inhuman and degrading treatment and punishment, the right to the development of personality, prohibition of slavery and servitude and prohibition of forced and compulsory

19 The abbreviations used in the table are explained in the Appendix I, below.

labour.[20] It is a very interesting paradox that the right to life, which presupposes all other human rights, is not mentioned in any of these constitutions, yet at the same time all of them have (with the exception of France) included provisions regarding prohibition of death penalty.

Furthermore, we have noticed that economic, social and cultural rights are represented to a lesser extent than political human rights. Only some basic social rights (such as the right to social security and the right to health care) and some basic economic rights to work and property are mentioned. Human rights connected to the private life of an individual, such as the right to personal and family life, the right to inheritance and the right to family and marriage, are also predominantly absent from the analysed constitutions in this group. Provisions regarding human rights of the third generation and the rights of special groups are mostly exceptions in these constitutions and are not regulated at constitutional level.[21]

3.2 Hypothesis

The constitutional profile of the group has indicated that the countries of the Romanic group give priority especially to human rights of the first generation that have been a relevant part of the first national constitutions. The countries in this group have therefore decided to follow the tradition – like the countries of the Nordic group – instead of the contemporary international law and important international documents on human rights (which were the exemplar for the countries of the Germanic group).

On the basis of the aforementioned characteristics of this analysed group we set the following hypothesis: **The Declaration on the Rights of Man and Citizen from 1789, the French Constitution promulgated in 1791 and the so-called Montagnard Constitution of France adopted in 1793 are among the most important documents that influenced the inclusion of certain categories of human rights in the present constitutions of the Romanic group**. We would like to stress that the verification of the hypothesis will be limited only to certain categories of human rights that - when compared to other analysed groups - stand out most clearly.

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20 This is also a typical characteristic of the Nordic group, however, contrary to Nordic constitutions Romanic constitutions did not include only the rights which are closely connected to person's right to life and his personality but also general provisions regarding equality and relating to criminal law, *nullum crimen* and other similar personal rights.

21 The exceptions are the constitutional provisions regarding special protection of mothers, minors and disabled in Italian present constitution and provisions regarding special protection of disabled in the present constitution of Monaco.

After a careful analysis of the French historical constitutional documents we formed the following table that helped us to verify the hypothesis:

Table 3: Categories of human rights in The Declaration on the Rights of Man and Citizen (1789), the French Constitution (1791) and the Montagnard Constitution (1793) [22]

Document/ year	Life		Dignity	F. from torture	Honour	Prov.- Crim. law	Nullum crimen	Ne bis in idem	Petition
	R	ADP							
1789	-	-	-	-	-	+	+	-	-
1791	-	-	-	-	-	+	-	-	+
1793	-	-	-	-	-	+	+	-	+

Compen.	Move.	Extradition/ expulsion	Asylum	F. to choose residence	Special protection				
					women	mothers	Minors	orph.	disabled
-	-	-	-	-	-	-	-	-	-
-	+	-	-	-	-	-	-	-	-
-	-	-		-	-	-	-	-	-

We began our comparative analysis with the preliminary assumption that the Declaration on the Rights of Man and Citizen from 1789 laid foundations for all future constitutional provisions regarding human rights in the present French constitution, and also influenced the inclusion of human rights provisions in the constitutions of other countries in the group. The most obvious evidence of the great influence of the Declaration from 1789 on the inclusion of human rights provision in the present French constitution is the fact that the Declaration from 1789 became an integral part of the present French constitution from 1958. Furthermore, there are only several human rights provisions that are included in the valid French constitution but cannot be found in the Declaration: equal right to vote, the right of access to public office and administration of public affairs, the right to vote and freedom of association.[23] Further analysis revealed that although later revolutionary constitutions from 1791 and 1793 extended the list of human rights, these added rights have not found their place in the present French consti-

22 The abbreviations used in the table are explained in the Appendix I, below.

23 All of these human rights can be found – with the exception of freedom of association – in the revolutionary constitutional documents from 1791, 1793 and 1795. This rather surprising finding could lead us to the conclusion that all provisions regarding human rights that are part of the present French constitution have their origins in French revolution 1789. The list of human rights in the French constitution therefore remained unchanged for the last two centuries.

tution. This certainly proves that the mentioned revolutionary constitutions did not have such an influence on the present French constitution as the Declaration from 1789. The founding fathers of the present French constitution therefore gave priority to their first relevant document on human rights.

On the grounds of a partly confirmed assumption and of the fact that France had a leading role in the neighbouring regions in the period of the French revolution we further assumed that the Declaration from 1789 also had a great influence on the inclusion of human rights provisions in the constitutions of other countries in the group. However, the results of this analysis were rather surprising. The comparative analysis of the chosen French historical documents and the present constitutions of other countries in the group revealed that, beside the Declaration from 1789, the revolutionary constitutions from 1791 and 1793 also had a great influence on the inclusion of human rights provisions in other constitutions. This characteristic can especially be seen in the case of certain categories of human rights that stand out in the most apparent way. It is evident from the tables above that the inclusion of a certain human right in the present constitutions of other countries in the group is strongly correlated to whether or not this right could be found in any of the revolutionary constitutions from 1791 and 1793. The best example of such an influence of other revolutionary constitutional documents is the right to petition. The provisions regarding the right to petition can be found in the present constitutions of Luxembourg (Art. 27), Belgium (Art. 28), the Netherlands (Art. 5), Italy (principle in Art. 5) and Monaco (Art. 31). The Declaration from 1789 does not mention the right to petition and that is presumably one of the reasons why we cannot find the right to petition in the present French constitution. However, the French constitutions from 1791 and 1793 did include the right to petition; it was stipulated in Article 7: »liberty to address individually signed petitions to the constituted authority« in the Constitution from 1791, and repeated in Article 32: »the right to present petitions to the depositories of the public authority cannot in any case be forbidden, suspended, nor limited« in the Declaration on Rights of Man and Citizen in Montagnard Constitution from 1793. The right to petition was therefore included in the present constitutions of the countries in the group – with the exception of France – although it was not mentioned in the Declaration from 1789. Another similar example is the right to assembly[24], as are for instance general provisions regarding criminal law, *nullum*

24 The right to assembly can be found in the constitutions of Luxembourg (Art. 25), Belgium (Art. 26), the Netherlands (Art. 9/1), Italy (Art. 17/1) and Monaco (Art. 29) although this human right was not included in the Declaration from 1789 and subsequently in present French constitution. However, the right to assembly found its place in the Constitution from 1791 (Art. 6) and in the Constitution from 1793 (Art. 7). This confirms the great influence of other revolutionary constitutional documents beside the Declaration from 1789.

crimen, and to a certain extent also freedom of movement.[25] These examples confirm the great influence of other revolutionary constitutional documents from 1791 and 1793 on the inclusion of certain human rights provisions in contemporary constitutions of all the countries in the group.

These findings are also relevant in explaining the absence of certain human rights: if a certain human right did not find its place in the analysed historical documents, then a great possibility exists that this right is not included in the list of human rights in the valid constitutions of the Romanic group. Such rights are the right to life, the right to dignity, the right to honour, freedom from torture and inhuman and degrading treatment and punishment, *ne bis in idem*, the right to compensation, freedom of movement, provisions regarding extradition/expulsion, freedom to choose residence. The only exceptions that do not follow this pattern are human rights of a more recent date, such as the right to asylum, prohibition of death penalty and special protection of certain groups such as women, mothers, minors, orphans and disabled.

On the grounds of the above findings and proven assumptions we can confirm our primary hypothesis that The Declaration on the Rights of Man and Citizen from 1789, the French Constitution promulgated in 1791 and the so-called Montagnard Constitution of France adopted in 1793, have indeed had some influence on the inclusion of certain categories of human rights in the present constitutions of the Romanic group. The Declaration from 1789 has especially influenced the inclusion of human rights provisions in the present French constitution, while the other two revolutionary constitutional documents from 1791 and 1793 present important references for the inclusion of human rights categories in the present constitutions of other countries in this group. We may therefore conclude that the countries of this group had given great priority to the earliest constitutional traditions when deciding on the list of human rights to be included in their contemporary constitutions.

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25 Freedom of movement is mentioned only in the Constitution from 1791, which in Art. 4 foresees the »liberty to every man to move about, to remain, and to depart without liability to arrest or detention, except according to the forms determined by the constitution«. Today this human right can be found in the constitution of the Netherlands (Art. 2/4) and the constitution of Italy (Art. 16/1, 2 and 35/4).

4. GERMANIC GROUP

ANDORRA, BULGARIA, CZECH REPUBLIC, ESTONIA, FINLAND, GERMANY, GREECE, HUNGARY, LATVIA, LITHUANIA, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, SPAIN AND SWITZERLAND

As we can see from the tables, this is the largest group in our analysis. The countries of this group span from the new democracies of Eastern Europe to the old ones in Western Europe. They are not connected geographically[26] nor did their constitutions develop in the same historical context. Yet, however surprising it might seem, they show amazing similarities when it comes to comparing constitutional provisions on human rights.

There are far too many unknown factors and accidental ones that we would have to take into account when explaining why this group shows particular similarities (or differences when compared to other groups of families of law). This is why we will try to explain only the most obvious ones.

First of all, at one or the other point in their history, all of these countries had some linguistic or historic ties with Germany and were hence under some influence of its legal tradition. The German Civil Code (from as early as 1896), for instance, has influenced even the earliest codifications of the Soviet Civil Law. Afterwards, both via the Soviet Union and directly, the German influence spread through most of the legal systems in the formerly socialist countries of Eastern and Central Europe. Even Greece has based its Civil Code on the German model (Bogdan 1994: 197). As we shall strive to prove later on, these German influences can be seen in the sphere of constitutional law as well, or – the subject of our analysis – in the provisions on human rights. This said, the name of the group comes quite naturally to mind: the *Germanic family of law.*

Secondly, we could try to explain the existing similarities with the time-frame of adoption of their constitutions. A large portion of the states from our group has fairly new constitutions. The majority of them (i.e. the countries of Central and Eastern Europe) underwent a dramatic constitutional development after the fall of communism. Each country was a specific case: some countries amended existing communist constitution (e.g. Hungary); some countries initially amended existing communist constitutions, then prepared and adopted their new democratic constitutions (e.g. Poland, Slovenia); some countries replaced their

26 Nevertheless, we might say that the majority of the countries from our group forms a so-called belt or the eastern border of the EU (from Finland on the north to Greece on the south), with some countries from the Central Europe (Germany and Switzerland) and the three 'guarding' the Western shores of the EU (the Pyrenees Peninsula).

communist constitution with their pre-World War II democratic constitutions (e.g. Estonia) (Žagar and Novak 1999: 179). In the case of Latvia, which is in fact the oldest constitution in our group (1922), most of the provisions on human rights were added in the new chapter in the Constitution of October 1998.[27]

In addition, constitutions of Andorra (1993), Finland and Switzerland (both 1999) are recently adopted. Maybe the most surprising one of all is Finland, since one might expect it to be included into the Nordic group. The original legal system of Scandinavian countries is based on the German legal tradition; however, it has also developed under the strong influence of different national traditions (Ring 1999: 5).

Only Germany (1949), Greece (1975), Portugal (1976) and Spain (1978) from our group have fairly old constitutions. We could explain the similarities with a clear tendency towards '*de jure* recognition' of the primacy of international law and incorporation of a large number of human rights provisions directly into their constitutions by the fact that all of these states were either former aggressors or have a totalitarian past. Germany, for instance, showed the attempts of returning to the pre-Nazi Rechststaat tradition, thus making the Bill of Rights of the Weimar Constitution the very beginning of its new Bonn Constitution, placing it in Chapter 1 (Glendon 1994: 69).

The Weimar Constitution from 1919 has been widely proclaimed as one of the most democratic constitutions of the world – it was among the first to include universal adult suffrage along with a generous formulation of human rights. Individual rights set in this constitution included free emigration, the right to form and join unions and the right to property, freedom of contract and the right to inheritance. Comprehensive insurance for medical needs is also provided throughout one's lifetime[28] (Blaustein and Sigler 1988: 357–358).

We should also mention Germany's Frankfurt Constitution of 1848 and its importance regarding the recognition of human rights. Blaustein and Sigler (1988: 358) state that the civil liberties included into the Frankfurt Constitution soon became an essential part of the constitutions of the German states, although they were not included in a national German constitution until the Weimar Constitution (1919). Section VI of this Frankfurt Constitution is entitled 'The Basic Rights of the German people'. Paragraph 130 of this section is designed as a preamble to the objectives of the framers: »The following basic rights are to be guaranteed to the German people. They are to serve as the norm for the consti-

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27 The Chapter VIII which deals with the fundamental rights of the citizens.

28 Art. 163: "Every German must be afforded an opportunity to gain his livelihood by economic labour. Where no suitable opportunity to work can be found for him, provision shall be made for his support."

tutions of the individual German states, and no constitution or legislation of an individual German state may ever abolish or limit them« (Blaustein and Sigler 1988: 202). The list of these rights went beyond the listings in the U.S., Polish and French Constitutions, which exemplified the understanding of human rights at the end of the eighteenth century. These additional rights included the right to free public education, the right to civil marriage, freedom of emigration and the right of any citizen to engage in any form of occupation. This constitution was also the first to limit the death penalty; capital punishment was limited to cases where prescribed by martial law or allowed by maritime law in cases of mutinies. The German Constitution of 1848 also abolished pillory, branding and corporal punishment (Blaustein and Sigler 1988: 202).

As far as the Central-Eastern European countries are concerned, they tried to compensate the typical repressive characteristics of the former communist regimes, for instance, censorship, the prohibition on leaving the country, and drastic penalties (including capital punishment) for political crimes (Bogdan 1994: 205–206). What is more, in order to join the European Union, new states needed to fulfil the economic and political conditions known as the 'Copenhagen criteria'[29], and earlier, in the case of the former Yugoslavia, also the criteria for modern democracy and preconditions for international recognition of new states, set out by the Badinter Commission[30] (Pellet 1992). Among both of these sets of criteria, stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities were the preconditions for joining 'the privileged club'.

In explaining how these similarities in our Germanic group came about, it is also important to point out that the Weimar Constitution was a model for Estonian Constitution from 1920. The provisions on human rights in the Estonian Constitution are similar to those in the Weimar document. But it goes even further. Where the German Constitution of 1919, for instance, protects the right to form and join unions, the Estonian Constitution of 1920 protects the right to strike with no exceptions for government employees. It is the protection of minorities, however, that it is best known and most praised for. Racial, ethnic, and linguistic minorities are all given special rights (Art. 20, 21) (Blaustein and Sigler 1988: 389).

There are only two countries in our Germanic group that are exceptions in themselves, namely Portugal and Spain which would presumably have to fall into the Romanic law group rather than the Germanic one. Yet after comparing the human rights provisions, we saw that the two countries show more similarities

29 EU Enlargement: http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm (28. 5. 2007).

30 More on the Badinter Commission see Pellet (1992).

with the latter one. This can in part be explained with aforementioned tendency to conform to international law after the period of totalitarianism when human rights in those countries (as well as in Germany) were the last on the political agenda.

4.1 Constitutional Profile

The countries' constitutions of the present, and as we could see, resulting from the continuity as well as discontinuity, thus show quite a few similarities. Most telling were the following categories of our analysis which – when compared to other groups (of 'families of law') – stand out in the most apparent way (see table in Appendix 1):

- right to physical and mental integrity, dignity, honour and freedom from torture,
- right to fair trial, petition, compensation, legal remedy,
- right to creativity and free enterprise; right to form trade unions and right to strike,
- freedom of movement, residence and freedom from extradition and expulsion,
- right to education and wide range of special protection provisions, e.g. special protection of women, disabled etc.,
- and, especially, the third generation of rights (rights of children, right to sound environment and rights of minorities).

We have to mention another peculiarity, which – as it turned out – is typical for the Germanic family of law. As already pointed out, Germany, Greece, Spain and Portugal as the former aggressors or states with a totalitarian past have tried to observe the rules of international law, which also served as a kind of 'pledge at the highest possible level' of fidelity to international legal values, also with their constitutional commitment (Vereshchetin 1996). Article 28(1) of the 1975 Greek Constitution,[31] Article 96 of the 1978 Spanish Constitution,[32] Article 8 of the 1976

31 Art. 28/1 of the Greek const.: »The generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity«.

32 Art. 96/1 of the Spanish const.: »Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the

Portuguese Constitution[33] and also corresponding articles in some other constitutions may also be viewed as a product of the reaction by the legislature and public of these countries to their former totalitarian or authoritarian regimes, which had quite often blatantly ignored and betrayed international obligations and common human values (Vereshchetin 1996).

We see this tendency of recognising the supremacy of international law also in other Central-Eastern European countries and, in comparison with other families of law, the number of such constitutional provisions clearly stands out. Moreover, we could presume that countries in our group have also incorporated many of the provisions on human rights from different international treaties directly into their constitutions, so as to "doubly" conform or to recognise the importance of the protection of human rights not only at the international level but also in the domestic law itself.

4.2 Hypotheses

1. We have noticed that the following categories, which clearly stand out, are the second generation of human rights: the right to education, work, social security, health care, unemployment, special protection (women, mothers, minors, orphans and disabled) and special protection of family and parenthood. Their inclusion could be the result of: a) on the one hand the influence of important international treaties and documents concerning human rights, b) and on the other, the fairly late adoption of the constitutions of states from our group.

a) International community started to show an unprecedented concern for human rights especially after the Second World War, which is reflected in the second paragraph of the Preamble to the Charter of the United Nations. This is almost the first reference to human rights in an international treaty (Merrills and Robertson 2001: 1–22). The second paragraph expresses the determination of all peoples of the UN:

manner provided for in the treaties themselves or in accordance with the general rules of international law«.

33 Art. 8 of the Portuguese const.: »1. The rules and principles of general or customary international law are an integral part of Portuguese law. 2. Rules provided for in international conventions that have been duly ratified or approved, shall apply in national law, following their official publication, so long as they remain internationally binding with respect to the Portuguese State. 3. Rules made by the competent organs of international organisations to which Portugal belongs apply directly in national law to the extent that the constitutive treaty provides«.

> *»...to reaffirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and of nations large and small«.*

A similar account to human rights was given in the Statute of the Council of Europe in 1949, Article 3 of which states:

> *Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the council as specified in Chapter 1.*

This meant that the maintenance of human rights and respect for the rule of law were not merely the objectives of the Council of Europe but were actually made a condition of membership. In 1961 we can see the next important development related to the »generalisation of social democracy«, or in other words, to what are now known as economic and social rights – namely the creation of The European Social Charter which lists nineteen economic and social rights and principles (Merrills and Robertson 2001: 1–22), soon to be followed by the two International Covenants, covering not only before mentioned rights but also civic and political ones.

b) The majority of the countries' constitutions from our group (9 out of 15) have been drafted and adopted in the last decade of the previous century, in the time when economic and social rights had already gained a firm foothold in international law and human rights doctrine. We hence presumed that the new constitutions have looked up to these principles of the international community and also included them into their constitutions. We have analysed the following international documents to see whether human rights provisions, which stand out in our group of countries, have their counterparts in the most important international treaties: Universal Declaration of Human Rights (1948), International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and European Social Charter (1961). The analysis showed, (see Table 4 below) that the categories of the second generation of human rights (Education, Work, Social security, Health care, Unemployment, Special protection provisions and Special protection of

family and parenthood) indeed exist in at least 2 (the right to education and unemployment provisions) or more international treaties (the rights to work, health care and social security, and both categories of the special protection provisions). Notwithstanding the almost absent special protection provisions regarding women, orphans and disabled in international treaties, we can see the endeavours of the Germanic group to fill the void, especially with the remarkable number of provisions for the protection of the disabled.

While other groups of families of law might include only some human rights provisions of the second generation – the most prevalent are the rights to work and education –, the Germanic group is the only one that covers the complete set of this generation of rights and does so bountifully.

Table 4: Categories of human rights in selected international documents[34]

Charter	Education				Work				Social security	Health Care	Unemploym.
	R	Compuls.	Free	Priv. schools	R	Payment	Free choice	Rest			
UN Decl	+	+	+	-	+	+	+	+	+	+	+
EUR Conv	-	-	-	-	-	-	-	-	-	-	-
EUR S.Ch	-	-	-	-	+	+	-	+	+	+	+
ICCPR	-	-	-	-	-	-	-	-	-	-	-
ICESCR	+	+	+	+	+	+	+	+	+	+	-

Charter	Special protection					Family and parenthood
	Women	Mothers	Minors	Orphans	Disabled	
UN Decl	-	+	+	-	-	+
EURConv	-	-	-	-	-	-
EUR S.Ch	-	+	+	-	+	+
ICCPR	-	-	-	-	-	+
ICESCR	-	+	+	-	-	+

2. We presume that the following provisions on human rights are a direct result of trying to heal the past wounds, where the rules of international law were left disregarded and human rights practices very questionable, to say the least: the right to dignity and honour, trade union rights, freedom of movement and creativity, free enterprise and prohibition of and freedom from extradition/expulsion.

Most of the countries in our group are young democracies which – along with Germany, Greece, Spain and Portugal – were in the hands of former authoritarian or totalitarian regimes, some of them till the end of the Second World War, some even longer than that. Greece, for example, saw another military putsch in 1967, after the one which installed the dictatorial regime under G. Papadopoulos, which lasted until 1974, when the military regime resigned and the new constitution was adopted in 1975. In Spain General Franco came to power in 1939 and stayed there until his death in 1975; democracy returned with the adoption of the new consti-

34 The abbreviations used in the table are explained in the Appendix I, below.

tution in 1978.[35] Portugal saw the beginning of the military regime taking over the parliamentary democracy already in 1926, followed by the totalitarian military regime of Salazar (1932–1968) which ended with the first democratic elections in 1975, with the new constitution following shortly after, in 1976 (Leksikon Cankarjeve založbe 2000).

After the fall of these undemocratic regimes most of these countries set out to reaffirm human rights at the constitutional level, especially the rights which were deprived during totalitarianism, namely dignity and honour of persons, freedom of movement, creativity, freedom from expulsion etc. The second hypothesis can in part be validated also with our argument for the first hypothesis, namely the potential influence of important international human rights treaties on the later constitutions. To give one example: in Protocol 4[36] (1963) of The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) four additional rights and freedoms were added: freedom from imprisonment for civil debt, freedom of movement and choice of residence; the right to enter one's own country and the freedom from expulsion; and the prohibition of the collective expulsion of aliens. Most of these can be found in constitutions of the countries in our group.

3. We can also notice the presence of the third generation of human rights in our group, namely the categories 'rights of children, sound environment and rights of minorities'. We presume that, again, this could be the result of the late adoption of the constitutions and the possibility of inclusion of certain rights, newly recognized at international level.

The international community has ratified numerous conventions and declarations (which include the so called third generation of human rights) before the majority of the constitutions from our group were adopted. As far as the rights of children are concerned, the most detailed and developed is certainly the Convention on the Rights of Children from 1989. In the field of the protection of environment, there are quite a few of such declarations, for example: the United Nations Declaration on the Human Environment of 1972 (also known as the Stockholm Declaration), the Hague Declaration from 1989 and the United Nations Declaration on Environment and Development of 1992 (known as the Rio de Janeiro Declaration).

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35 International Constitutional Law – Spain Index:http://www.servat.unibe.ch/law/icl/sp__indx.html (28.5.2007).

36 Protocol 4 to The Convention for the Protection of Human Rights and Fundamental Freedoms. At: http://conventions.coe.int/Treaty/en/Treaties/Html/046.htm (28.5.2007).

The tradition of the protection of minorities is considerably longer and dates back already to the beginning and turn of the 19th century, when provisions on minority protection can already be found in the conclusions of the Congress of Vienna in 1815,[37] the Congress of Berlin in 1878[38] and Paris Peace Conference in 1919, where the whole system of minority protection gets its legal guarantee in the League of Nations. However, it is in the 20th century that we see an unprecedented concern for the protection of minorities, especially after the World War II. Many international instruments have included provisions of minority rights, for example the UN Resolution on Fate of Minorities from as early as 1949, the International Convention on Elimination of All Forms of Racial Discrimination, the Convention on Prevention and Punishment of the Crime of Genocide, to name just a few. Finally, in 1992, the protection of minorities sees its highest achievement in attainment of both the formation of the High Commissariat for Minorities in Helsinki and its own UN Declaration on the Rights of National, Religious and Linguistic Minorities (Komac 2002: 91–104).

Besides this abundant tradition, new sets of criteria – as already mentioned – were imposed on the new democracies of Central and Eastern Europe in order to join the European Union. We can conclude with great certainty that both the Copenhagen Criteria and the Badinter Commission played an important role in what is today the constitutional recognition of the rule of law, human rights and protection of minorities, which as we saw in most cases greatly surpasses the constitutional protection of other groups of families of law.

5. THE COMMON LAW GROUP

CYPRUS, IRELAND, MALTA

The smallest group in our analysis consists of three seemingly unconnected countries. Ireland, Cyprus and Malta are in truth all island states. Malta lies in the Atlantic Ocean, Cyprus and Malta in the Mediterranean. Again, that can hardly support our contention that there exists some strong link between them. We have to turn to history for an explanation why their constitutions exhibit certain similarities that go beyond mere coincidences. All three countries were – at some point in their history – under the British colonial rule.

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37 It is the first document, which mentions the term 'national minorities' (Komac 2002: 47).

38 The protection of minorities becomes the precondition of successful recognition of new or enlarged states (Komac 2002: 51).

Ireland came under the British rule as early as in the twelfth century, and had for most of its history endured strong pressures aimed at uprooting relatively developed traditional customs and laws. In 1366 Statutes of Kilkenny forbade the use of Irish language, custom or laws and thus effectively severed all ties with the Irish legal tradition. This trend was completed – at least formally – when in 1800 Ireland was fully integrated into the United Kingdom by the Act of Union. After a period of turmoil and following almost seven centuries of British rule Ireland gained independence in 1921. It remained a member of the (then British) Commonwealth until the declaration of a republic in April 1949, when its membership under the Commonwealth rules was automatically terminated. Yet the process of political disassociation had almost no adverse influence on the strong affinity between the British and the developing Irish legal systems. The first Irish constitution adopted in 1922 left the common law system intact. Furthermore, Article 73 of the constitution expressly stated that the laws in force in Ireland at the date of the coming into operation of the 1922 Constitution "shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the '*Oireachtas*', the legislature of the new state.[39] Some of the pre-1922 statutes still remain in force in Ireland to this day.[40] The historical connection that existed between Ireland and the United Kingdom for several centuries has left a deep imprint on the Irish legal system, which is among the most prominent common law systems in the world today.

Malta, on the other hand, became a British colony only after the Napoleonic wars in 1814 when the Treaty of Paris recognised British sovereignty over the island. From that time, Malta remained under the British rule, although the structure of government in Malta changed periodically during the 150 years of the British rule.[41] In 1921, Malta became self-governing while power and responsibility were shared between Britain and Maltese ministers. In 1936, Malta came under colonial regime. Malta was granted independence within the Commonwealth in 1964 and became a republic ten years later, in 1974. Malta remains a member of the Commonwealth to this day. Its legal system combines civil law as well as common law features. The influence of the Roman law and the Napoleonic Code is readily visible particularly in civil law. The English law on the other hand has had some influence on certain areas of criminal law and procedure.[42] Perhaps the most visi-

39 An almost identical provision can be found in the subsequent constitution, which was adopted in 1937 (Art. 50).

40 Guide to Irish Law: http://www.llrx.com/features/irish.htm (3.6.2007).

41 Encyclopaedia of Nations – Malta: http://www.nationsencyclopedia.com/Europe/Malta-HISTORY.html (3.6.2007).

42 Ministry for Justice and Home Affairs – Judicial System (Malta): http://www.justice.gov.mt/judicialsystem.asp (3.6.2007).

ble proof of that is the fact that the presiding judge sits with a jury.[43] As in other common law countries, the office of the judge is held in high respect. A lawyer has to practise as an advocate in Malta for a period of not less than twelve years in order to qualify for appointment as a judge,[44] which is typical for the common law culture, but almost completely foreign to the civil law tradition.[45] But it would be wrong to neglect the impact the English common law has had on the Maltese public law in general, event though the English law was never formally part of the Maltese law.[46]

Cyprus came under the British rule some sixty years later than Malta. It was only in 1878 that Cyprus – then under the Ottoman occupation – was ceded to the United Kingdom. In 1914 the British government proclaimed the island's annexation, which was formally acknowledged by Turkey a few years later, in 1923, by the Treaty of Lausanne.[47] But the British rule was not a peaceful one. A political effort, spanning over several years, finally culminated in the uprising of Greek Cypriots in 1955. The struggle came to a successful end in 1960 when the Zurich-London Agreements granted independence to the island. Cyprus became and remained a member of the Commonwealth. But in spite of the troublesome historical experiences with the British, the common law that was brought to Cyprus remained in force. In a constitutional provision very similar to the one we have pointed out in the Irish constitution, the Cyprus Constitution of 1960 states that »all laws in force on the date of the coming into operation of this Constitution shall, until amended, whether by way of variation, addition or repeal, by any law or communal law, as the case may be, made under this Constitution, continue in force ...« (Art.188/1). On this basis many of the pre-1960 British statutes still remain in force. The basis of the legal system of Cyprus is thus still the common law and the principles of equity applicable at the time of independence as amended or supplemented thereafter by the Republic's statutes and case law.[48] The influence of the civil law tradition is perhaps most visible in the area of administrative and – to some extent – in constitutional law.[49] However, the common law tradition remains

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43 *Ibid.*

44 *Ibid.*

45 More on position of judge in civil law and common law tradition see van Caenegem (2003: 55-9).

46 Association of the Councils of the State – Tour Europe (Malta): http://www.juradmin.eu/en/eurtour/eurtour_en.lasso?page=detail&countryid=18 (3.6.2007).

47 More on the history of Cyprus see Cyprus Brief Historical Survey: http://kypros.org/Cyprus/history.html (3.6.2007).

48 Human Rights Instruments, Core document forming part of the reports of States parties: Cyprus, 2 July 1993. HRI/CORE/1/Add.28. At: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6adfc0 (3. 6. 2007)

49 *Ibid.*

strong. The prevailing influence of the British law is best illustrated by the fact that the pre-independence laws are still in force and that the courts have to apply the principles of common law and equity (Art. 29(l)(b) of the Courts of Justice Law (Constantinides and Eliades 2007: 1–2).

This short overview demonstrates that all three countries have strong historical and legal ties with the United Kingdom. Today, the legal systems of Ireland, Malta and Cyprus exhibit the typical marks of the common law system. Although a prevailing part of law is codified in all three countries, some important parts of law are still governed by the common law. Even more importantly, lawyers still tend to rely on precedents when they interpret statutory provisions. Thus, the most important source of law remains jurisprudence or case-law. This characteristic alone would justify the fact that the three countries should be treated separately and analysed as a distinct group within the European legal systems.

5.1 Constitutional Profile

Because of the small number of countries that comprise the 'Common law group', it is inherently difficult to outline its constitutional profile with equal certainty as in larger groups. It is also worth pointing out that the Irish constitution was adopted in a rather different time period. Notwithstanding that there are only some twenty years separating it from the Maltese and Cypriot constitutions, these two decades were marked by a considerable leap forward as far as human rights are concerned. Some categories (e.g. *nullum crimen* or *ne bis in idem*) that are consistently covered by the constitutional provisions of the Maltese and Cypriot constitutions are lacking in the Irish constitution. This cannot, however, be attributed to a dissimilar legal tradition, but can be explained by an environment less conscious of the importance of constitutional human rights guarantees.

Nevertheless, we can discern at least two evident features present in all three constitutions that may reflect – as we will try to show – a common tradition and distinguish these three countries from other groups to an important degree. These two features are:

- a rather extensive constitutional regulation regarding fair trial and
- absence of the constitutionally guaranteed right to access to public office.

Table 5: Categories of constitutional human rights provisions in the Common law group that stand out in relation to other groups[50]

Country	Fair Trial					Access to public office
	Public trial	Trial within reasonable time	Independent and impartial tribunal established by law	Presumption of innocence	Rights of accused person	
Ireland	+	-	+	-	+	-
Cyprus	+	+	+	+	+	-
Malta	+	+	+	+	+	-

Other similarity present in all three constitutions is that they all guarantee some rights of religious communities. This can serve as a reminder that simultaneous correspondence in a certain category is not in itself proof of some deeply rooted similarity or shared tradition. It can also be a coincidence, as in this particular case. Malta and Ireland are both predominantly Roman Catholic. The Maltese constitution explicitly proclaims the »Roman Catholic Apostolic religion« as the state religion (Art. 2/1), while the Irish constitution stops short of such proclamation, even though several provisions (e.g. preamble and Art. 44/1) leave a careful reader in no doubt as to the inclinations of the legislator. The Cypriote constitution tried to maintain a fragile balance between the Greeks and Turks. The constitutional provisions reflect the wish to give something to the Greek Orthodox Church (namely, exclusive right of regulating and administering its own internal affairs and property in accordance with the Holy Canons and its Charter, as stated in Art. 110/1 of the constitution) and something to the Turkish religious community (namely, the guarantee that the *shari'a* law institution of *waqf*[51] will remain in force, including those *waqf*s that comprise properties belonging to Mosques and any other Moslem religious institutions, as stated in Article 110/2 of the constitution). Thus, very similar constitutional provisions, guaranteeing autonomy to the religious communities, were a product of quite different circumstances.

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50 The abbreviations used in the table are explained in the Appendix I, below.

51 *Waqf* is a religious endowment in Islam, typically devoting a building or plot of land for Muslim religious purposes.

5.2 Hypotheses

1. Emphasis placed on the constitutional provisions regarding fair trial is influenced to an important degree by the English constitutional history and the procedural nature of the common law.

One of the most thoroughly elaborated differences between the civil law and the common law is the predominantly procedural nature of the common law (e.g. David and Grassman 1999: 311–2, Bogdan 1994: 106ff., Zweigert and Kötz 1998 ch. 18, van Caenegem 2003: 59–62, Glenn 2000: 210ff.). Since the power of the Norman conquerors was initially not yet entrenched, they had to gain the confidence of the locals. The Normans chose one plausible way as they co-opted local priests (who could read and write) to preside over the courts, but it was the locals who – according to the local customs – decided the merits of the case (Glenn 2001: 206sqq.). Any unification of law could therefore begin only on procedural plane and only slowly progress into the realm of substantive law. So, step by step, a body of laws and customs emerged, that were valid throughout the kingdom (Bailey and Gunn 1991: 4, David and Grassman 1999: 308). This body of law was soon called *commune ley* in Law French (or Norman i.e. Old French legal terminology) or common law (David and Grassman 1999: 307–308). This historical insight explains why substantive law is considered to be »secreted« or hidden (Main in Glenn 2000: 211). Since the reasons for their decisions were known only to the jurors who decided the case, the lawyers could effectively influence the outcome only by placing emphasis on the procedural elements of the case (e.g. whether what the other party wanted fell within the scope of the writ) (Glenn 2000: 211, Losano 2000: 267). This background sheds some light on the fact that the common law is marked primarily by its history: »it is a historical and legal phenomenon (*un fenomeno storico-giuridico*) « as one scholar pointed out (Rav 1982: 95) and impossible to understand without the knowledge of its historical development (Bogdan 1994: 102).

So far, it is clear that constitutional arrangements which were influenced by the common law tradition would place heavier emphasis on the procedural constitutional rights. But why these particular ones? Why would fair trial enjoy such prominence? Apart from obvious reasons – that the outcome of criminal procedure could jeopardise some of the most basic values, such as life and liberty, there are again historical reasons, stemming from English constitutional history. We can speculate that a major impetus came from historic documents such as Magna Carta (1215) or the Bill of Rights (1689). Both documents contain provisions which would today be regarded as parts of the right to fair trial. Section 39 of the Magna Carta guarantees that no free man »shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do

so, except by the lawful judgement of his equals or by the law of the land«. The insistence on the »due process« can be seen as an expression of the importance of procedural guarantees. Similar guarantees can be found in the Bill of Rights, for example the prohibition of disproportionate bail, fine or punishment, the proper selection of jurors and the presumption of innocence (expressed rather implicitly) – most of which are connected to criminal law.[52] We can safely conclude that the concept of due process is deeply rooted in English constitutional history.[53] Because of its central place in the English constitutional law it is hardly surprising that it has left a deep imprint on the constitutional thought of countries which were for some time under the British rule.

2. Absence of the constitutionally guaranteed right to access to public office can be explained as a consequence of the highly professional nature of the British civil service, which in all probability served as a model for the developing public administrations in countries formerly under the British rule.[54]

Conspicuous absence of a right represented both in the Universal Declaration of Human Rights (1948; Art. 21/2) the International Covenant on Civil and Political Rights (1966; Art. 25/3) as well as in several other international documents[55] and a vast majority of the constitutions, analysed in this paper (22 out of 30 constitutions) is the second feature common to all three constitutions. At first sight, it is difficult to find out what the reason for that aspect of the constitutional profile of the 'common law countries' is. But the reason behind the shared constitutional arrangement might be the model of public administration inspired by the British civil service.

The British civil service is a corps of professional administrators, who are in principle politically neutral and not dependent on elected politicians for reappointment (Heywood 1997: 347). The present set-up of the service was instituted through a reform, first in India (1853) and two years later also in the United

52 »And thereupon the said Lords Spiritual and Temporal and Commons, ... do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare: ... That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders; That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void...« (The English Bill of Rights, 1689).

53 O'Connor, Tom: The Quest for Justice and The Problems of Constitutional Criminal Procedure. At: http://faculty.ncwc.edu/toconnor/325/325lect02.htm (3.6.2007).

54 We are grateful to Professor Mitja Žagar for this suggestion.

55 E.g. The American Convention on Human Rights; (Art. 23/1 (c)); the African Charter on Human and Peoples' Rights (Art.13/2).

Kingdom. The most important innovation in that time was the adoption of the principle that all candidates are to be admitted to civil service after a competitive examination of their general education (Ridges 1937: 171).[56] Civil service thus became an organisation based on merit, in the first place measured by the education acquired (and not, as the case may be in the USA, on spoils).[57] Because of this threshold, the entrance into civil service could not be regarded as a right, but rather as a privilege. It is this conception of civil service that is a very likely reason for the absence of the right to access to public office. We see once again that the implicit and unexpressed notions of the past shape the constitutional law of today. In the case of this particular group of countries, the irony is even greater: it is shaped by the notions brought to them by a foreign power that they have all tried very hard to become independent from.

CONCLUSION

At the outset of this paper, we posed the question as to what can be learned from a comparative constitutional analysis. We hinted at an important layer of legal reality that is only rarely exposed to our view by the comparative analysis. This article has tried to unveil this amalgam of different factors hidden from our eyes that shape the constitution and its contents. Almost without exception, constitutions are regarded as a rational response to reality that can sometimes be irrational (the balance of political forces, religious disputes and so forth). But the constitution qua law tries to respond in a rational fashion. In an era of human rights, this perception of law as a purely rational response to reality is even stronger. The ideology of human rights treats 'human rights' as something objectively existent, as something that only has to be transformed into a legal document. It follows quite naturally that we can expect an almost complete uniformity in all constitutions trying to protect human rights.

Our analysis demonstrates how different the process of constitutional framing really is. Certainly, a process is fundamentally rational and the legislator does respond to a set of demands posed in all modern European societies. Yet at the same time, a 'legal subconsciousness' is at work, drawing from a number of sources, most notably, from historical patterns embedded in minds of lawyers framing a new document. There is no explanation, for example, why the French constitution does not include freedom from torture. No reasonable person would contend that the French legal system endorses torture. But the French constitution along

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56 This principle was reaffirmed by the Superannuation Act of 1859 and by the Order of Council of 1870.

57 The spoils system favours employing and promoting civil servants on the basis of party loyalty rather than on the basis of their ability and professional skills (so-called merit system).

with those of Luxembourg, Belgium, the Netherlands, Italy and a handful of other European states[58] does not prohibit torture. All these states had no reservations when they ratified the European Convention on Human Rights which expressly prohibits torture, but saw no need to change or amend their constitutions. In such a way, different constitutional profiles emerge, which are characteristic of certain states.

The use of adverbs Nordic, Romanic, Germanic should not be taken at its face value. The analysis we have carried out has shown that the mere linguistic affinity is not sufficient a reason for the inclusion of a country in a certain group. The Germanic group offers a good illustration. It includes such diverse countries as Spain and Portugal or Finland and Greece. Our research work has led us to believe that the framing of the constitution is dominated by four important factors, which determine to which group a country will belong:

- *Historical and geographical factors*: to a large extent shared history and geographical proximity are potent factors, increasing the possibility that a country will belong to a certain group. We can frequently observe how the countries conquered (e.g. Belgium, Netherlands), colonised (Ireland, Malta, Cyprus) or governed by some other country adopt the constitutional patterns of that country.
- *Linguistic factors:* similar (or same) language can be a strong indication that a state will fall into a specific group of countries (e.g. Belgium in the Romanic group, Ireland in the Common law group). Sometimes the reason is the knowledge of the language: Slovenia, Czech and Slovak republics, for example, were under the Austro-Hungarian Empire and thus used German as the official language of the period. This closeness begot also intellectual affinity, especially when the dominant nation appeared to be progressive (France after the 1789 revolution, Germany after the 1848 revolution).
- *Timeframe of the adoption:* Historical, linguistic and geographical factors may not be enough. The constitution of Liechtenstein was adopted in 1862 and bears the marks of that time. For this reason it shows almost none of the characteristics of the Germanic group's constitutional profile, although it is closely connected to this group in all other aspects. On the other hand, the constitutions adopted in the same period exhibit common traits. The Germanic group, for example, was strongly influenced by the adoption of many important international documents concerning human rights. At least in some constitutions this inspiration can be strongly felt and even

58 Liechtenstein, Austria, Ireland, Germany and Denmark.

proven. If this trend continues we can expect the harmonisation of the human rights constitutional guarantees.

- *Discontinuity*: In some cases, a wider picture has to be taken into consideration. The civil laws of Spain and Portugal, for example, both belong to the Romanic legal family, but nevertheless, at the level of constitutional rights protection, they exhibit almost the same constitutional profile as that of Germanic countries. Since the main trait of this group is extensive regulation of human rights at the constitutional level, we can attribute this on the one hand to the post-dictatorial enthusiasm over newly gained human rights, and on the other hand to the desire to never again let the dictatorship reoccur.

In our view, the analysis presented has born fruit. It has provided us with important impetus to further research and has thus enabled us to take a step forward in our constitutional analysis. The chosen method has proven to be valuable. Whatever its methodological shortcomings, the relative simplicity in handling the data and comparatively easy overview of the gathered information have considerable value for further constitutional analysis. On the substantive level, we believe that both of our preliminary hypotheses were vindicated. The existence of the common core of human rights protection in European constitutions is beyond doubt. Almost equally persuasive are the data on important differences in constitutional profiles. Constitutional provisions on human rights in European constitutions differ. Our analysis did not stop at that conclusion, but has ventured into an uncharted territory of the constitutional comparison. This venture has had two interconnected goals: the vindication of the hypotheses set with regard to each constitutional profile, but in no smaller measure also the contribution such an approach to constitutional analysis can make to the comparative law.

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APPENDIX 1: LIST OF ABBREVIATIONS USED IN THE PAPER

Access to court – right to access to court (right to judicial protection)

Access to public office – right to an equal eligibility for appointment to public service

ADP – Abolition / prohibition of death penalty

Asylum – right to an asylum

Compen. – right to demand compensation in case of state inflicted damage

Creativity – Freedom of creativity (freedom of research and art)

Develop. of pers. - right to development of personality

Dignity – right to dignity

Education – Compuls. – constitutional provisions establishing compulsory (primary) education

Education – Free – right to education free of charge

Education – Priv. schools – right to establish private schools

Education – R – right to education

Extradition/expulsion – prohibition of extradition or expulsion

F. from torture – right to freedom from torture

F. to choose residence – freedom to choose one's residence

Fair trial – Independent and impartial tribunal established by law – right to be tried by an independent and impartial tribunal established by law

Fair trial – Presumption of innocence – right to be presumed innocent of an offence

Fair trial – Public trial – right that the trial be conducted openly

Fair trial – Rights of accused person – rights of accused person, such as right to counsel, right to have adequate time and facilities for preparation of his defense, right to interpreter etc.

Fair trial – Trial within reasonable time – right to be tried without unnecessary delay

Family and parenthood – constitutional provisions establishing special protection of family and parenthood

Forced & Compulsory Labour – prohibition of (freedom from) forced and compulsory labour

Free enterprise – right to engage in economic activity

Health care – right to health care

Honour – right to respect of honour

Legal Remedy – right to legal remedy (right to appeal)

Life – right to life

Marriage & Family – right to marry and to found a family

Move. – right to freedom of movement

Ne bis in idem – prohibition of double jeopardy (for being tried twice for the same offence)

Nullum crimen – *Nullum crimen nulla poena sine lege praevia* (the principle of legality in criminal law)

P&M Integrity – right to physical and mental integrity

Petition – right to petition

Prov.- Crim. law – regulations pertaining to punishment and criminal responsibility (e.g. provisions establishing individual criminal responsibility)

R. of children – rights of children

R. of minorities – rights of ethnic, national, linguistic and religious minorities

Recog. of legal person. – right to recognition as a person before law

Security – right to security

Slavery & Servitude – prohibition of (freedom from) slavery and servitude

Social security – right to social security

Sound environm. – right to sound environment

Special protection (of women, mothers, minors, orphans, disabled) – constitutional provisions establishing some sort of special protection for certain groups of population

Trade union – Gen. – freedom to form and join trade unions

Trade union – Strike – right to strike

Unemploym. – right to be insured against unemployment

Work – Free choice – right to free choice of work

Work – Payement – right to payment (remuneration) for work performed

Work – R – right to work

Work – Rest – right to rest (limitations of working hours)

APPENDIX 2: CATEGORIES OF CONSTITUTIONAL HUMAN RIGHTS PROVISIONS IN THE GERMANIC GROUP THAT STAND OUT IN RELATION TO OTHER GROUPS

Country	P&M Integrity	Dignity	F. from torture	Honour	Fair trial					Petition	Compen-sation	Legal remedy	Crea-tivity	Free enter-prise	Trade union	
					Pub.	Time	Trib.	Innoc	R. of accused p.						Gen	Strike
Latvia	-	+	+	+	-	-	+	+	+	+	+	-	+	-	+	+
Germany	+	+	-	-	-	-	-	-	+	+	-	-	+	-	+	-
Hungary	+	+	+	+	+	-	+	+	+	+	+	+	+	+	+	+
Greece	-	-	+	+	+	+	+	-	+	+	+	P	+	-	P	+
Portugal	+	-	+	+	-	-	-	+	+	+	+	-	+	+	+	+
Spain	+	+	+	+	+	+	+	+	+	+	+	-	+	+	+	+
Slovenia	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Lithuania	+	+	+	-	+	-	+	+	+	+	+	+	+	+	+	+
Estonia	-	-	+	+	+	-	+	+	+	+	+	+	+	+	+	+
Czech r.	+	-	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Slovak r.	+	+	+	+	+	+	+	+	+	+	+	+	+	P	+	+
Andorra	+	+	+	+	- op	+	+	+	+	+	+	- op	-	+	+ op	- op
Poland	+	+	+	+	+	+	+	+	+	+	+	+	+	-	+	+
Switzerl.	+	+	+	-	+	+	+	+	+	+	+op	+	+	+	+	+
Bulgaria	+	+	+	-	+	+	+	+	+	+	+	+	+	+	+	+
Romania	+	-	+	-	+	+	+	+	+	+	+	-	+	+	+	+
Finland	+	-	+	+	-	+	+	-	+	-	-	-	+	+	+	-

Country	Move-ment	Extrad./ Exp.	F. to choose residence	Education				Special protection					R. of children	Sound environm.	R. of mino-rities
				R	Comp.	Free	Priv. schools	Women	Mothers	Minors	Orphanes	Disabled			
Latvia	+	+	+	+	+	+	-	-	-	P	P	P	P	P	+
Germany	+	+	-	-	-	-	+	-	+	+	-	+	+	-	-
Hungary	+	+	+	+	+	+	-	-	+	+	-	-	+	+	+
Greece	+	+	+	P	+	+	+	-	+	+	P	+	-	P	-
Portugal	+	+	+	+	+	+	+	-	+	+	+	+	+	+	-
Spain	+	+	+	+	+	+	+	-	-	+	-	+	+	+	-
Slovenia	+	+	+	+	+	+	-	-	+	+	+	+	+	+	+
Lithuania	+	+	+	-	+	+	+	-	+	+	-	-	-	+	+
Estonia	+	+	+	+	+	+	+	-	-	-	-	+	-	-	+
Czech r.	+	+	+	+	+	+	+	+	-	+	-	+	-	+	+
Slovak r.	+	+	+	+	+	+	+	+	-	+	-	+	+	+	+
Andorra	+	+	+	+	-	-	+	-	-	-	-	-	-	P	-
Poland	+	+	+	+	+	+	+	+	+	+	+	+	+	P	+
Switzerl.	+	+	+	+	-	-	-	-	P	+	P	P	+	P	-
Bulgaria	+	-	+	+	+	+	+	-	+	+	+	+	+	+	-
Romania	+	+	+	+	+	+	+	-	-	+	-	+	+	+	+
Finland	+	+	+	+	+	+	-	-	-	-	-	-	+	+	+