A Comparative Study of Constitutions of Germany, Austria and Switzerland

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ABSTRACT

In this article, comparisons are made between the Constitutions of Germany, Austria, and Switzerland. The Constitutions of Germany, Austria and Switzerland establish these States as Federal Democratic Republics. All these countries have parliamentary form of governments. The principles of Democracy, Federalism and separation of powers are found in the Federal Constitutions of each country. Yet the way these principles have been dealt with in each country differs widely. The purpose of this article is to bring forth this point after a comparative analysis of the constitutions of these three countries. However, the whole analysis is directed towards a larger goal which is establishment of the fact that a comparative analysis helps us to formulate a better and effective understanding of other nations’ constitutional arrangements opening up multiple scopes of improvement in the domains of constitution and law in the process.

Keywords: Constitution, Germany, Switzerland, Austria, Federalism, Democracy, Power, Separation

1. Introduction- Importance of Comparative Study

With a few exceptions, almost all the countries have written Constitutions. Constitutions seek to regulate the relationship between organs of the state i.e. the relationship between the executive, legislature and the judiciary; most constitutions also attempt to define the relationship between individuals and the state, and to establish the rights of individual citizens.

Constitutions can be written or unwritten. A written constitution is one that is contained in a single document, which is the single source of constitutional law in a state. An unwritten constitution is one that is not contained in a single document, consisting of several different sources, which may be codified or not codified.
Comparative Constitutional law can be called as an approach, a process/method of comparing two or more Constitutions or parts thereof with a definite aim. However, as a practice it can be traced to antiquity, to Aristotle’s ‘Politics’in which after analyzing the constitutions of 158 city states Aristotle arrived at a classification of Government and Constitution. According to him monarchy, aristocracy and polity were good forms of Government or Constitutions while tyranny, oligarchy and democracy were their perverted forms respectively. A good Constitution was one, which strives to achieve common good while a perverted one focuses on sectional interests rather than common good. This tradition of comparative constitutional analysis was taken up in the 17th century Netherlands where extensive study of ancient and contemporary models was undertaken to resolve constitutional problems of nascent Dutch Republic.¹

The 19th century also saw the rise of academic discipline of comparative law in the establishment of International Congress of Comparative Law in Paris in 1900.² Hence comparison was practiced in the 19th century. Mark Tushnet in his seminal work talks about the possibility of learning from constitutional experience elsewhere in which comparing constitutional experience elsewhere might contribute to interpreting one’s own Constitution.³

A particular constitutional provision is drafted to perform a particular function in a legal system. Comparative constitutional study can help identify -those functions and show how different constitutional provisions serve the same function in different constitutional systems.⁴ Such an exposure can help in formulating a better and effective understanding of one’s own constitutional set up opening up multiple scopes of improvement.

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⁴Ibid.
Also, the comparative study of other Constitutions assumes importance when a nation has to draft a new constitution for itself. While drafting a new constitution, it is only logical to inquire as to how a particular issue was addressed (in comparable circumstances) in other countries. Where a Constitution is framed with materials borrowed from other Constitutions (for instance, India) the need for a comparative study assumes a special significance. This is because in interpreting and applying the borrowed Constitution, the national courts have to refer to the foreign precedents in order to discover what meaning had been imputed to the borrowed materials in the countries of their origin.\(^5\)

As Justice Breyer has also argued that although each nation has political and structural differences, the experience of other jurisdictions may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.\(^6\)

Interpreting and comparing Constitutions is a challenging task. Such comparison should be as evaluative as it is descriptive, the latter being an inevitability. Germany is a civil law European country with a Parliamentary form of government. In this article, comparisons are made between the Constitutions of Germany, Austria, and Switzerland. Like Germany, the Constitutions of Austria and Switzerland establish these States as Federal Democratic Republics. All these countries have parliamentary form of governments.

The Constitution of Germany came into effect on 23\(^{rd}\) May 1949. Austria has been governed by multiple Constitutions; in 1938, Austria ceased to exist as a sovereign state after it was annexed by Nazi Germany, however, the Constitution of Austria was eventually reinstated on May 1, 1945, Austria having reestablished itself as an independent republic shortly before Nazi Germany's definitive collapse. The Constitution of Austria is split up over many different acts. The Federal Constitution of 18 April 1999 is the third and current federal constitution of Switzerland (the Swiss Constitution was also adopted by a Referendum). All the three countries comprise constituent states (known as Lander in Germany and Cantons in Switzerland) and all these constituent states in each country have their own state constitutions.

\(^6\) Printz v. United States, 117 SC 2365, 1997
2. Democratic Principle

Democratic principle is inherent in all the three Federal Constitutions. However, there can be discerned distinguishable features in this principle in each country. In Germany, democracy constitutes a complex system of government that requires democratic participation of the people, protects minorities and ensures a free process of decision making. The Basic Law for the Federal Republic of Germany is the constitutional law of the Federal Republic of Germany. The Basic Law was created in an irregular situation of Allied occupation after Germany’s total defeat in World War II and the moral catastrophe of the atrocities during the Third Reich. Originally considered provisional and therefore named Basic Law instead of ‘Constitution’, the fundamental structures have kept their identity, guaranteed constitutionally by the eternity clause Art 79 III BL.

Although the Basic Law (of Germany) does not mention the Opposition explicitly, the democratic principle guarantees its functional existence. Since democracy is a permanent process of legitimation, control and review of ruling institutions, it presupposes an open process of communication and freedom of opinion. Electors and the elected are connected by a permanent feedback process that allows for the influence of the citizens on the continuing process of forming political opinion. Therefore, the individual liberties concerning communication further re-inforce the democratic principle. In a famous decision called Luth decision, the Constitutional Court explicitly stated that the freedom of expression is “quite simply constitutive” for a democracy.

Individual liberties are secured by a set of fundamental rights. Fundamental Rights in the Federal Republic of Germany are a set of rights guaranteed to the German people. The principle of

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8 Ibid, p. 30
9 Ibid, p. 30
10 Ibid, p. 31
11 Ibid, p. 31
13 7 BVerfGE 198,208- Luth
human dignity stands at the head of the entire catalogue of Basic Rights i.e. Art 1 which declares it as inviolable and it further contains that all the “basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.” The principle of human dignity is often considered as the normative foundation of the Federal Republic, the essence of its statehood. While encroachment into other rights may be justified, this is not possible in the case of human dignity. Human dignity may neither be balanced with other rights nor be relativized.

Each fundamental right guarantees a particular sphere of protection. Art 2 I BL guarantees “the right to free development of one’s personality”. This provision has been broadly interpreted and “serves as an anchor and basis for the development of new rights.” This right first protects what can be called the right of privacy, eg private diaries against its use in a criminal trial or sexual identity.

The equality provision is contained in Art 3 I BL. It states that: “(1) All persons shall be equal before the law; (2) Men and women shall have equal rights…; (3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.” However, it must be noted here that the equality provision doesn’t forbid differentiation and classification by statutes but only prohibits arbitrary unequal treatment.

Art 4 states the “inviolability” of the freedom of faith and conscience. Interestingly, the institution of marriage and family also find mention in the German Constitution. Art 6 states that: (1) Marriage and the family shall enjoy the special protection of the state; (2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty…(5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

Freedom of assembly is a constitutional, i.e., basic right of the Germans. All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission. While some fundamental rights apply only to Germans, there are some on which only non-Germans can
rely, e.g. right to asylum (art. 16a). However, this right is often described as being rendered illusory because of reform in the country’s asylum laws. In June 1993, Germany enacted amendments designed to deny the right to seek asylum to persons travelling through "safe third Art 17 contains the right to petition. Every person shall have the right individually or jointly with others to address written requests or complaints to competent authorities and to the legislature. In the event that these rights are violated and a remedy is denied by other courts, the constitution provides for an appeal to the Federal Constitutional Court [Art. 93 (1) (4a)].

Democracy and Switzerland are almost synonymous.\textsuperscript{14} The principles of sovereignty of the people, equality among citizens, and universal adult suffrage are most truly and meaningfully inherent in the democratic principle of Switzerland. The kind of democracy existent in Switzerland is “direct democracy”. Direct democracy is a form of democracy in which people decide (e.g. vote on, form consensus on) policy initiatives directly, as opposed to a representative democracy in which people vote for representatives who then decide policy initiatives. Democracy (Art 136 to 142) can be said to be one of the four pillars of Swiss Constitutional law. To say that in Switzerland, Constitution truly belongs to the people would not be an exaggeration because any amendment to the Federal Constitution cannot take place without the direct vote of the people.

Article 1 of the Federal Constitutional Law reads: “Austria is a democratic republic. Its law emanates from the people” Hence the democratic principle is declared at the very outset. Austria is a parliamentary democracy. Unlike Switzerland, Austria has representative democracy based on universal adult suffrage, equal suffrage, direct suffrage, secret ballot and proportional representation.\textsuperscript{15}

3. Federalism

Federal form of Government is to be found in the Constitutions of all the three countries. The Basic Law of Germany constitutes a federal system as federalism (along with republicanism, social responsibility) forms one of the key components of the Constitution (Art 20). The official name “Federal Republic of Germany” manifestly explains the federalist structure of the constitutional system of Germany.

The Basic Law constitutes a federal system and divides authority between the federal government and the states ("Länder"), with the general principle governing relations articulated in Article 30: "The exercise of governmental powers and the discharge of governmental functions shall be incumbent on the Länder insofar as this Basic Law does not otherwise prescribe or permit." Thus, the federal government can exercise authority only in those areas specified in the Basic Law. It is also important to note that the member states in Germany have their own constitutions. Art 28 I says that “the constitutional order in the Länder must correspond with the principles of a republican, democratic and social state governed by the rule of law within the meaning of the Basic Law”. So the constitutional autonomy of the Länder means that the constitutional realms of the federal government and of the Länder are in principle separate and in a position of parity. 16

The Constitution of Germany divides legislative heads into exclusive powers (Articles 71 and 73), concurrent powers (Articles 72, 74, and 74a). The exclusive legislative jurisdiction of the federal government extends to defense, foreign affairs, immigration, transportation, communications, and currency standards. The federal and state governments share concurrent powers in several areas, including civil law, refugee and expellee matters, public welfare, land management, consumer protection, public health, and the collection of vital statistics. In the areas of mass media, nature conservation, regional planning, and public service regulations, framework legislation limits the federal government's role to offering general policy guidelines, which the states then act upon by means of detailed legislation. The areas of shared responsibility for the states and the federal government were enlarged by an amendment to the Basic Law in 1969 (Articles 91a and 91b), which calls for joint action in areas of broad social concern such as higher education, regional economic development, and agricultural reform. Concurrent authority

16Heun, supra note 7, p.54.

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basically means that in principle the Lander has the opportunity to legislate as long as the Federation has not legislated in those fields.\textsuperscript{17} Therefore, many German constitutional scholars feel that “the Basic Law does not regulate the distribution of functions in a definite way. It prefers instead a system of fundamental presumption of jurisdiction in favour of the Lander and confers far reaching powers in favour of the federal government enabling it to act in the realm of Lander’s presumed jurisdiction.”\textsuperscript{18} Legislation is in practice mostly federal legislation.\textsuperscript{19}

If in the realm of legislation, the federal government occupies primacy then in the realm of administration, the Lander has extensive powers. That’s why German Federalism is often termed as Executive Federalism due to the supremacy of the executive power of the Lander both in theory and practice.\textsuperscript{20} The Bundestag may regulate the organization and procedure of State agencies with the prior consent of Bundesrat. Since there are constitutional objections against any form of mixed administration between federal government and the Lander, the so-called joint functions of the Federation and the Lander have been included in the Constitution in Art 91a, 91b, since 1969.

The notion of Rechtsstaat- meaning a state in which the rule of law prevails- does not appear in Art 20 but in Art 28 I which says that “the constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law.” In a Rechtsstaat, the power of the state is limited in order to protect citizens from the arbitrary exercise of authority.

Federalism in Germany has its origins in history. “The dissociation of Germany in hundreds of territorial states which were only loosely associated within the framework of the Holy Roman Empire of the German Nation, prevented the establishment of a unitary and centralised nation state…. The revival of federalism (1949) was due to the prior existence of the Lander… Tradition and political situation combined are the reason for the re-establishment of federalism in

\textsuperscript{17}Ibid, p. 54.
\textsuperscript{18}Ibid, p. 58.
\textsuperscript{19}Ibid, p. 59.
\textsuperscript{20}P. Dann, \textit{Parliaments in Executive Federalism} (Berlin, Spinger, 2004)
Germany.21 Germany comprises sixteen states (which are collectively referred to as Länder) with each state having its own constitution. Hence on the face of it, one can say that constitutional autonomy of both the federal state and the member states encompass the dualistic concept of the federal state. But there have been academic reservations regarding federalism in Germany. It is often said that though the member states have constitutional autonomy yet “the Länder constitutions have not achieved the status of Basic Law either in public law theory or in constitutional practice.”22 Even in the public consciousness the Länder constitutions remain secondary.23 There has been witnessed a development from a dualistic to cooperative federalism. In particular Art 91a and 91b formalised a close cooperation between the federation and the Länder in the form of “Joint Tasks” in the fields regarding the construction of universities, education, planning and the improvement of the regional, economic and agrarian structure. Further, such cooperative federalism is strengthened by the fact that (and as stated in Art 91a II) any federal law for the execution of “Joint Tasks” has to be enacted with the prior consent of Bundesrat.

One of the four traditional pillars of Swiss Constitutional law is federalism (Art 42 to 135 address the relationship between the Swiss confederation and the twenty six cantons). Though the Republic of Switzerland is formally designated as a confederation, it is in fact a Federation.24 The powers of the government have been divided between the national and the cantonal governments. The Federal government has been vested with powers of national importance and the residuary powers have been left to the Cantons.25 The Cantons, however, enjoy supremacy in their own sphere, though some restrictions have been imposed upon them viz. they must have republican constitution; their constitution must not be contrary to the Federal Constitution; they must be subject to revision or amendment by popular vote.26 The Cantons are allowed to keep their own military force [Art 60(3)]. This is a unique provision because in other Federations of the world, defence is usually the concern of the Centre. During emergency, the Federal government is vested with exclusive authority over the cantonal forces. The Swiss Constitution

21 Author, supra note 7, p 51.
22 Ibid, p.54.
23 Ibid, p. 54.
expressly recognizes the judicial personality of the Cantons. One can therefore conclude that the Cantons on the whole possess large amount of autonomy.

Austria is a federal republic made up of nine states. According to Art. 2 B-VG it consists of nine autonomous states. Each Austrian state has an elected legislature a state government, and a governor. Austrian federalism is largely theoretical as the states are granted few legislative powers. The federal constitution in the beginning had given all legislative powers to the states, but many powers were later taken away. Very few powers such as planning and zoning codes, nature protection, hunting, fishing, farming, youth protection, certain issues of public health and welfare and the right to levy certain taxes are now with the states. All other matters, including but not limited to criminal law, civil law, corporate law, most aspects of economic law, defense, most educational matters and academia, telecommunications, and much of the healthcare system are now in the domain of federal Government. There is no judicial authority of the Länder which, since the federal constitution gives all the judicial powers to the federal Government.

In his 2004 paper “Austria a Federation without Federalism?” Jan Erk stated that “the Austrian federation seems to work more as a unitary system… this is because the federation lacks territorially based societal heterogeneity to sustain a principled commitment to federalism…societal homogeneity induces a centralist political outlook at all levels of government which undermines the notion of self-rule in constituent units essential for federalism”. 28

4. Separation of Powers

In Germany, the principle of separation of powers is expressly laid down in Art 20 II which states that “All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies” and is also protected against constitutional amendment by the “eternity clause” of Art 79 III.

27 Ibid, p. 303.
The Basic Law established Germany as a parliamentary democracy with separation of powers into legislative, executive and judicial branches.

Part III of the Constitution contains provisions relating to Bundestag. The Bundestag is a constitutional and legislative body in Germany. Art 38 lays down that the Members of Bundestag shall be elected in general, direct, free, elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience. To be a Member of Bundestag, one must have attained eighteen years of age. The Bundestag shall elect its President, Vice-Presidents and secretaries. It shall adopt rules of procedure [Art 40]. Art 38 protects the individual member against undue party influence, mandatory voting along party lines is prohibited and only party discipline on a voluntary basis is permissible. Art 46 lays down the immunities accorded to the members of Bundestag. Members shall not be questioned elsewhere for votes or debates in the Bundestag, they may be prosecuted or arrested only with the consent of the Bundestag. Art 47 confers on them the right to refuse to give evidence concerning persons who have confided information to them in their capacity as Members of the Bundestag, or to whom they have confided information in this capacity.

Part IV of the Constitution lays down the provisions relating to Bundersrat. Article 50 declares that the Länder (the federal states) shall participate through the Bundesrat in the legislation and administration of the Federation.

The German Bundesrat is a legislative body that represents the sixteen Länder (federal states) of Germany at the national level. The Bundesrat participates in legislation, alongside the Bundestag, the directly elected representation of the people of Germany, with laws affecting state competences and all constitutional changes requiring the consent of the body. Functioning similarly, it is often described as an upper house along the lines of US Senate, the Canadian Senate or the British House of Lords, although the German constitution does not declare the Bundestag and Bundesrat to form houses of a bicameral parliament. Officially, it is generally referred to as a "constitutional body" alongside the Bundestag, the Federal President, the Federal Cabinet and the Federal Constitutional Court. The legislative authority of the Bundesrat is

29Heun, supra note 7, p 101.
subordinate to that of the Bundestag, but it nonetheless plays a vital legislative role. Bundersrat is often seen as preserving federalism. The main difference between the German form of federalism and other federative systems when it comes to the division and execution of tasks is that the individual federal state governments participate directly in the decisions of the national state or Federation and this is done through the Bundersrat.\textsuperscript{31}

The executive branch consists of the largely ceremonial Federal President as head of state and the Federal Chancellor, the head of government, normally (but not necessarily) the leader of the largest grouping in the Bundestag. Articles 54 to 61 outline the tasks and powers of the Federal President. “In his actions and public appearances, the Federal President makes the state itself – its existence, its legitimacy, its unity – visible. This at the same time involves an integrative role and the control function of upholding the law and the constitution. There is also a political reserve function for times of crisis in the parliamentary system of government.”\textsuperscript{32}

The Chancellor is the head of government (Art 62) and the most influential figure in German day-to-day politics. While every minister governs his department autonomously, the Chancellor may issue overriding policy guidelines.\textsuperscript{33}

Part IX of the Constitution deals with Judiciary. Art 92 states that the “judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal Courts provided for in this Basic Law, and by the courts of the \textit{Länder}.” Art 93 outlines the jurisdiction of the Federal Constitutional Court. It is the guardian of the Basic Law of Germany.

Article 79 states the Basic Law may be amended by an absolute two-thirds majority of the Bundestag along with a simple two-thirds majority of the Bundersrat, excluding amendment of those areas defined by the eternity clause. The Basic Law only names referendum on a single issue: a new delimitation of the federal territory.

\textsuperscript{33}http://www.bundesregierung.de/Webs/Breg/EN/Chancellor/_node.html(accessed 4 December 2014).

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The principle of separation of powers is expressly laid down in Art 20 II is protected against constitutional amendments by the eternity clause contained in Art 79 III. According to Art 20, state authority shall be exercised by “specific executive, legislative and judicial organs or institutions”. However Werner Heun observes that “only the judiciary still fits in this picture of separated powers while the distribution of legislative and executive powers as it is organized by the Basic Law does not. The Basic Law constitutes a system of parliamentary government where Parliament and Executive are dependent on each other and work closely together….Parliament and government are institutionally, functionally and personally strongly interconnected and linked so that it has been said that the theory of separation of powers has now become a theory of its violations.”

However, David P. Currie observes otherwise. He says that “there is more separation of powers in Germany than a first look at the parliamentary system might suggest.” He says that in Germany “Only the legislature may make laws; only the executive may enforce them; only judges may adjudicate”; “not only is the executive bound by the laws and in many respects per-mitted to act only on the basis of statutory authority; in Germany there are meaningful and judicially enforced limits to the delegation of legislative power”; “with rare exceptions there are no independent agencies with executive powers;” and “finally, there are essentially no quasi-judicial agencies in the American sense of the term; if administrators decide concrete individual disputes, their decisions must be subject to de novo judicial review on questions of fact as well as law.”

There are meaningful checks on encroachment of powers. For instance “the Court held in 1959 that mayors, municipal administrators, and members of municipal councils could not constitutionally act as judges in criminal matters that might also affect their other official duties.” This not only means that no legislative or executive agency may exercise judicial functions as such; it also limits the ability of the same individual to serve simultaneously as both legislator or administrator and judge.

Separation of powers is not without history. The reasons for its inclusion in every Constitution can always be traced back to a particular historical experience. The United States opted for a

34 Heun, supra note 7, p 86
strong and independent executive after a period of dissatisfaction with the excesses and inadequacies of populist legislatures; the Federal Republic (of Germany) strengthened legislative prerogatives after an era of executive tyranny.

The Federal legislature of Switzerland is called Federal Assembly. It is a bicameral legislature consisting of two Houses- the National Council and Council of State. The Constitution vests supreme power in the Federal Assembly. However, it is often said that the principle of separation of powers is virtually absent in Switzerland because the legislative, executive and judicial functions are performed by the Federal Legislature only.\(^\text{39}\) In the exercise of its legislative powers, the Federal Assembly passes all federal laws and legislative ordinances (Art 163). The Executive powers include supervision of the activities of civil service, determining administrative disputes between federal officials; it controls Federal army ( Usually, the President i.e. the Executive Head of the State is the commander of armed forces); it has the power to declare war and conclude peace. The judicial powers of the Federal Assembly are: the judges of the Federal Tribunal are elected by the Federal Assembly; it also hears appeals against the Federal Council’s decisions on administrative disputes; it deals with conflicts of jurisdictions between different federal authorities; it exercises prerogative on pardon (which is an Executive prerogative in India). From the above it may seem that the Federal Assembly is a powerful but in reality it is not. Because the “adoption of devices like Referendum and Initiative have enabled the people to exercise final power of accepting or rejecting a Bill.\(^\text{40}\)

The Fundamental Principles of the Austrian national Constitution can be said to be the following: the democratic principle; the principle of the separation of powers; the principle of the rule of law; the republican principle; and the liberal principle.\(^\text{41}\) So the principle of separation of powers counts as one of the fundamental principles in Austrian constitutional law. However, Kurt Heller observes that “the separation of powers in the Austrian Federal Constitution is less rigid than the separation in other countries.”\(^\text{42}\) A kind of delegated legislation exists in Austria which makes some scholars to observe that the principle of separation of powers has been diluted. Kurt Heller

\(^{39}\)Ibid, p. 316.
\(^{40}\)Ibid, p. 316.
\(^{41}\)http://www.nyulawglobal.org/globalex/austria.htm (accessed on 4 December 2014).
says that “the separation of powers is incomplete in Austria because administrative authorities are allowed to issue regulations. Those regulations consist of norms which have binding effect, like statutes of Parliament.” But “administrative authorities may issue a regulation only if the statute provides for it and if, in addition, the statute establishes general guidelines for the issuance of a particular regulation.” The separation of administration from the judiciary has been explicitly laid down in Art 94 which reads thus: “Judiciary and administration shall be separate at all levels of proceedings.”

5. Judiciary

In Germany the Separation of powers principle in Art 20 II constitutes the judiciary as the third branch of government by determining that legislative, executive, and judicial functions be vested in distinct institutions. While the legislative and executive institutions are in many ways intertwined (as seen above also), the judiciary is fundamentally and strictly separated from other branches. Germany is characterized by its extremely differentiated court system. With regard to the organization of the judiciary in Germany the Basic Law states: “Judicial power is vested in the judges. It is exercised by the Federal Constitutional Court, the federal courts provided for in the Basic Law, and the courts of the Länder (regional administrations).” That judicial power is vested in the judges “means individuals and not judicial institutions.” The court system is inquisitorial, thus judicial officers personally enter proof and testimony into evidence, with the litigants and their counsel merely assisting, although in some courts evidence can only be tendered by litigants. In Germany, “the decisions of the federal courts are binding only in the individual case. They do not claim legal precedence as stare decisis does not exist.”

With regard to independence of the judiciary in Germany, it is often said that the tradition of judicial independence has a longer history than democracy in Germany. Court system in Germany can be divided into: Ordinary Courts; Specialized Courts; Constitutional Courts.

44 Ibid.
45 Heun, supra note 7, p 159.
47 Heun, supra note 7, p 166.
Ordinary Courts consist of Trial Courts and Appellate courts. Specialized courts deal with five distinct subject areas: administrative, labour, social, fiscal, and patent law. Like the ordinary courts, they are organized hierarchically with the state court systems under a federal appeals court. Constitutional Courts exist at both the State level and the federal level. Each Länder has its own state constitutional court. These courts are administratively independent and financially autonomous from any other government body. For instance, a state constitutional court can write its own budget and hire or fire employees, powers that represent a degree of independence unique in the government structure.

“The Federal Constitutional Court is the supreme constitutional court established by the constitution or Basic Law of Germany. It solely performs the enormously important task of judicial review. Armed with the power of judicial review it can declare any legislation passed by the federal or state legislation to be unconstitutional. Thus as per the powers and duties are concerned it demonstrates similarity with other supreme courts with judicial review powers, like the Supreme Court of the United States. But what makes it a bit distinctive is the fact that it enjoys some additional powers which have made it one of the most interventionist and influential national courts in the world. Unlike other supreme courts, apart from cases concerning constitutional or public international law it does not serve as a regular appellate court from lower courts or the Federal Supreme Courts on any violation of federal laws. Constitutional amendments or changes passed by the Parliament are subject to its judicial review.

The federal judiciary of Switzerland consists of the Federal Supreme Court, the Federal Criminal Court, the Federal Patent Court and the Federal Administrative Court. The Swiss judiciary plays a less vital role than the judiciary in other nations of the world. The Federal Supreme Court of Switzerland is known as Federal Tribunal and is the only national court in the country. However, the Federal Tribunal has only limited judicial review. “It can declare only a cantonal law unconstitutional if it conflicts with the federal Constitution or even Cantonal Constitution. It does however uphold the Federal Constitution against cantonal laws and administrative acts.”48 The Swiss Federal court does not possess the power to declare federal law unconstitutional if it violates the Constitution. “This right is earmarked for the Federal Assembly subject to the final

48Bhagwan and Bhushan, supra note 24, p. 331.
verdict of the people through Referendum.” In fact the Swiss Federal Tribunal in the world which stands alone instead of being at the head of a national judicial system as in the case of USA or India. 

So keeping in view its limited judicial review authority, it would be a misnomer to designate the Swiss Federal Tribunal as a Supreme Court. “The proposals to enhance the powers of the Swiss Federal Tribunal have been rejected in unequivocal terms. It is apprehended that any such alteration in the present judicial set up would impose a restriction on the sovereignty of people. In fact Federal Tribunal has not been able to command prestige and enjoy independence” as other Supreme courts of other nations enjoy.

The system of courts in Austria interpreting and applying Austrian law is marked by a division between ordinary courts, dealing with criminal and civil cases, and public law tribunals for constitutional law, administrative law and asylum law. Austria's legal system, having evolved from that of the Roman Empire, implements civil law. The legal system comprises of Constitutional Court entrusted with judicial review of legislative acts, and separate administrative and civil/penal supreme courts.

The judicial system is independent of the executive and legislative branches. The constitution establishes that judges are independent when acting in their judicial function. They cannot be bound by instructions from a higher court (except in cases of appeal) or by another agency. In administrative matters, judges are subordinate to the Ministry for Justice. A judge can be transferred or dismissed only for specific reasons established by law and only after formal court action has been taken. The Austrian judiciary functions only at the federal level, and thus there is no separate court system at the provincial level.

49 Ibid, p.331.  
50 Ibid, p. 305.  
51 Ibid, p.335.  
6. Conclusion

Comparative study is both about identifying patterns of similarity and patterns of difference within a particular sub-group of countries. The Constitutions of Germany, Austria and Switzerland establish these States as Federal Democratic Republics. All these countries have parliamentary form of governments. In all these countries, the constituent states have their own separate constitutions. The principles of Democracy, Federalism, separation of powers are found in the Federal Constitutions of each country. Yet the way these principles have been dealt with in each country differs widely. The kind of democracy which exists in Germany differs from democracy which exists in the other two. In Germany the democracy is strengthened by the fact that the electors and the elected are connected by a permanent feedback process that allows for the influence of the citizens on the political process. In Switzerland one finds direct democracy in which the Swiss people have the ultimate say on every law and law making. In Austria one finds representative democracy which is common to many other countries. So in the end one can conclude that there are broad similarities “at an abstract constitutional level” but “significant heterogeneity at a more concrete or specific level of constitutional comparison.”\(^{54}\)