

Comparative Supreme Justice

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Abstract

This article deals with the great variety of Supreme Courts in the world today and presents some selected courts. Supreme Courts are found in most countries both as only apex courts or in a courts' system where also supreme administrative courts or constitutional courts are found. The starting point is the variation of supreme justice in the Nordic countries where one apex court is the system of Denmark and Norway whereas administrative courts are found in Sweden and Finland. Constitutional courts stem from the European tradition and are most abundant in Europe and in countries with a civil law system but especially in Africa they are also found in common law countries. Mexico is mentioned as a specific example of a Supreme Court that has taken upon itself to be a main player in the endeavour to communicate the law to a general audience. The article is a presentation with samples of what is going to be a project on comparative supreme justice in which the position of supreme courts in the various states, the recruitment scheme and competence of the courts and other such factors will be analyzed on a global basis.

Key words

Supreme Courts; Courts; Justice; constitutional courts; global law

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1. Introduction

We live in a global world, but national institutions still play a decisive role in law, and the legal world is not something that can be grasped by just looking at international or supranational institutions. Comparative law at its outset was not only about legal systems, common law or civil law, it was also a comparison of different national laws, French law and German or even English law and American law. The law is still basically the law of a country and it is applied in a specific country. The Nordic countries can provide an example. It is common to talk of a Nordic legal family¹ but even if there is agreement that such a family exists, which implies that one can accept the idea of such families, Nordic law has no unity and even legislation introduced as part international collaboration in the field of law is not applied in the same way in different countries. You may hear decisions from one Nordic country being quoted in others, although this is not a common occurrence, but Danish law is still Danish, as Finnish law, Icelandic law, Norwegian law and Swedish law are laws in their own right. And each country has its own institutions that work in very different ways. Universities and law professors may be international, but legislators and courts are national and produce or judge according to national law. Even if to some the national approach may seem obsolete, we are still living in a world of nation states where the law is made and applied by national institutions. One of these institutions, and a very important one, is the law court and court system.

The reflections on the role of courts and judges which I am going to present here emerge from part of a project which takes as its starting point the position of one such institution, namely the Supreme Court and in this case the Supreme Court of Denmark². With a starting point in the differences as to the function of this institution in the Nordic countries, the project aims at comparing on a global basis the way in which supreme justice is organized, to determine the role of supreme courts in society and thus to attempt to map the function of supreme courts in different parts of the world and their various roles. This is a vast project of which only the rough outlines can be given here. Comparisons of courts have been done before. One can for instance compare the style and way of presenting judgments³. My aim is different. I look at the position of the supreme court in society, its role, its understanding of itself, its possibilities and ambitions and as a legal historian I have a natural inclination to look at the courts historically and thus try to combine legal history and comparison in law.

Today courts, like other institutions, live in a time of internationalisation, but as already stressed their work is still *local* and many courts around the world live a secluded life, being only rarely if ever confronted with cases that include elements of foreign origin. Even if discussions of the role of the courts are international and often take their starting point in the role of the US Supreme Court or discussions of international courts like the European and the Inter-American Court of Human Rights established 1979 or supranational courts such as the ECJ⁴, the national state plays a decisive role in the understanding of the way in which *local justice* functions. In that respect every country has its own way of looking at justice, legal education and the way the courts function. The courts are local in their function but

¹ For discussion of the concept of a Nordic legal family, see e.g. Zweigert and Kötz (1998, p. 277), and now esp. Husa, Nuotio and Pihlajamäki (2007, p. 5).

² See the Danish version, Tamm (2011a, p. 52 s).

³ See Lasser (2004), for a comparison of the French Cour de Cassation, The US Supreme Court and the ECJ.

⁴ Other examples are the courts of the EFTA, the court of the South American Comunidad Andina (CAN), the Southeast African COMESA. An updated list can be found on the homepage of PICT – Project on International Courts and Tribunals run by NYU. It is important to stress in this connection how the existence of supranational courts and international courts is changing the idea of justice being local. Danish courts or other courts in the EU have an obligation to have preliminary questions regarding community law put before the ECJ. The possibility of having national decisions tried by an international court of human rights is another example of how courts cannot isolate themselves.

at the same time it is important to recognize that to grasp what is unique in the legal system of each country you must look across borders and make comparisons.

I think one can safely say that courts in general – and this also applies to Danish courts – have for many years seen and still basically see their role not in an international context but as national institutions with a specific professional task to fulfil. This is changing, especially in higher courts, and even if most cases still are local and decided according to local rules, there is a growing understanding of courts and judges as fulfilling a function that implies an outlook towards the world outside the court room. European courts in particular must be aware, and are increasingly so, of the diversity of legal sources often of supranational or international origin and of their being assessed and measured themselves by an international standard as part of modern legal culture.

There are several common features in today's discussion of the role of courts. Especially at Supreme Court level judges have more international contact and learn from each other⁵. To what extent, however, can courts look towards foreign courts for inspiration instead of national legislation? Another question is that of judicial activism. Should courts anticipate a political decision and make new law or should they rather be reluctant to transgress the border between law and politics, respecting their position as courts and not a political organ? The concept of there being a "epistemic community" among judges has been used of the phenomenon that judges in different countries despite national differences have a common understanding of their role⁶.

"Judicialization" means that courts increasingly take a stand in conflicts that used to be considered political or administrative or in general in fields formerly not normally considered by courts. The American phenomenon is seen now also in England, Germany and Southern Europe. The question is important and has ramifications for our understanding of how democracy should function and the role of judges within it (Guarnieri, Pederzoli 2002). It is not only a question of the role judges are taking up but also has to do with the more or less precise way in which modern legislation is drafted. Where there is less precision this gives the courts a wider field of interpretation.

Another question connected to the function of supreme justice has to do with the legitimacy connected to the appearance of a final judgment as unanimous. For instance, since 1938 the Danish Supreme Court has published both majority and minority votes, whereas e.g. the French Cour de Cassation or the ECJ do not. The disclosure of dissenting opinions is seen from a Danish point of view as being important for the legitimacy of the decision, but this question is seen differently in systems based on the French tradition. In the Danish Supreme Court the rule is that judges do not publish individual votes but tend to find a common solution, in most cases unanimously, but otherwise as a majority and a minority, or sometimes several minorities. In the Danish tradition judgments are rather brief, without however competing in this respect with the style of the French courts.

The way a supreme court is perceived in society is dependent on a series of features apart from those already mentioned. The independence of the court and its ability to reach judgments without influence from other state powers is essential. Delay is a serious problem in many court systems. The absence of corruption and the quality of the judgments are other features, and differences from one country

⁵ Julie Allard and Antoine Garapon (2005) discuss a specific "commerce des juges". The idea that judges are part of an international net that will create a new form of "global governance" was introduced by A-M Slaughter (2004). For a general view of Courts in an international context see also Schapiro (1981) and Hirschl (2004).

⁶ The expression was used by the Italian professor and judge of the Italian Corte Costituzionale, Sabino Cassese (2010) in a paper at the XVIIIth International Conference of Comparative Law, Washington DC, July 2010: "Judicial networks are growing, and constructing step-by-step an epistemic community".

to another are obvious in a picture of a “global justice” that does not always offer justice the best conditions.

Many themes regarding supreme courts may be compared. There may be one apex court or there may be a system of several supreme courts dealing with ordinary cases, constitutional matters or administrative matters. Denmark is an example of a country in which the Supreme Court traditionally is competent in all matters. There is only one apex court, as is the case in Norway, whereas the structure is different in Sweden and Finland.

Another important question as to the role of courts has to do with the way in which judges are nominated (Malleon, Russell 2006). An important issue today is the balance between those decisions made by politically chosen organs and decisions made by judges who are nominated and not democratically elected. In some countries judges or at least higher judges are nominated by the government; this was also the case in Denmark until ten years ago, when a specific Board of Courts and a Committee for the Selection of Judges was established in order to keep these nominations outside the political system. One may ask oneself whether this system is positive as to recruiting future judges among other groups of lawyers than those of professional judges. However, an important feature in modern courts is also the willingness to recruit judges without a previous career as judge. The Danish Supreme Court is an example of a court that in later years has been actively trying to recruit judges with a background as practical lawyers, as professors or in other areas of professional experience, even if most judges still make their career as judges.

A general tendency has been the recruiting of an increasing number of women as judges. In the Danish Supreme Court men are in the majority but in lower courts female judges take the lead. In the Danish debate about the role of the court the argument that female judges may vote differently from men is not heard, but this rather controversial view of the importance of gender in court is brought forward in the US⁷.

The political role of courts and judges is a theme which is becoming increasingly important. It is not new to talk about judges and politics but in a legal culture like the Danish one there has been a marked reluctance to touch upon the idea that judges may be political actors. In Denmark there is a tradition of considering the courts in general, including the Supreme Court, as being outside the political sphere, whereas in other countries the courts and the political views of judges are the object of public interest⁸.

2. The Danish Supreme Court in a Nordic context

A look at the Supreme Courts of the Nordic countries will reveal extreme variations in traditions and ways of organisation. The Danish Supreme Court belongs to the minority of single apex courts and is in many ways unique. As a still functioning institution it can trace its history back to its foundation in 1661 as part of a series of administrative reforms introduced by a newly installed absolutist government.

⁷ This point of view was presented by Suzanna Shery (1986, pp. 543 ff). It should also be noted how the discussion following the statement of the now Justice of the US Supreme Court Sonia Sotomayor in a speech in 2001 at Berkeley University: "Our experiences as women and people of colour affect our decisions." On the other hand however the Norwegian historian Erling Sandmo commenting on the first two Norwegian female Supreme Court judges in 1968 and 1971 stated that their appointment was not "likely to have influenced the way of thinking or practice of the Supreme Court".

⁸ See e.g. Robert A. Dahl (1957 quoted from Lee Epstein 2005, p. 485): "To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system. For it is also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy. As a political institution, the Court is highly unusual, not least because Americans are not quite willing to accept the fact that it *is* a political institution and not quite capable of denying it...". See also Sunstien et al (2006).

Whereas many supreme courts have their legal basis in a constitution, the Danish Supreme Court is older than the Danish Constitution from 1849. It thus has had to carry the burden of history to find its place as an absolutist institution in (Tamm 2011b, p. 13 s) a constitutional system, and this has not always been easy. However, frictions have been few, and one may see the reluctance of the Danish Supreme Court to accept “judicial review” and to actually consider a statute unconstitutional as a remnant of a past in which the court had close ties to the government⁹.

The closest cousin of the Danish Supreme Court is the Norwegian Supreme Court, which was founded in 1814 when Denmark and Norway were separated. The Norwegian Supreme Court was part of a new constitutional system set up in 1814 when Norway acquired a new constitution that created institutions which secured for the country a new and much more independent position in its union with Sweden – lasting from 1814-1905 – following the more than four centuries of Danish-Norwegian union¹⁰. A separate Norwegian Supreme Court was part of the Norwegian nation building after 1814. Even if there are institutional similarities with the Danish Supreme Court, the constitutional position is different, and this may also explain some of the most marked differences as to the way in which the Norwegian Supreme Court has acted in certain situations¹¹.

The methods of work of the two courts, Danish and Norwegian, are similar. In both courts oral proceedings are the rule. Judges vote orally when proceedings are over. Danish Supreme Court judges start with the youngest judge whereas in Norway the president of the court decides the order. Norwegian decisions are formed as personal opinions. Danish judgements, as already mentioned, are the result of intense work to agree on a common text.

A peculiarity of the Danish system, not found elsewhere, is that the Supreme Court does not decide itself which cases to hear on appeal. It is the task of a specific board¹² composed of judges and other lawyers to grant permission to have a case brought before the Supreme Court if it has already been heard twice. In Norway as in the other Nordic countries the Court decides itself whether a case has sufficient interest as a precedent for it to be tried by the Supreme Court.

The Danish Supreme Court was also Supreme Court of Iceland¹³ until a separate Supreme Court for Iceland was established in 1919 to act as second instance for all Iceland.

One can consider the Danish, the Norwegian and the Icelandic Supreme Courts as belonging to a West-Nordic family and as institutions that point back to a common past. The court system of Sweden and Finland is quite different, as is the approach to public law and public institutions there in general. Common to the Nordic countries, however, is the absence of a constitutional court.

⁹ Until now there has only been one case, in 1999, in which the Danish Supreme Court has considered a statute unconstitutional. The case concerned an Act adopted by the Danish parliament to stop public aid to certain listed private schools, all part of the same corporation (Tvind). In its 1999 ruling the Supreme Court annulled the Act as unconstitutional because it was seen as a violation of the division of power between legislators and courts.

¹⁰ The history of the Norwegian Supreme Court from 1814-1965 has appeared in two volumes as Nils Rune Langeland (2005) and Erling Sandmo (2006).

¹¹ Special mention should be made of the fact that judicial review was known and practised in Norway already in middle of the 19th century. The historian Rune Slagstad (2000, p. 27) expresses it thus: Norway had already at the time of the Union with Sweden established a constitutional court. Also during the Second World War and the German occupation of both countries the Danish and the Norwegian Supreme Courts took different stands. The Norwegian Supreme court resigned because it would not accept Nazi legislation, whereas the Danish Supreme Court continued its function even if that implied acceptance of legislation against German interests.

¹² The so called *Procesbevillingsnævnet*.

¹³ Iceland belonged to Norway but in 1814 remained with Denmark. In 1918 Iceland was granted autonomy and the Supreme Court was part of the new order. In 1944 Iceland became independent.

The organisation of the Swedish-Finnish system stems from the establishment of so called "*hovrätter*" or royal courts in the 17th century. A first royal court was established in Stockholm in 1614, next came Åbo (now Turku) in Finland in 1623, then Dorpat in Livonia (at that time a Swedish possession) in 1630 and Jönköping in Sweden in 1634. Later more courts have been added both in Sweden and in Finland after the separation in 1809.

The Swedish Supreme Court was established by King Gustav III in 1789, and like the Danish Supreme Court it has an authoritarian past without a constitutional foundation. The King originally had two votes. It was only in 1809, with the introduction of a new constitutional order, that the Court came to have a constitutional basis. It became the administrative Supreme Court in 1909. Until 1974 the decisions of the court were issued in the name of the King. The Swedish Supreme Court not only is not a constitutional court, it does not come close to having any function of "judicial review".

The court systems of Sweden and Finland are based on a distinction between ordinary and administrative procedure, as in the French system. The highest administrative court in Sweden, corresponding to the French Conseil d'Etat, has since its foundation in 1909¹⁴ been known as the Government Court (*Regeringsrätten*) and the highest Finnish administrative court is the Highest Government Court (*Korkein hallinto-oikeus*).

The Finnish Supreme Court dates back to 1809, whereas the Supreme Administrative Court was established in 1918 and thus is contemporary with Finnish independence and the new Finnish constitution.

There are notable differences in the function of the Swedish and the Finnish Courts (Hallberg 2009). A common factor is the written procedure at the supreme level which differentiates these courts from the Danish, Norwegian and Icelandic Supreme Courts. The Swedish Administrative Court system is three-tiered and thus the highest Administrative Court, like the ordinary Supreme Court, only hears cases of general interest as precedents. The highest Finnish Administrative Court is second instance and deals with a much greater number of cases.

The Danish system with regard to administrative procedure is different. There are a few specialized administrative courts, such as the National Tax Court and the Social Appeal Court that function as courts but under appeal to the Supreme Court (when granted). Apart from those institutions there are no administrative courts but specialized boards fulfil the function of hearing complaints about administrative decisions in the various fields.

3. Constitutional courts

Some supreme courts have a general competence in all kinds of case, but in an increasing number of countries supreme justice is divided between ordinary supreme courts and constitutional courts. Many countries also have a specific administrative court procedure and in some countries there are both ordinary courts, constitutional courts and administrative courts. We can also in ordinary supreme courts distinguish between courts of "cassation" modelled on the French system, and supreme courts that function as supreme appeal courts.

Constitutional courts are especially concentrated in Europe. About three quarters of European countries have a constitutional court. Remarkable exceptions outside the Nordic countries are England, Switzerland and the Netherlands. Out of 195 nations of the world¹⁵ around half are acquainted with constitutional courts. In Asia and

¹⁴ The centenary was celebrated by the book *Regeringsrätten 100 år*, Uppsala 2009. See e.g. about differences between the procedure in the Supreme Court and the Highest Administrative Court, Johan Munck (2009)

¹⁵ The 192 member states of the UN and Kosovo, Taiwan and the Vatican State.

North and Latin America the frequency is lower, whereas about half of the African states have constitutional courts.

In a historical perspective the US Supreme Court may be described, on the basis of the landmark decision of “*Marbury v. Madison*”, as the first constitutional court, even though constitutional matters are not the only competence of the court. In the context of identifying the first specialized constitutional court, mention should be made of the Austrian *Verfassungsgerichtshof* founded in 1919 and active since 1920¹⁶. Other claims to be the oldest constitutional court come from the courts of the Grand Duchies of Liechtenstein and Monaco, which both claim on their respective homepages to be “in fact the first European constitutional court” or to be “considered the oldest constitutional court in the world”. Neither of these has an equally long tradition as an active court, however. It therefore seems safe to endorse the claim of the Austrian model to be the first instance of a specialized constitutional court.

The Italian Constitutional Court, *La Corte Costituzionale*, was established by the constitution of 1948 and began its work in 1956. The members are appointed by the President, the Parliament or the courts. The age of nomination is deliberately remarkably high; most judges are experienced judges or former professors above the age of 70. Thus was created a court of indisputable competence and independence with a certain atmosphere of being above ordinary life with a position in society comparable to the Senate of ancient Rome.

Constitutional courts were established in Germany in 1949, Spain in 1978, Portugal in 1982, Belgium in 1985 and Russia in 1991.

In some but not all of the former countries of the eastern block new supreme courts and constitutional courts that are seen as courts *sui generis* and not part of the ordinary judicial system have been established. In Estonia the Nordic solution was applied. A Supreme Court – *Riigikogu* – was established in Tartu in 1992. It is competent in both ordinary and constitutional cases, the latter being decided by a specific panel elected from the ordinary chambers of the court. This is also in accordance with Estonian tradition as the former Estonian Supreme Court from 1920 had the power of “judicial review” (Rask 2009, p. 59ff).

In Latvia there is both a Supreme Court, re-established in 1993 and based on the system of cassation, and a Constitutional Court. Like Estonia the basic principle after independence has been a revival of the republic founded in 1920. The establishment of a constitutional court had been discussed in Latvia since 1934 without results until a constitutional court was opened in 1996. Since 2000 cases can be initiated by the President of the Republic, Members of Parliament, judges and citizens who consider their rights violated.

The Constitutional Court of Lithuania (*Lietuvos Respublikos Konstitucinis Teismas*) was established in accordance with the constitution of 1992. The court is not part of the ordinary judicial system and cases cannot be brought from other court instances before the Constitutional Court, which has on several occasions declared statutes to be unconstitutional. The ordinary Supreme Court, as in Latvia, works according to the cassation system.

It is probably not possible to devise a general theory concerning the reasons for establishing constitutional courts. There is a tendency that such courts are found in countries which have known strong political changes and the courts have thus formed part of a “transitional justice” system when democracy was established or re-established as in Italy and Germany. The establishment of many constitutional courts after the Second World War can be explained in this way. Countries such as the Nordic countries, England or the Netherlands, with a strong tradition of

¹⁶ The influence of Hans Kelsen in the creation of the Austrian Court and his defence of the court against Carl Schmitt who considered the President the “Hüter der Verfassung” should be mentioned here.

continuity, do not have constitutional courts. Also countries with a federal structure have a greater need for such courts to settle conflicts between the different levels of government (Schneider, Kramer, Caravita di Toritto 2009). Belgium and Austria are examples.

Africa is a continent dense in constitutional courts. The court with the clearest profile and a model for other constitutional courts is the Constitutional Court of South Africa in Johannesburg. The homepage of the court states¹⁷:

“This court, the highest in South Africa on constitutional matters, was born of the country's first democratic Constitution in 1994. In an acclaimed new building at Constitution Hill, the 11 judges stand guard over the Constitution and protect everyone's human rights”.

The South African constitution and the establishment of the court are closely connected to the transition from minority white government to majority rule under the dominance of ANC. The South African constitutional court has an enormous prestige attached to both the quality of its decisions and the symbolic value that stems from the relation between the constitutional court and the rupture with apartheid. The South African constitution, with its ample catalogue of human rights, breaks with the past and is the foundation of a society built on new values.

South Africa has two apex courts. The Supreme Court of Appeals in Bloemfontein is to some degree associated with the old regime. It is in some ways seen as a court with traditional links going back to a less attractive past. The new Constitutional Court was based on the idea that new judges should be recruited on a basis that came closer to the ethnic composition of the country. The court played an important role in the drafting of the constitution of 1996 and has made several landmark decisions as to civil rights.

A question often discussed is the difference between civil law and common law countries as to the organization of justice. The basic concept of state may differ, and administrative justice is normally limited to civil law countries. The French tradition of separating normal courts and administrative justice is important,

but constitutional courts are also more often found in civil law than in common law countries. Europe has a great number of constitutional courts, especially in countries with civil law systems¹⁸. Africa is a continent rich in constitutional courts. Common law and civil law systems cover most of Africa but there seems in Africa to be a tendency that constitutional courts are mainly found in African countries with a civil law system¹⁹.

¹⁷ <http://www.constitutionalcourt.org.za/site/thecourt/history.htm>

¹⁸ As already mentioned, England and the Nordic countries, none of them civil law countries, do not have constitutional courts.

¹⁹ Constitutional courts are thus found in Algeria, Morocco, Tunisia, Gabon, The Republic of Congo, The Central African Republic, Tchad, Burkina Faso, Mali, Mauritania, Niger, Senegal, Togo, Djibouti, Madagascar, The Comoros – all former French colonies. Of such colonies only Cameroun, Ivory Coast and Guinea have no constitutional courts. In the former Belgian colonies of DR Congo, Burundi and Rwanda constitutional courts are found. Former Portuguese colonies Angola, Sao Tomé and Príncipe, Mozambique have constitutional courts. Cape Verde has only one supreme court. An interesting task is to study the relations between these courts and the constitutional court of Portugal and the federal supreme court of Brasil. The formerly Spanish Equatorial Guinea has a constitutional court. Among former British colonies only Sudan, South Africa and partly Tanzania and the Seychelles (<http://en.wikipedia.org/wiki/Seychelles>) have constitutional courts. Egypt also has a constitutional court, see Mahmoud M. Hammad, (2006, p. 274); N. Bernard-Maugiron (2008) and on the engagement of Egyptian courts in the protection of civil rights and independence of the courts, Tamir Moustafa, (2008, p. 108), on the Egyptian Constitutional Court, that: “Given the overwhelming strength of the Egyptian government, the SCC should be commended for its strong stand on important human rights provisions”.

4. Mexican inspiration

I will conclude this far from exhaustive survey of supreme justice with some personal experiences. I visited the Mexican Federal Supreme Court a few years ago. This court has a limited number of justices but the total number of collaborators amounts to about 3,000. The Supreme Court of Mexico does not at all function on the model of an old-fashioned supreme court that tries to limit the number of its cases and directs its attention only to cases of constitutional relevance. In the wake of the recent political changes in Mexico, especially the giving up of the one-party system, the Supreme Court has taken as its responsibility the reconstruction and upholding of justice all over Mexico. The Supreme Court not only runs its own premises in Mexico City with its own TV-channel. In all Mexican provinces Casas de Justicia have been set up in which one can find legal advice, libraries and information on justice. Thus the Supreme Court defines itself as the motor not only in case law on the supreme court level but also in the promotion of justice in the country as such. To me the organization of the Mexican Supreme Court was an eye-opener as to the different ways in which supreme justice functions and how differently such courts can conceive their task in a given society.

The Mexican concept of a Supreme Court differs from what can be found in other Latin-American countries. In Chile we find a division between an ordinary Supreme Court and a constitutional court. The more active of these courts is the ordinary Supreme Court, which functions in a very traditional way as an appeal court. Argentina is different. Here there is a federal Supreme Court, established 1863 and based very much on the pattern of the US Supreme Court but not enjoying the same respect or stability, since many judges have left the court in connection with political changes. Criticism of the Argentine court has not concerned its activism or conservatism but has accused it of being too dependent on the executive branch and of not maintaining independence. In recent years this image may be changing, however²⁰.

Guatemala, the small neighbour of Mexico, has a system of both a Supreme Court and a Constitutional Court with the remarkable characteristic that judges are only appointed for five years and are not in practice re-elected. There is much discussion as to whether this system can secure independent justice.

The examples from Latin America show what different roles supreme justice can play, even in a continent based on a common colonial culture, where countries have shared experience as to the way independence from Spain was reached at the beginning of the 19th century. My way of approaching supreme justice therefore comes close to that advocated in the old rule formulated by Montesquieu: laws are different according to different conditions. In this respect I think that political conditions, the way in which governments function and political changes in particular play a significant role. Or we can turn the matter around and say that the way supreme justice is organized also reflects important features of a given society. Mexico is moving, Chile has a tradition of stability (with well known exceptions), Argentina is a country with somewhat complicated relations between population and politicians, and Guatemala has a historical past of military rule and genocide that is difficult to overcome. That is the surface. When we dig out roots to find the spirit of the law in a country, as Montesquieu asks us to do in his *De l'Esprit des Loix* from 1748, we see that understanding the different roles of supreme courts in different countries is one of the keys not only to legal culture in the world today but also to a better understanding of the role of justice in society.

²⁰ On the Argentinian Federal Supreme Court and the executive branch, see Yves Dezalay and Bryant G. Garth (2002, p. 245): "The courts remain highly politicized...".

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