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constitutional
thinking
beyond
borders

Comparing Constitutional Networks

Priv.-Doz. Dr. Konrad Lachmayer

Irish Society of Comparative Law Annual Conference
“(Dis)Locating Comparative Law”
NUI Galway, May 23, 2016

www.lachmayer.eu
konrad@lachmayer.eu

Comparing Constitutional Networks

1. The Concept of Constitutional Law
2. Federalism and Sub-national Constitutions
3. Neo-Federalism and Transnational Constitutions
4. From Constitutional Fragments to Constitutional Networks
5. Methodological Consequences

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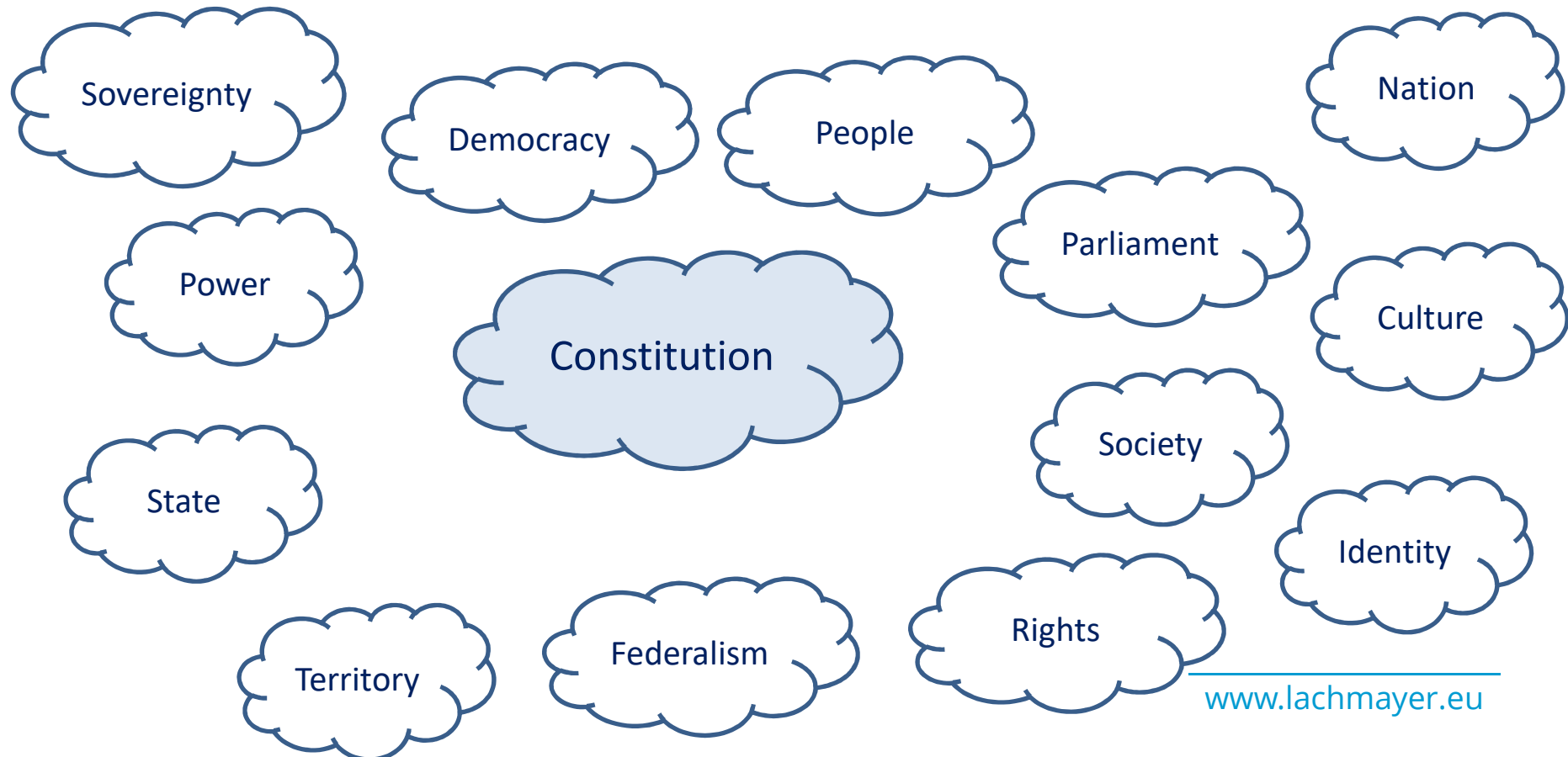
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1. The Concept of Constitutional Law

Constitution as State-building concept



Functions of Constitutional Law



Unifying political power

Monopolising (Political) Power

Legal expression of political power

Structuring (political) power

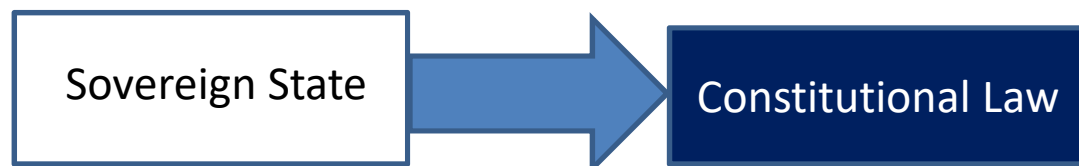
Legitimising and binding (political) power

Addressee of political demands:

- Democracy
- Human rights
- Social justice

...

Characteristics of Constitutional Law



Establishing a legal system, legal expression of political authority

Unifying a social entity

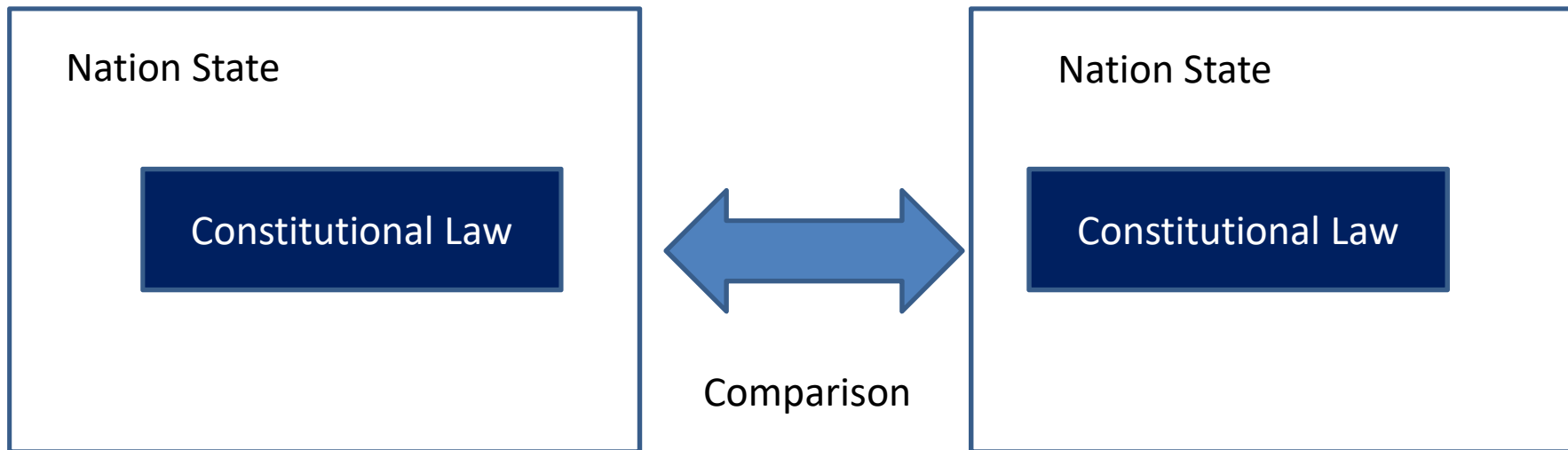
Re-structuring a unified entity („separation of powers“)

Legitimizing and Binding Political Power („rule of law“)

„Constitution as a single, unitarian, coherent level of law“

„Constitution as a higher, even supreme level of law“

Comparative Constitutional Law



Ideas?

Function?

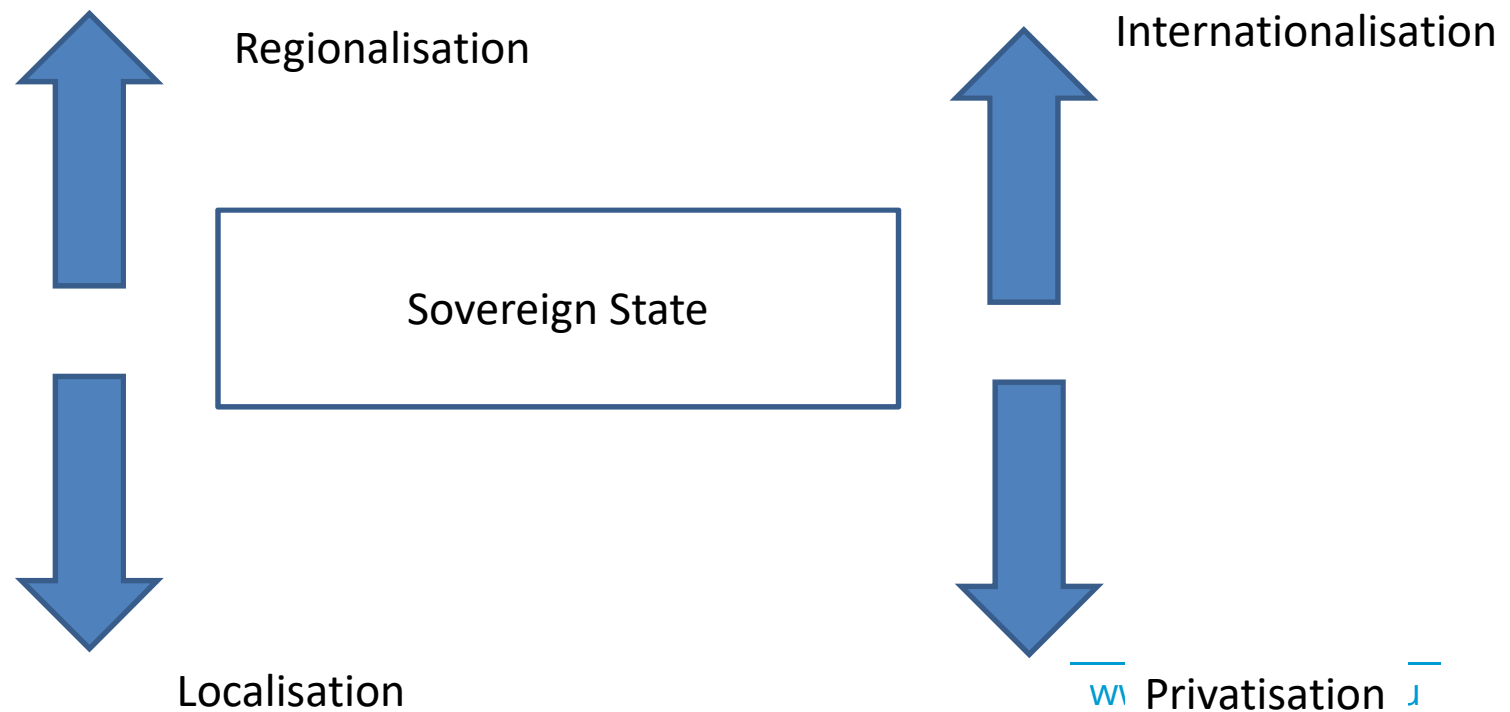
Culture?

Identity?

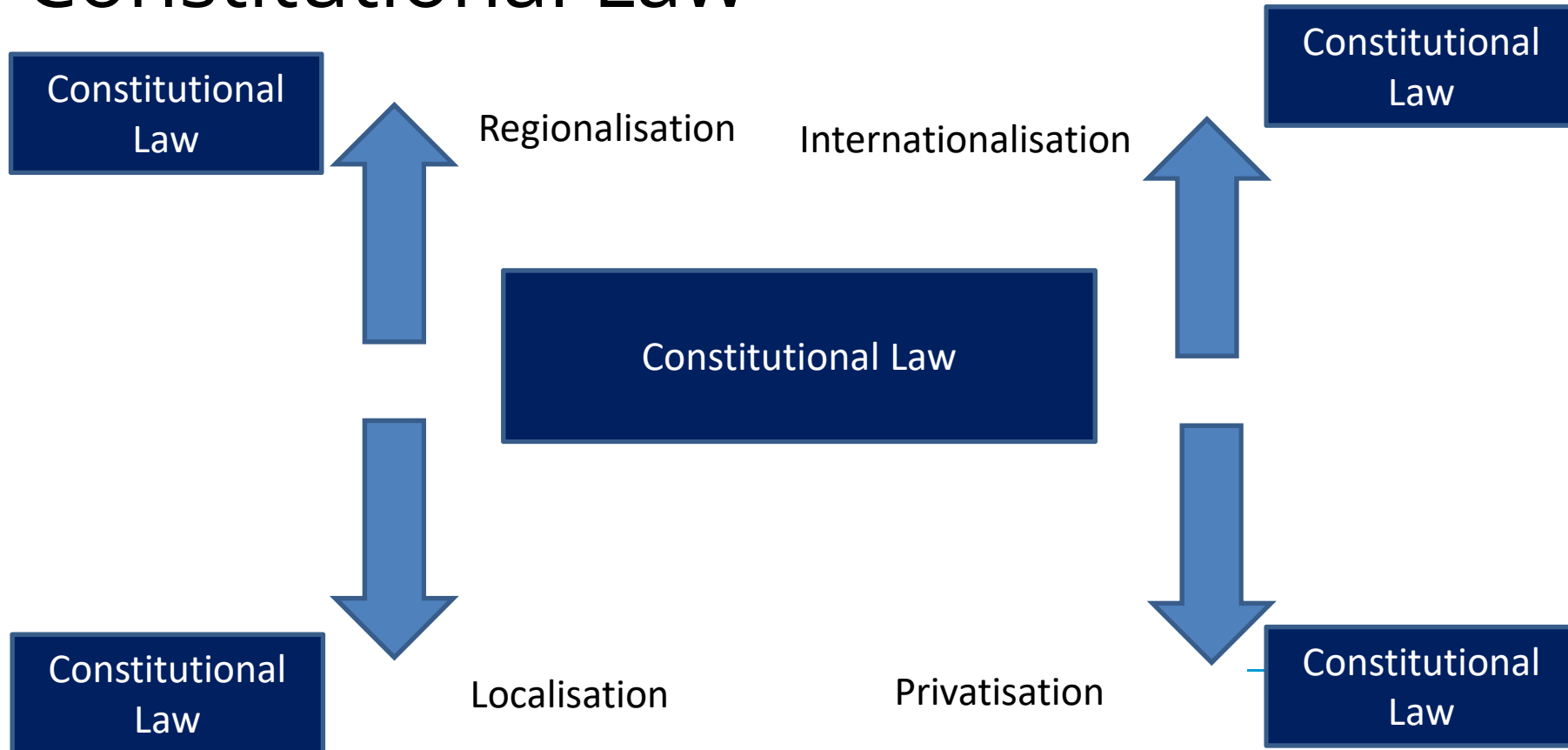
Locating Constitutional Law



Dislocation and Dispersion of Political Power



Dislocation and Dispersion of Constitutional Law



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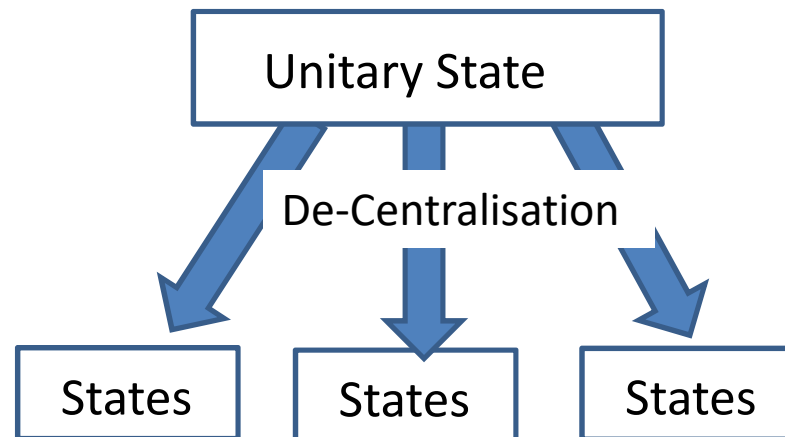
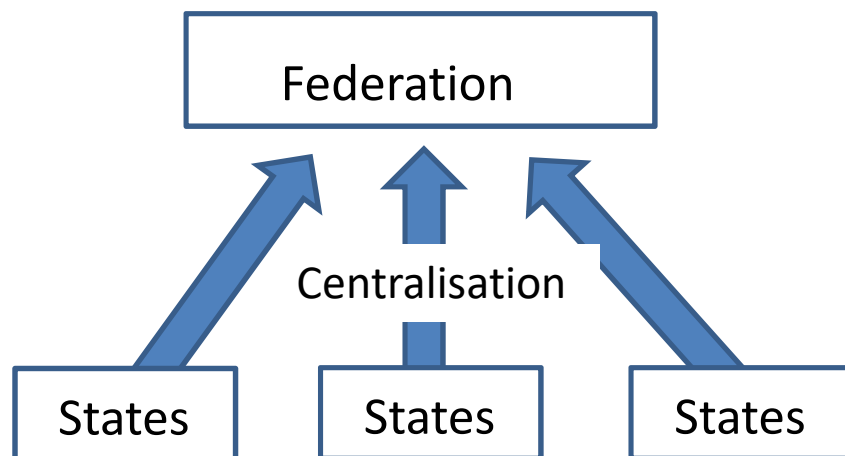
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2. Federalism and Sub-national Constitutions

Federalism



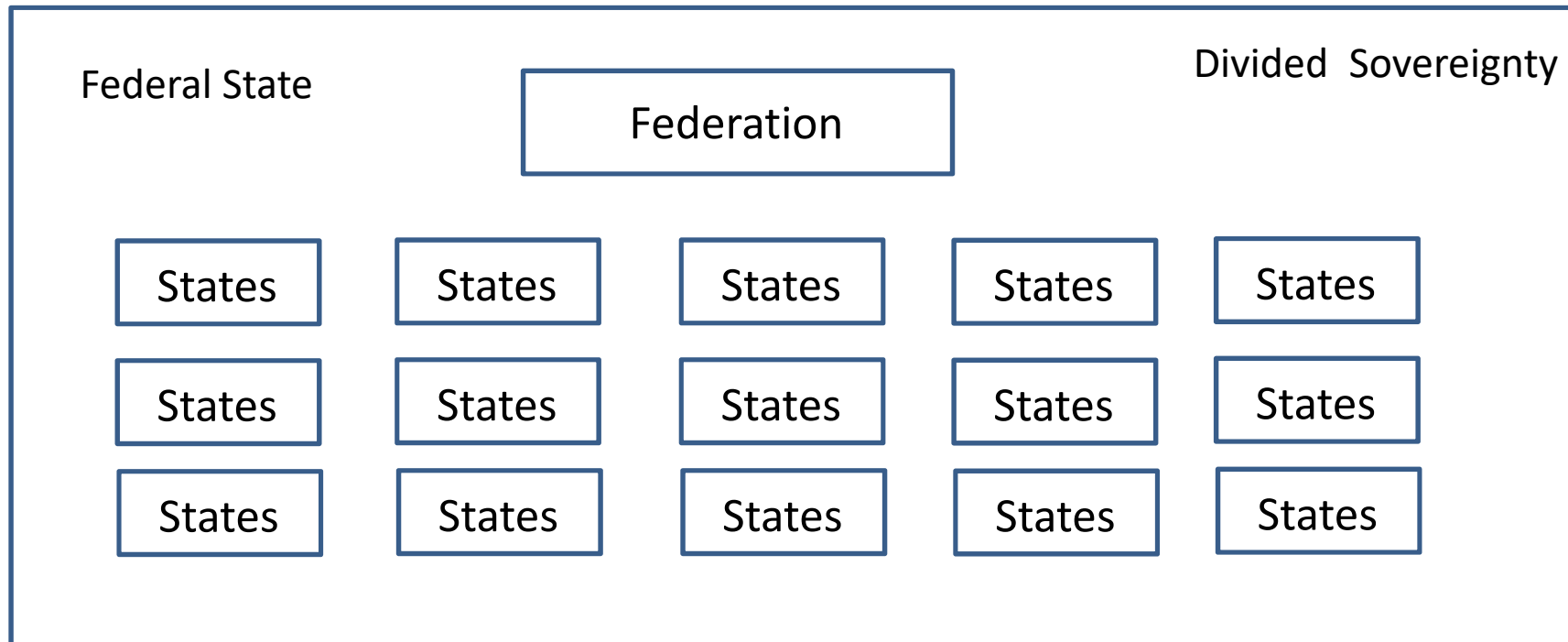
Culture?

Identity?

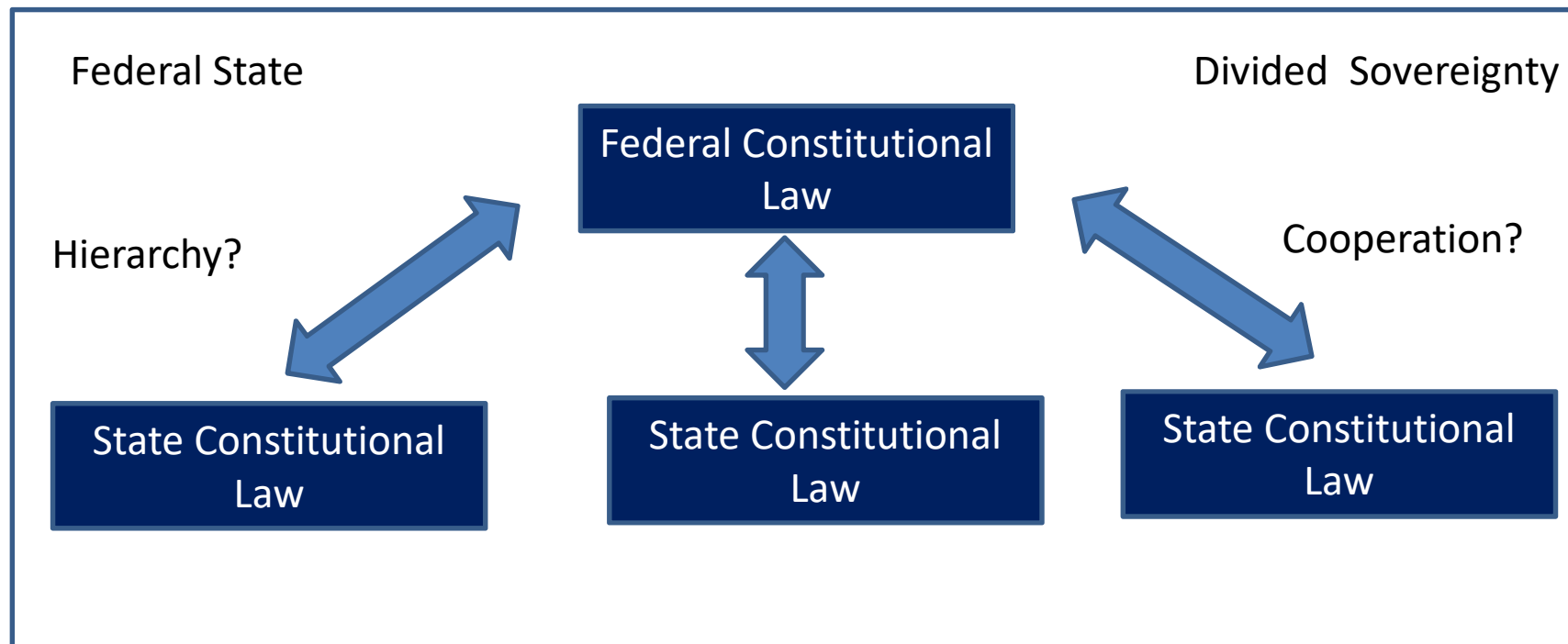
Society?

Federalism

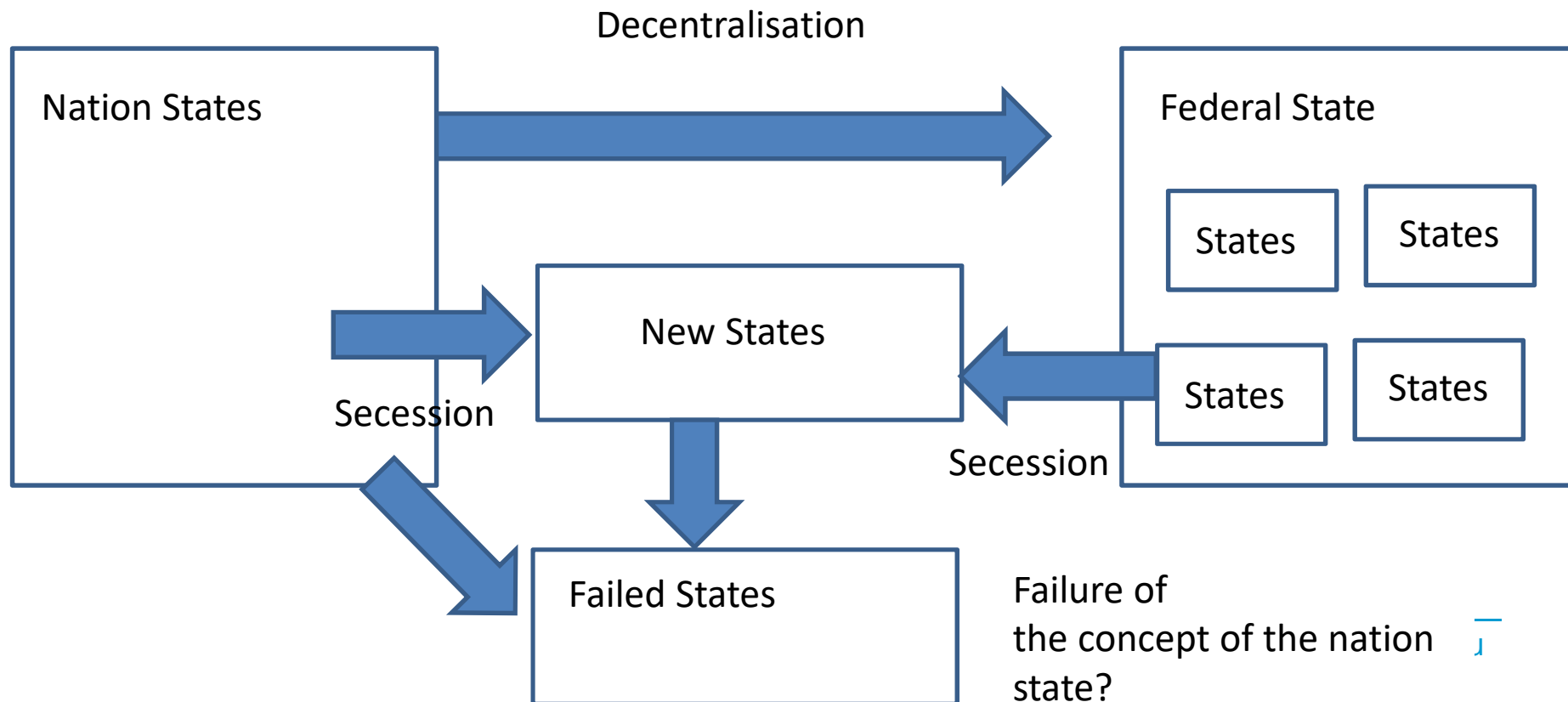
Sovereign State



Sub-national constitutions



Evolution of States and Dynamics of Federalism



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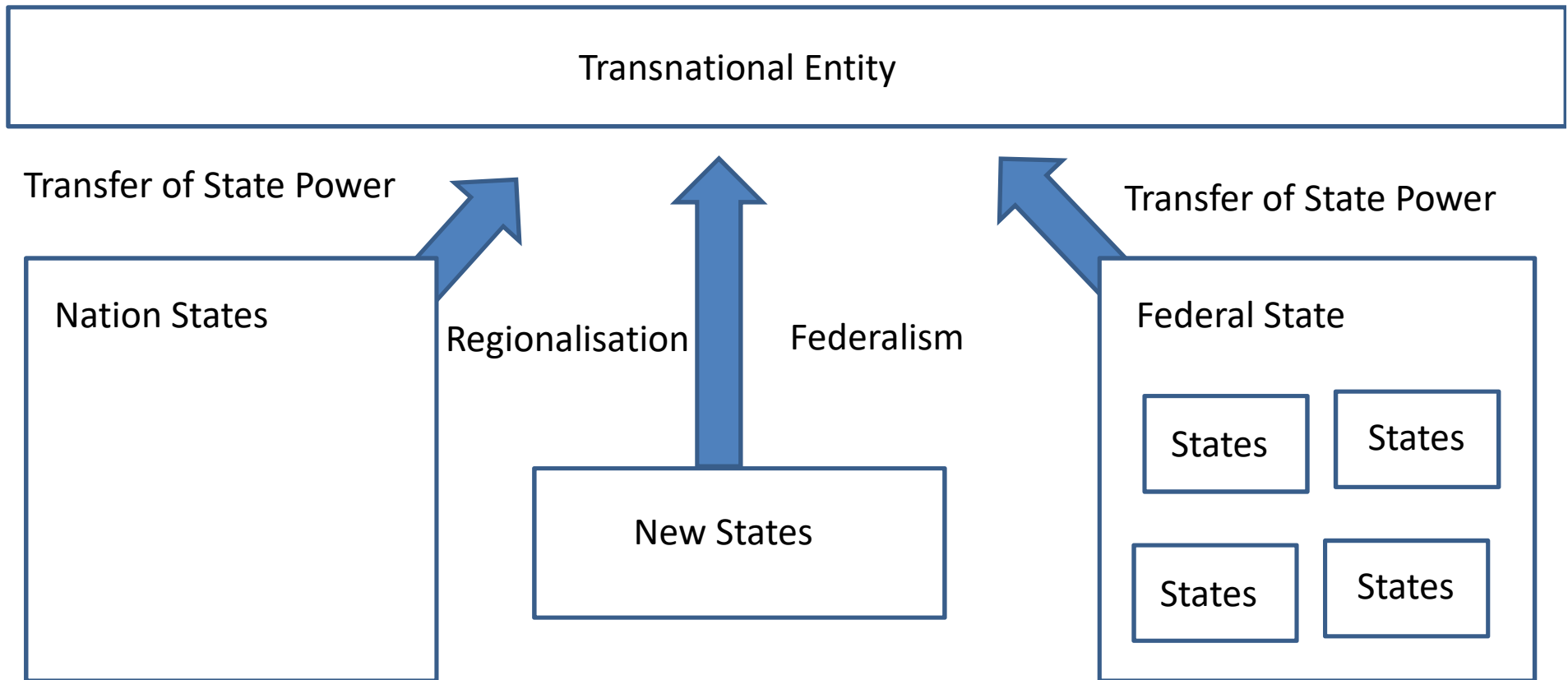
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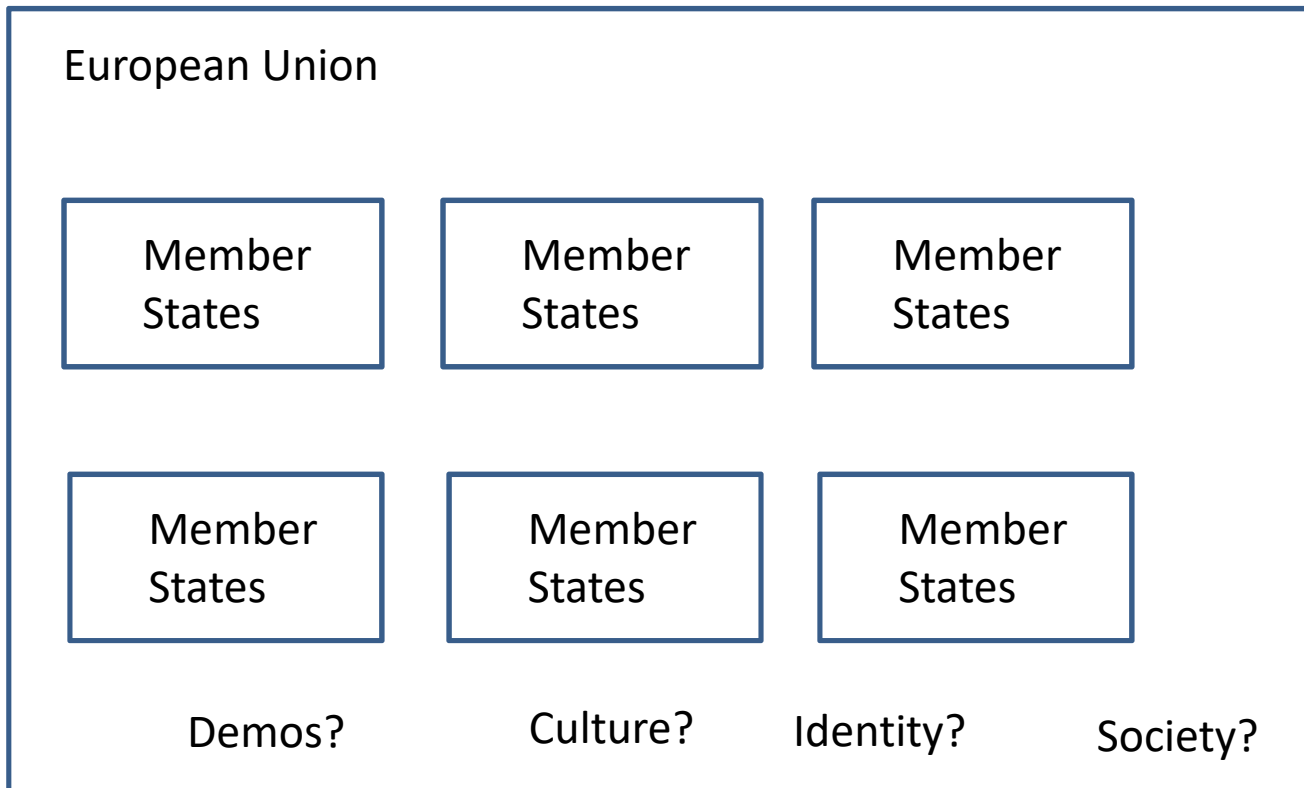
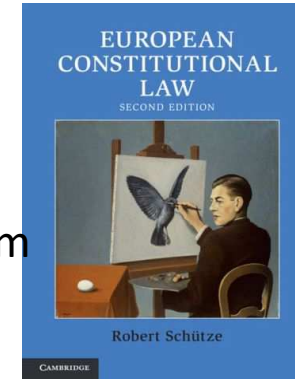
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3. Neo-Federalism and Transnational Constitutions

Regionalisation and Federalism



European Constitutional Law



Constitutional Dimension:

- Legal expression of political power
- Structuring (political) power
- Legitimising and binding (political) power

International Constitutional Law

Transfer of
state power



Post-Sovereignty
Concept



Constitutionalism

**Anne
Peters**

International Organisation

Member
States

Member
States

Member
States

Member
States

Member
States

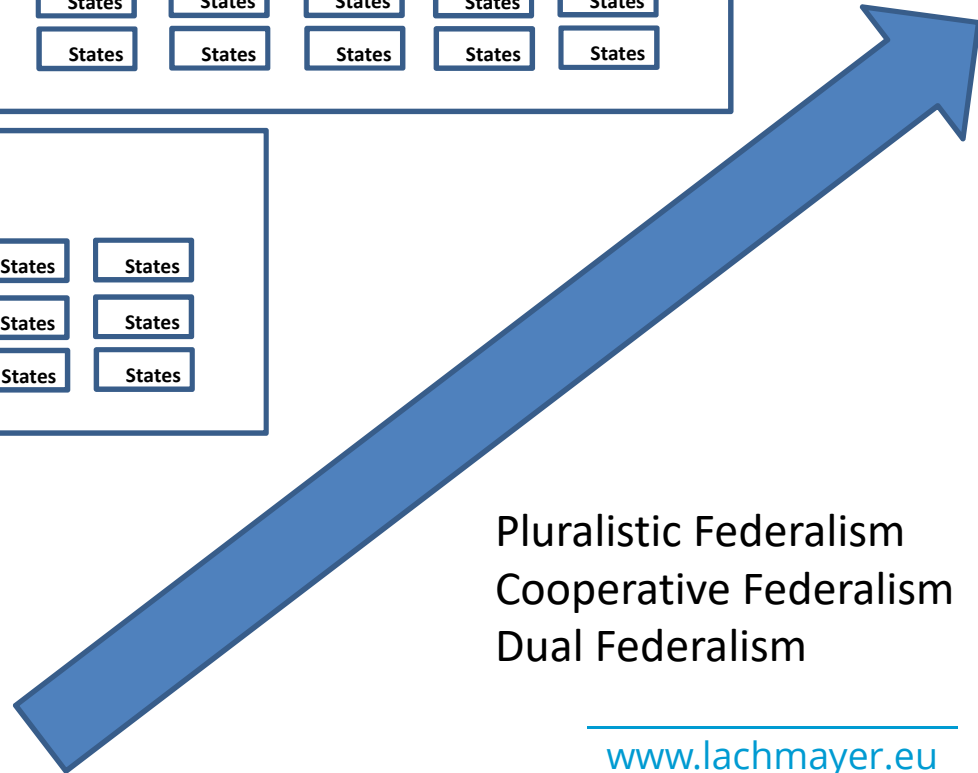
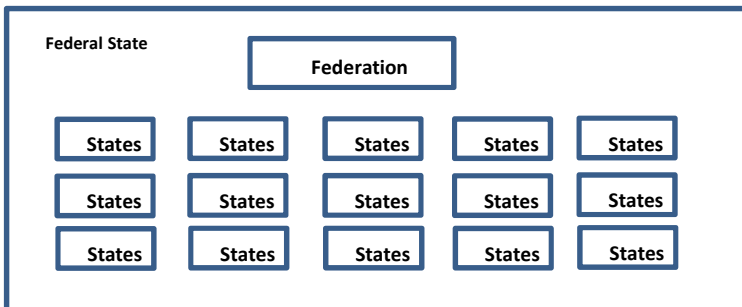
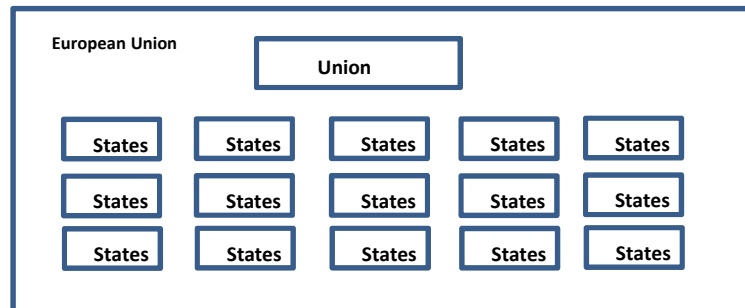
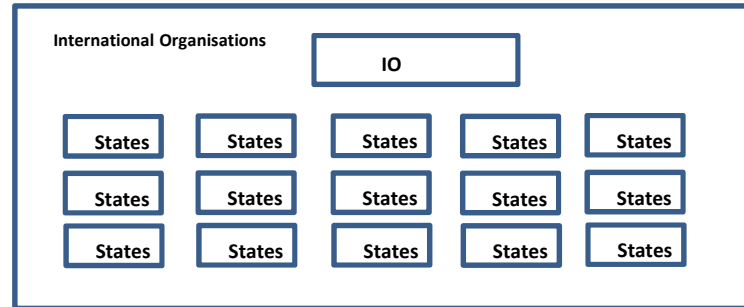
Member
States

Constitutional
Dimension:
- Legal expression of
political power
- Structuring
(political) power
- Legitimising and
binding
(political) power

No Demos // No Culture // No Identity

Neo-Federalism

Robert
Schütze



Pluralistic Federalism
Cooperative Federalism
Dual Federalism

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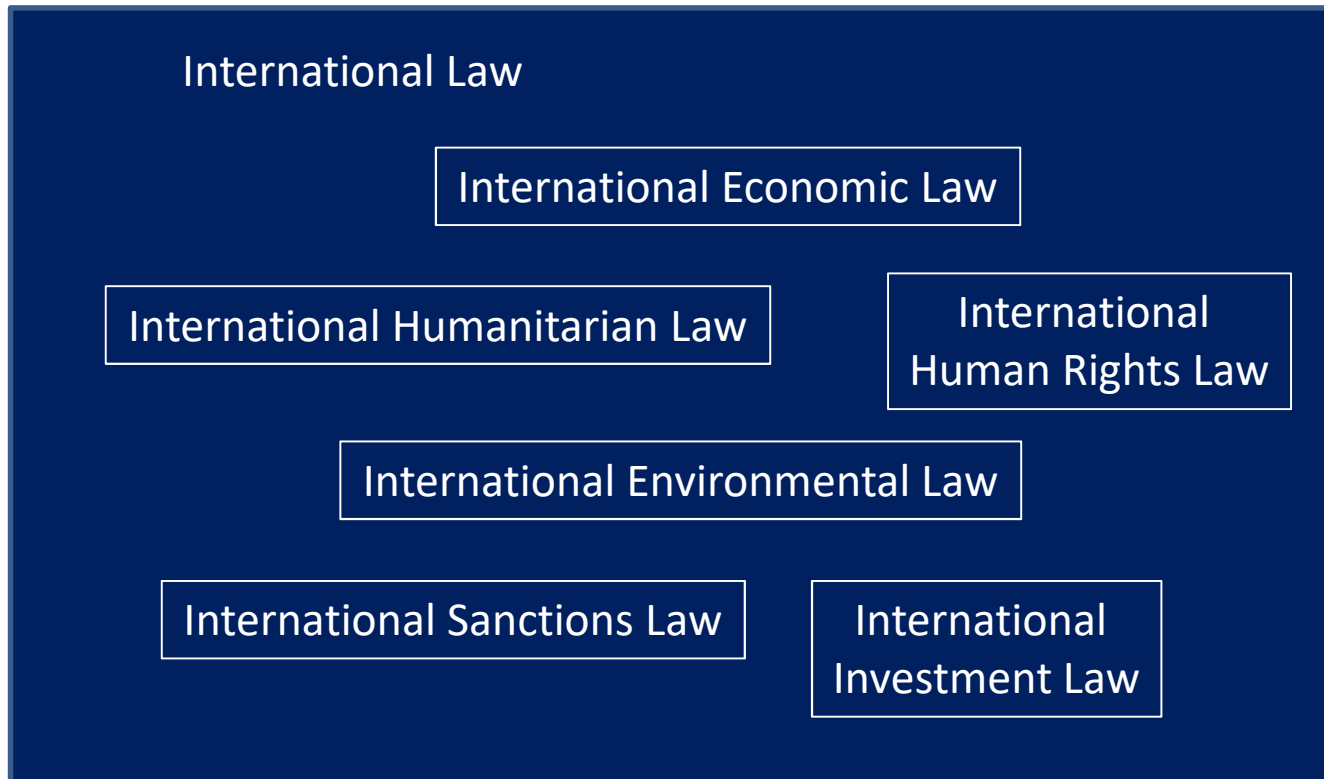
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4. From Constitutional Fragments to Constitutional Networks

Fragmentation of International Law

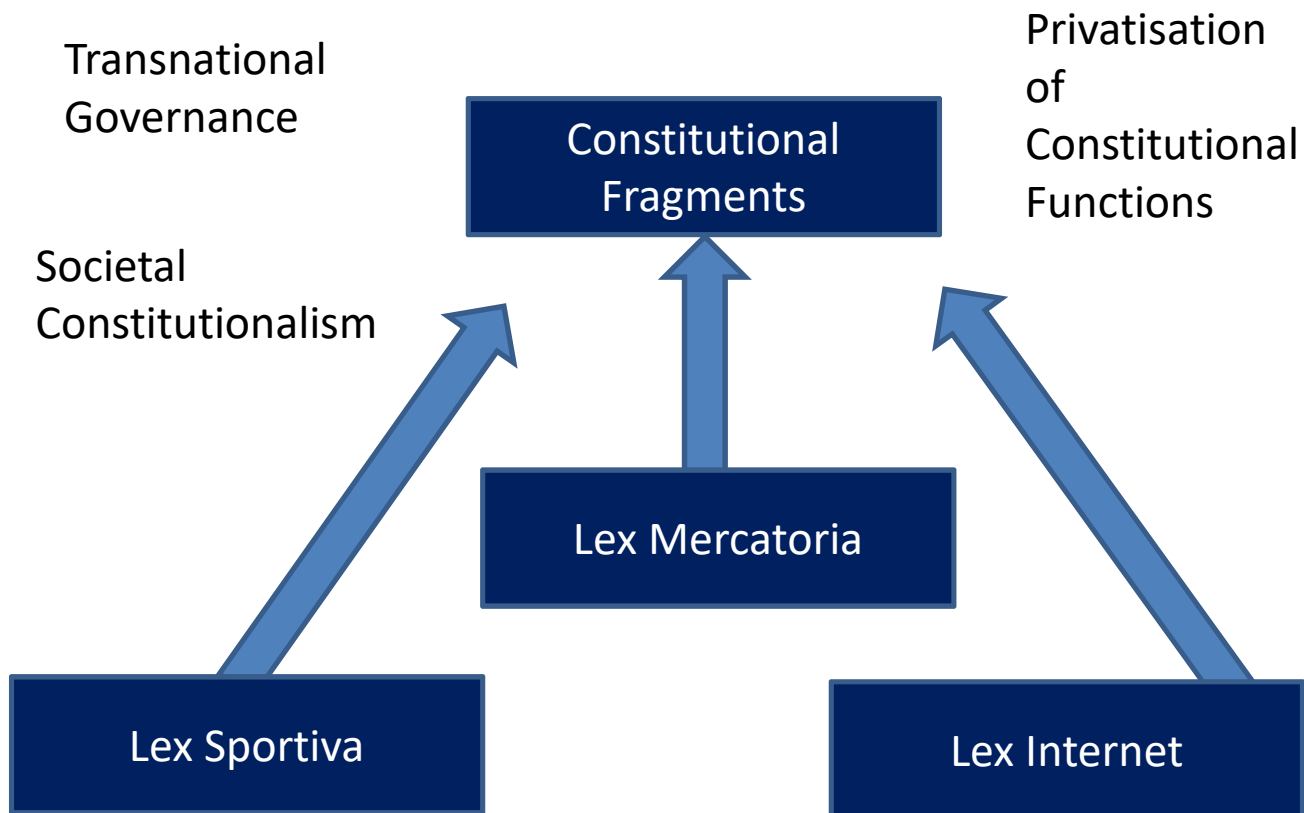
**Martti
Koskenniemi**



Constitutional Dimension:
- Legal expression of political power
- Structuring (political) power
- Legitimising and binding (political) power

Constitutional Fragments

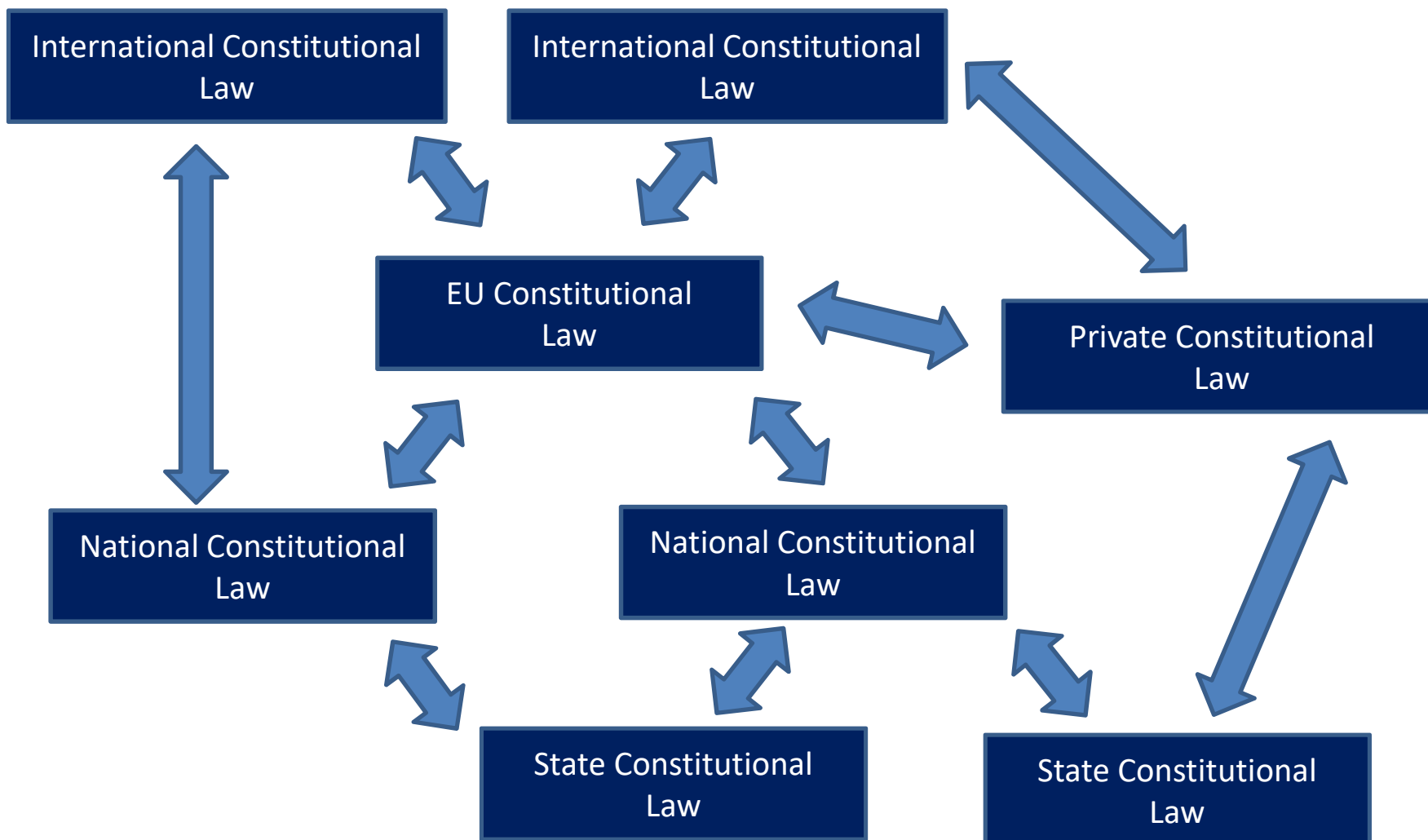
**Gunther
Teubner**



Constitutional Dimension:

- Legal expression of political power
- Structuring (political) power
- Legitimising and binding (political) power

Interrelating Fragments: Constitutional Networks



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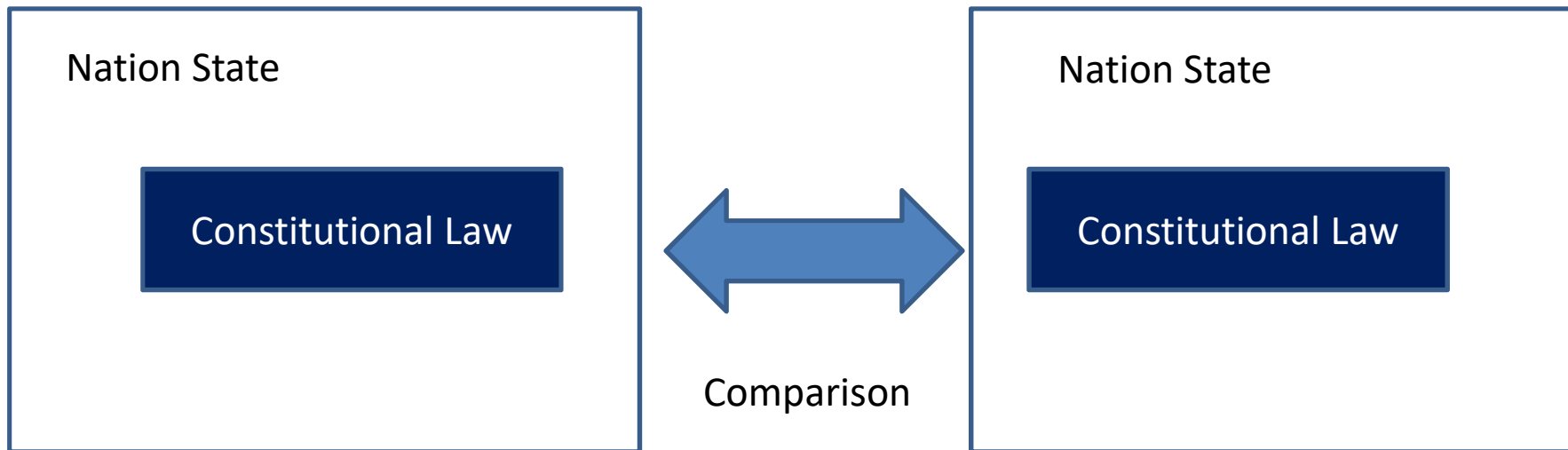
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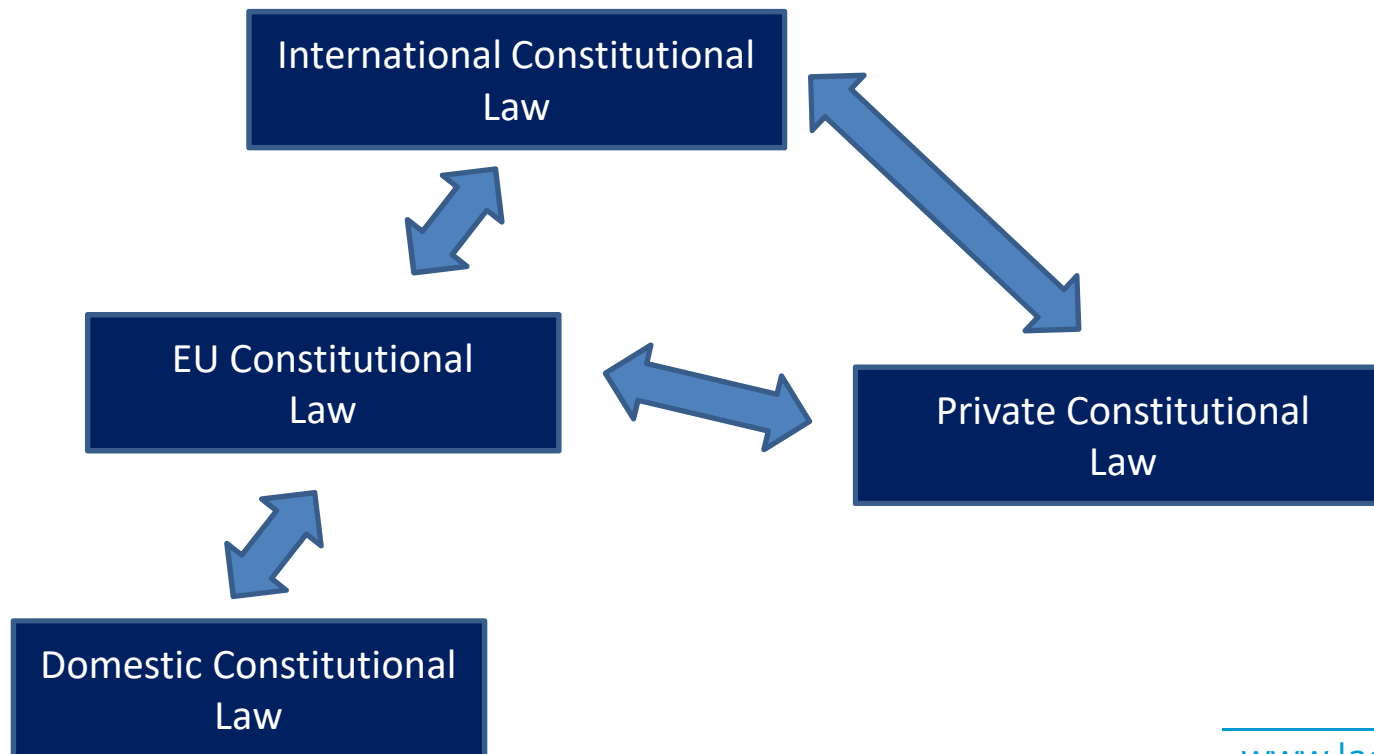
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5. Methodological Consequences

Comparative Constitutional Law



Comparing Constitutional Networks

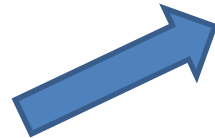


Revisiting the Functionalist – Contextualist Debate

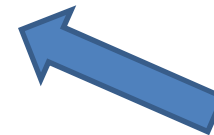
Functionalist

Contextual

State-based comparison



Similarities of
Social Problems



Differences of
Cultural Particularities

Society?

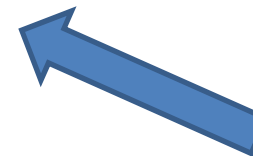
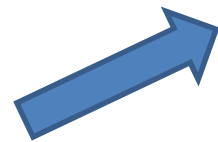
Culture?

Revisiting the Legal vs Social Science Debate

Legal

Social Science

State-based comparison



Problem-based
institutional analysis
Thick „constitutional“ concept

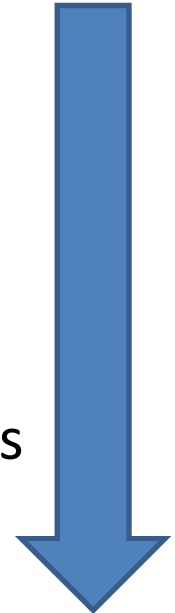
Text-based databases
numerical/statistical analysis
Thin „constitutional“ concept

People?

Constitutional texts?

Steps towards a new way of comparison

- Addressing national constitutions, which might be the wrong legal level (place) to find answers to the questions
- Comparing international law regimes
- Cross-comparison of national and transnational constitutions



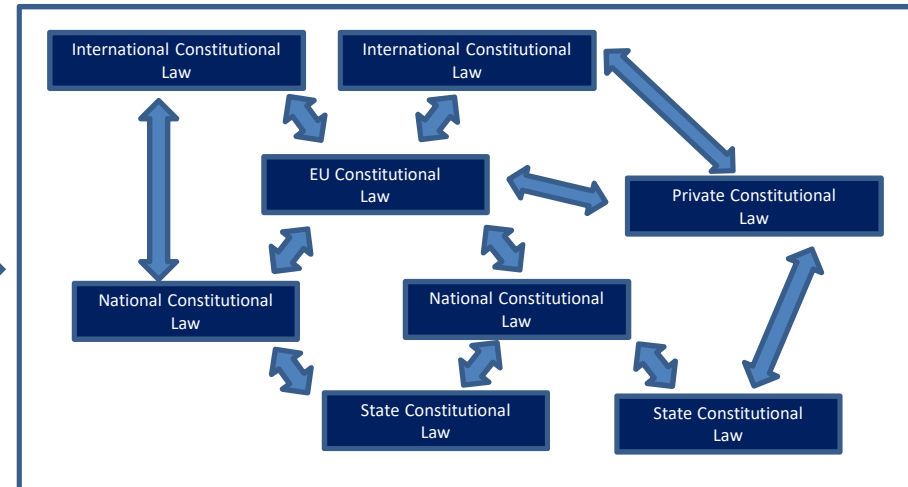
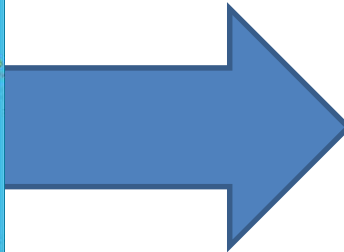
Comparing Constitutional Networks

- Different constitutional layers (fragments) have to be taken into account at the same time
 - multi-level human rights regime in comparison to the multi-level environmental law regime
- Dynamics have to be taken into account
 - Sub-national constitutionalism results in national constitution affecting transnational constitutions (e.g. Scotland case)
- Comparing relations between constitutions became more important
 - Different influences of transnational courts on domestic courts

Comparing Constitutional Networks

- Identifying relevant constitutional fragments
- Analysing of the dynamics and interrelations of these constitutional fragments
- Methodological pluralism (functional, contextual, hermeneutical, quantitative ...)

Dis-Locating Constitutional Law



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