

Concepts, models and traditions of a comparative European constitutional history

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1. *History of Law and Constitutional History – seen from the perspective of the History of Science*

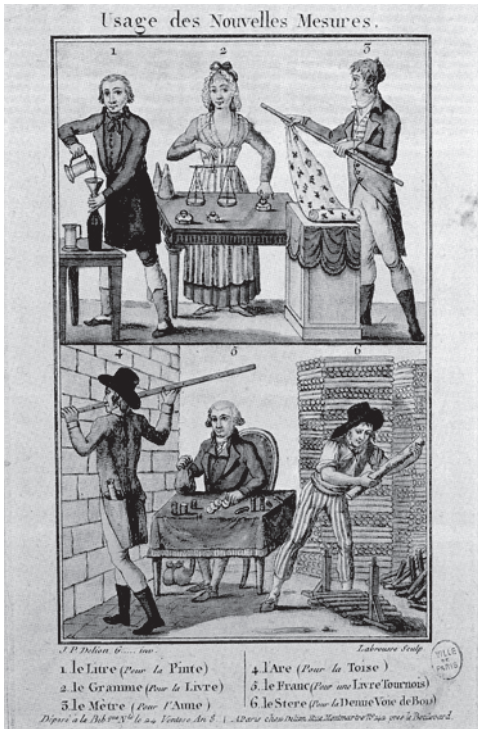
The historical subjects that now are known as “Rechts- und Verfassungsgeschichte” originated in the course of the differentiation of jurisprudence and the historiography during the 16th and 17th century. This historical process is embedded in the development of the sciences beginning at mediaeval universities, ending with the reform of universities in 1800. The History of law and the constitutional history have not always been there. They are products of the contemporary comprehension of one’s own history, of the culture of law being contained in it; thereby they both are historical phenomena.

Only from a historical viewpoint it is possible to explain that these subjects are taught since the 18th century in Germany and especially nowadays at law schools. It is not coercive – neither from the side of

the jurisprudence nor from the side of the historiography.

Even more important is: There is no specific history of law and constitutional history – not even in the sense of a consensus of methodological convictions. Other coherences concerning the culture of law lead on to another comprehension of law and its history.

The history of science within the history of law should therefore neither be a story of melancholic deterioration nor a story of ingenuous progress. It should be able to explain how changing contexts concerning the culture of law lead up to different conceptions of history and the history of law. It should also be able to explain how arguments from the side of the history of law were applied for the justification of actual decisions and how the formation of an academic discipline can change since its questions become a process with its own dynamics and through exterior factors like political hopes, seductions and restraints.



"Usage des Nouvelles Mesure", stampa edita per illustrare al popolo le corrispondenze tra le vecchie e le nuove misure introdotte per legge il 18 germinale anno III, autore Labrousse, custodita presso il museo Carnavalet

The history of science gives us the chance to discuss elder and contemporary premises and jaundices – including one's own – on a meta level. According to the working hypothesis it is assumed that scientific recognitional goals and the forming of theories depend on general communication about what is important to know, what seems to be important to be researched and in which institutional framework it should be conveyed to the next generation. With good reason Karl Kroeschell said: «Rechtsgeschichte ist als ein Sich-Verhalten zur Vergangenheit Symptom eines ganz bestimmten Verständnisses vom Recht der Gegenwart» (Kroeschell 1992, p. 10).

The discipline "constitutional history" requires that "constitution" is identified as a historical phenomenon. Not before the process of constitutionalisation – in which we take active part – is considered a historical process, the distance needed to describe this historical element can be gained. That was the case during the mid-19th-century in Germany. Over fifty years the constitution was being discussed, from the American to the French constitutions (1791-1814), from the South-German constitutions after 1818, the constitution after 1830 in Belgium, Sachsen, Kurhessen and Hannover to the national constitution 1848/49. The last one – and also its failure – was a very disturbing political incident for all Germans. From now on "Verfassungsgeschichte" was formed.

In Germany, one spoke of "Reichsgeschichte", or "Reich History" in the 18th century and then, in the early 19th century, of "Staatsgeschichte" or "State History". The term "Verfassungsgeschichte" or "Constitutional History" has only been known since the mid-19th century (Georg Waitz). Even then, it did not feature in the training of lawyers. It was not until the university curriculum introduced by the National Socialists in 1935 that lectures on "Verfassungsgeschichte der Neuzeit" or "Modern Constitutional History" became obligatory, parallel to "Privatrechtsgeschichte der Neuzeit" or "History of Modern Civil Law"¹.

After 1945 this new subject, having proved its value, was retained. Nowadays there are a number of text books on constitutional history in Germany, which I would like to look at briefly as they tell us something about the present state of the subject.

The older books on constitutional history (Carl Bornhak, Fritz Hartung, Ernst Forsthoff) are little used nowadays, despite having been well written. Fritz Hartung wrote an account of constitutional history in the Thirties as a historian, student of Otto Hintze and, in turn, teacher of Gerhard Oestreich. His interpretation of the concept of constitutional history was a broad one – he included administrative history in the term, and understood it on a “national” basis (Grothe 2005). The same applies, with a few modifications, to Ernst Forsthoff, whose short textbook written during the war was republished several times during the post-war period.

After the Second World War ended, Ernst Rudolf Huber wrote his monumental “German Constitutional History since 1789”, which ran to seven volumes each some 1,000 pages in length (Huber 1957-1982). The circumstances of its writing were rather special. As a former collaborator to the national socialist system, Huber was *persona non grata* for many years in the Federal Republic and he concentrated on writing this work over a period of four decades². He took a comprehensive view of the concept of “constitution” as referring to the political (social, economic and cultural) “state” of Germany. The sheer wealth of material contained in the book is impressive, and his account provides an indispensable resource for all subsequent researchers. His interpretation is a conservative, harmonising one that contains overtones of Hegel’s philosophy of history, and he takes a much more positive view of the constitutional monarchy of the 19th century than we generally do nowadays (Walkenhaus 1997).

There is no need to look in detail at the many introductory courses written for teaching purposes (Boeckenfoerde 1981; Boldt 1993; Botzenhart 1993; Brandt 1998; Fenske 1991; Frotscher, Pieroth 2005; Grimm 1988; Jeserich, Pohl, von Unruh 1983; Kimminich 1987; Kröger 1988; Menger, 1993; Scheyhing, 1968).

In some cases they are not really original and in some they are incomplete. None of them takes a comparative, European approach. Only Dieter Grimm includes American and French developments in such a way that their outcome can be transferred to Germany, but unfortunately his short book stops in 1866 (Grimm 1988). At present, the best account of German constitutional history is by Dietmar Willoweit (Willoweit 2009). This was written by a legal historian who is familiar with the medieval period from his own research, particularly strong on the early modern period but has also produced his own studies right down to the legal history of the Federal Republic. He has written a highly condensed account that displays a familiarity with the literature and is free of any narrow nationalism. In other words: we have in Germany today sufficient textbooks on constitutional history, including the particularly good account by Willoweit – but there is, for example, no comparative historical introduction to western constitutional law of the sort produced by R.C. van Caenegem (Gent) (van Caenegem 1995). However, I will close this initial overview of the literature by mentioning two interesting recent publications by historians. The Freiburg historian Wolfgang Reinhard has written a Comparative Constitutional History of Europe from Early Times to the Present Day (Reinhard 1999; Stolleis 2000). The book

has received brilliant reviews, and the author was – in my opinion deservedly – awarded the German Historians' Prize. Reinhard describes the development of "states" in Europe as a gradual change in the structures of governance since the Middle Ages. His account encompasses a broad panorama: Germany, Italy, France, Portugal, Spain, England, Denmark, Sweden, Bohemia, Poland and Hungary. And he actually compares structures, rather than merely juxtaposing them. His book finishes in the present, where he discusses the highly topical issue of whether the transition into the European Union signals the beginning of the end for the European states. One criticism made of the book is that it approaches the subject too much from the point of view of the state, takes too little account of the co-operative movement and neglects the significance of the cities and grass roots movements such as the peasants. That is undoubtedly the case, but his intention was never to write a "total" history but rather one of "state power". Virtually parallel to Reinhard's book, another Freiburg historian, Hans Fenske, also published a work entitled "The Modern Constitutional State. A Comparative History from its Origins to the 20th Century" (Fenske 2001). This is, in my opinion, a less successful book, because it not only takes an "unhistorical" approach – the modern constitutional state is the "telos" of history – but also is a largely descriptive account that does not achieve the depth of reflection of Wolfgang Reinhard's work.

Legal historians in law faculties have not, as yet, produced any comparative constitutional history, and I cannot at present identify anyone who would be able (or willing) to do so³. But of course we do

have the freedom to consider how such an account written from a German perspective and against the background of German traditions might look. Before I do so, I would like to describe the present situation as I see it.

2. *New projects and perspectives*

The conditions for producing such an account have improved considerably over the last 30 years. Only a few years ago, the sort of large-scale analyses of forms of government and administration attempted by Max Weber and, above all, Otto Hintze⁴ had not really been continued post 1945. But if one now looks back at the last thirty years, one can see that considerable progress has been made throughout Europe.

Institutional comparative research can now build on a solid base of results. I am thinking here of the many studies of parliaments and courts of justice (Parlement de Paris, Groote Raat van Mechelen, Reichskammergericht, Högsta Domstolen in Sweden), studies of *conseils d'Etat*, electoral law, local authority self-government and many other aspects of administration⁵. A historical approach that is more strongly oriented towards social history than in the past has also produced many comparative studies of local office-bearers, especially in the historical "School of Bielefeld" (Hans-Ulrich Wehler, Jürgen Kocka)⁶.

Since 1992 we have gathered and published large quantities of material about "politia" (*polizia, policey*) at the Frankfurt Max-Planck-Institute for European legal history. We have been able to cover and

compare many thousands of legislative acts from Germany, Austria, Sweden, Denmark and Switzerland⁷. There has also been revival in Europe of comparative histories of political ideas and theories of state. I am thinking, for example, of the work of Quentin Skinner in Cambridge, Michel Senellart in Lyon, Enzo A. Baldini in Turin and Gianfranco Borrelli in Naples; people that intensively dedicated themselves to the thoughts of Machiavelli and his reception during the European machiavellianism.

History of ideas and intellectual history are well established⁸. In Germany, an association for the "History of Political Thought" has been set up⁹. There is intense interest in studies of mentalities, collective attitudes, the history of symbols and symbolic actions, rituals and ceremonies (Miloš Vec, Barbara Stollberg-Rilinger).

Finally, there is a growing number of general accounts and monographs on the history of administration. In Germany a massive five-volume work entitled *Deutsche Verwaltungsgeschichte* ("German Administrative History") appeared between 1983 and 1988, and Finland (thanks to the activities of Heikki Ylikangas) and Denmark (thanks to Ditlev Tamm in Copenhagen) now also have complete administrative histories. In Italy there even is a *Fondazione italiana per la storia amministrativa (FISA)* and, in Milan, an "Istituto per la scienza dell'amministrazione pubblica".

In Florence, Maurizio Fioravanti published a major work on *La scienza del diritto pubblico* in 2001. Bernardo Sordi has written three books on the history of administration (*Tra Weimar e Vienna. Amministrazione pubblica e teoria giuridica nel primo dopo-guerra*, 1987; *Giustizia e amministrazione nell'Italia liberate*, 1985;

L'amministrazione Illuminata, 1991). Giulio Cianferotti published the first volume of his *Storia della letteratura amministrativistica italiana* in 1998. In Poland, Jerzy and Dorota Malec (Krakow) have published several books on Polish administrative history. In Germany, above all, Erk Volkmar Heyen (Greifswald University), together with Guido Melis, Jean-Louis Mestre and others, has been publishing a *Yearbook of European Administrative History* for the last decade. For Spain and South America there is, for example, Bartolomé Clavero's book *Happy Constitution, Cultura y lengua constitucionales*, 1997. Therefore one can justifiably say that there is now a wealth of material and insights into the subject. Of course they are not all in one place, easily accessible to all-corners. In many cases, people do not have the language skills required to make use of them. And there is no European forum or journal providing for an exchange of information and ideas. Many researchers are not even aware of each other's existence. That is why it would seem to me to be the right moment to give some consideration to the possibility of setting up comparative projects at European level.

3. Comparative Constitutional History

What form could comparative constitutional history assume? What methodological guidelines could there be for such a discipline? We know from the history of humanities that specialist areas such as political history, economic history, social history, the history of ideas, mentalities and culture, or – more specifically – "Roman legal history", "national legal history",

“history of civil law”, “history of public law” and, indeed, “constitutional history” are not phenomena that one finds in “nature”, but rather products of university teaching. In most cases they are not more than a hundred or a hundred and fifty years old. They are lecture modules and therefore represent the ring-fenced territories of individual professors, each with his own particular gold-mine that he wishes to retain for himself.

That is why the first hope attached to any comparative constitutional history of Europe would be that these artificial claims could be swept aside and an attempt made to produce a “histoire totale”. Individual historians could then more freely decide whether they wish to describe particular phenomena in terms of political, economic, intellectual and cultural causes – whether, in order to understand them better, they wish to regard the individual “spheres” separately from one another as “systems” and let them interact, whether they prefer the presentation of columns of figures or “thick description” – and whether they wish to focus on persons or on structures.

Of course a “histoire totale” is not possible for practical reasons. History cannot be presented on a 1:1 scale. Both the author and the reader have to be selective. At the beginning or end of a book “hypotheses” and “theses” have to be set up that condense the endless variety of life into a certain perspective in order to make the imaginary “whole” comprehensible. That is why narrative structures (and structures to reduce diversity) have to be found. There is also a need for temporal and geographical limits to be set. To do so, I shall use the device of five theses:

1. A comparative European constitutional history should not take the form of a massive work created jointly by a large number of authors. Publishing houses like such large-scale undertakings, provided enough subscribers can be found for them, but they merely lead to a cacophony of voices, a piling up of material and resounding but empty editorial introductions. And in the final analysis nobody is interested in reading the twenty illustrated volumes that are the end result. What I have in mind would either be the work of a single author or a joint production by a small number of authors who view themselves as a group, meeting and openly criticising each other’s texts. Working with such a group would make it possible for the work to adhere to an overall thesis.

2. The imposition of temporal limits is difficult. The French tend towards choosing the year 1789 as marking a clear caesura in national terms – and from their own perspective they are not so far wrong in doing so. But other European nations find it less easy to accept this date as a crucial turning-point in history. Of course, one has to say that constitutions in the modern sense have only existed since the last third of the 18th century. If one understands constitutional history in this classic sense, then the main focus is on the nineteenth century, with the pre-history running from the *Magna Charta* via the Bill of Rights to the Constitution of Virginia. Similarly there is a Spanish and Portuguese colonial history and a founding epoch in South America in the 19th century. In Scandinavia, the monarchy between the 16th and 18th centuries will be seen as the run-up to the constitutional period of the nineteenth century. And in Germany, the history of the Holy Roman Empire from the

16th century to its end in 1806 represents the (very important) precursor of its own constitutional epoch.

Another argument in favour of regarding 1776 or 1789 as the turning point is the fact that these decades were indeed regarded by contemporaries as representing a break with the past. They marked the end of the feudal period that dated from medieval times, the creation of the "nation" out of the third estate and the step-by-step removal of inherited inequalities. They marked the beginning of bourgeois society and its associated rights and the onset of the industrial revolution and the "social question". Democracy and the rule of law, parliamentarianism and human rights – all are, as it were, derived from the new start that took place in 1789.

Nevertheless I have been arguing for years that one should not be over-hasty in selecting 1789 as the turning point. From the German point of view, the continuities are stronger. Germany did not experience a revolution along the French lines. The structures of public governance either evolved after 1806 or were changed by "reform from above". Typical for this period is the parallel coexistence of the structures of the Ancien Regime, artificial recreations of the Middle Ages and completely new elements. This also applies to many other European nations that did not go through any "quatorze Juillet".

3. It would therefore perhaps be better not merely to provide a chronological account of parallel national constitutional histories linked by a few threads, but rather to focus on a number of core questions and deal with these on the basis of a variety of different source materials.

Such core questions could be as follows:

How did the modern state evolve from the feudal system that was common to the whole of Europe? How did this "modern state" prevail in Europe over the aristocracy, the church and the cities? What role was played by the *leges fundamentales* found throughout Europe in limiting the power of the state? Did they play the same role in the early modern period that later was played by constitutions? What political and economic conditions led, in the late 18th century, to the downfall of the *ancien régime*? Was France a spectacular special case? What elements do European constitutions prior to 1830 have in common? What role was played by the industrial revolution and the "social question" around 1848 in Europe? What was the relationship between the constitutional movement and nationalism in Europe? Was the constitutional monarchy in Europe a model that might have had a future or was it only a historical "stepping stone" in the development towards an egalitarian democracy in the industrial age?

4. Any constitutional history based solely on the development and the text of the constitutions would be incomplete with regard to one crucial aspect. If it is true that "administration is the concretisation of the constitution", then every constitutional history would also need to include a history of administration as well. If one looks, for example, at early 19th century constitutions, one often finds that realisation of the postulates laid down in the constitution was dealt with directly in the form of so-called "organic edicts" that took the form of simple laws. If these edicts and their practical implementation are ignored, then one would only be left with the empty text of the constitution and would not be in a position to say what had developed out of it.

There is no doubt that the difficulties in realising this postulate begin to pile up; it will not be possible (if only because of a lack of any groundwork) to describe the political development of the constitution parallel to providing an account of the administration for all countries and simultaneously make a comparison with other countries. But at least an attempt should be made to do so.

5. A particular problem is that of imposing geographical limits on such an undertaking. What is Europe and how far does it stretch? There have been many publications on the issue (J. Kocka 2005). For some, Europe is a fantasy, an antique fable, a figment of the imagination that has been attached to this unusual geographical construction on the western edge of the continent of Asia ever since classical antiquity. Anyone who thinks along these lines stresses the fact that "Europe" is a projection, an attitude of mind. For the "realists", Europe is the reality of the present European Union (including the accession states) in Brussels, Strasbourg and Luxembourg, and the reality of its institutions and policies. These realists, too, are, of course, aware that this European Union has a long and varied history that incorporates periods of both war and peace. If one looks more closely at the differences, one realises that the gap between the fictionalists and realists is very small indeed.

Both camps agree that Europe has relatively clear borders to the South and North. In the South these are marked by the Mediterranean. Egypt, Libya, Tunis, Algeria and Morocco may not be in Africa, but they are not part of Europe either. To the North, the limits are marked by the Arctic Circle. But things become rather more difficult when it comes to defining the western

and eastern limits of Europe. In the West, the question is whether one includes South and North America. Both continents were colonised by the Europeans and subsequently, in the 18th and 19th centuries, gained independence. For the Spanish and Portuguese, therefore, the question arises just as it does for the north-western Europeans as to whether this "New World", which is European in genetic terms, should not be included in any comparative study. There are cogent arguments both for and against.

Demarcation to the East and South-East is even more difficult. Drawing the line from Warsaw to Minsk, from there to Moscow, and then to Vladivostok or the Kurile Islands offers a pragmatic delimitation of Europe from the East. For several reasons I am in favour of excluding Russia – even if, since the 16th century, there have been periods when Russia was closely oriented towards western Europe both politically and intellectually. In the Southeast, one finds the area of the former Byzantine empire (the Balkans, Bulgaria, Moldavia, Greece, the territories around the Black Sea and Turkey). This is the territory of "East Rome" – the second Rome, the empire that was conquered by the Turks in 1453.

In the discussion as to what constitutes "Europe" we need to differentiate between historical arguments dating from classical antiquity (Greece, East Rome), the medieval period (crusades, migration to south-eastern Europe) and modern times, linguistic, ethnic and cultural arguments and, finally, political arguments related to accession to the European Union.

One cannot expect the results to be clear-cut. There is no general "truth" that will be acceptable to everyone concerned.

But a research project can decide more or less pragmatically how far it wishes to cast its net. If its main focus is on the 19th and 20th centuries, then there is no doubt that all these countries have to be included. World politics, and therefore also the constitutional history of the 19th century, would be unthinkable without the Spanish, Russian and Ottoman, the Habsburg and British empires. But this only seems to be a modern problem. In medieval times European expansions, colonisations, crusades and conquests begin. In the late 15th century the expansions start to explode up to the new world as well as around Africa to Asia¹⁰. The French, the Portuguese and the Dutch Colonial Empires have to be included as elements of the European "Verfassung" as well as the imperial expansion beginning with Gustav Adolf, leading up to Karl XII. Similarly Prussia had its phase of expansion and diminution within the German – speaking area up to its termination after the Second World War. Hitler's dreams of a "Großraum" in the east belong here as well as Mussolini's imperial expansion attempt to Africa. During its long history Europe has always been traversed by lines of force of dominant States, by which the smaller ethnicities and national states orientated themselves. The centers of gravitation changed. Perhaps now, twenty years after the decline of the Russian – Soviet Empire, it is becoming clearer that European constitutional history can not be about an addition of national constitutional histories. The unsettled continent Europe that nowadays step by step treads the path of juridification, even perhaps of constitutionalisation (Grimm 1995; v. Bogdandy 2003; 2005; Pernice 2001), has witnessed times of relatively delimited

sovereign National States, but also epochs antecedent to the state, that structurally resembled the variety of the "Multilevel Constitutionalism" (Pernice 2006) even more.

These similarities shall not suggest identicalness; much less they shall propagate the return to elder conditions, they shall only give impulse to reflect about the question how the future could be created after the epoch of the national states. Therefore European constitutional history – like in the 19th century when the word "Verfassungsgeschichte" emerged – will incorporate intensive suggestions from the current discussion about a "Ius Publicum Europaeum" (Bogdandy, Cruz Villalón, Huber 2007-2008; Pernice, Engelhardt, Krieg, Ley, Saldias 2009). It is uncertain where the path leads to. But we definitely can say that the times of national constitutional histories are over.

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¹ Regarding one of the most influential protagonists see Eckhardt 1935; concerning the role of the most important figure see Grothe 2007; Frassek 1994; Id 2004.

² Grothe (Anm. 3), pp. 165 ss. (the reforms of legal education, pp. 190 ss.); 1999; 2008.

³ The most comprehensive document on legal history (not constitutional history) comes from Wesel 2001.

⁴ Grothe (Anm. 3), pp. 55 ss.

⁵ Best survey by Diestelkamp 1996. See also Battenberg, Ranieri 1994.

⁶ See for example the broad debate around the last volume of Wehler 2009.

⁷ Stolleis 1996, with contributions to Italy, France, Spain, Bohemia

and Moravia, Silesia, Hungary and Siebenbürgen, Poland, Netherlands, Switzerland, Denmark, Sweden and England. From the repertoires the volumes concerning below mentioned territories are published: the Reich, Cologne, Mainz and Trier, Brandenburg-Preußen (2 vol.), the Wittelsbach territories (2 vol.), Württemberg and Baden (1 vol.), Hannover, Saxony (1 vol.), smaller territories (2 vol.), Denmark and Switzerland (2 vol.). The volume for Sweden is expected. – For the history of ideas see Simon 2004. – Relating to the imperial free towns now see Härter, Stolleis 2007. The repertoires for Frankfurt am Main, Cologne and Ulm are published. Other repertoires, around 15, will follow.

⁸ See, for example, Raphael, Tenorth 2006.

⁹ Since 1991 a Yearbook *Politisches Denken* is published in Stuttgart (J. B. Metzler), ed. by V. Gerhardt,

H. Ottmann, M. P. Thompson. It is the annual review of the German Society for the Study of Political Thinking.

¹⁰ Reinhard 1983-1990; Fisch 1984; Clavero 1997.