Journal of Constitutional History

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47

Teaching constitutional history: a comparative and international overview
Insegnare la storia costituzionale: uno sguardo comparativo e internazionale

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Sommario / *Contents*

GIORNALE DI STORIA COSTITUZIONALE n. 47 / I semestre 2024
JOURNAL OF CONSTITUTIONAL HISTORY n. 47 / I semester 2024

Teaching constitutional history: at the crossroads of international experiences, disciplinary articulations, target audiences

LUIGI LACCHÈ, GIUSEPPE MECCA

The *Journal of Constitutional History* dedicates both 2024 issues to the topic of teaching constitutional history. The first (47, I) deals with an important series of experiences in Europe and North and South America, while the second (48, II) will be devoted to the Italian way of teaching constitutional history. Our project starts with the observation that constitutional history is now a fertile and innovative field of research, frequented by jurists and historians from various different backgrounds (legal historians, historians of political institutions, historians of political thought and so-called general historians). Although constitutional history has made great leaps forward in terms of methodology and results as a point of intersection between different fields of knowledge, there is no shortage of open questions that deserve further and more in-depth analysis.

The *Journal of Constitutional History* has already devoted specific reflections to method and/or internal changes in constitutional history on other occasions[1]. But this new issue – starting with methodological questions[2] – seeks to focus above all on the pedagogical question, and we have therefore asked renowned scholars to represent the state of the art in their teaching practice. We posed a number of questions: who teaches constitutional history in the various academic contexts? What does it mean to speak of the tradition of teaching constitutional history? Why is this teaching important? What chronology should be used when to teach constitutional history? What does constitutional history teach? Who are and who should be the students of constitutional history courses? More generally, to whom should the teaching of constitutional history be addressed? How does the discipline consolidate and organize its knowledge through its textbooks? In this direction, it is also a question of understanding what the role of constitutional history might be in the universities of the third millennium.

There are many themes and questions to consider. For example, problems and per-

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spectives in the teaching of constitutional history; scientific-disciplinary boundaries, intersections and contamination in constitutional history; constitutional history and its possible beneficiaries; constitutional history textbooks and the internal articulation of university courses; method in the teaching of constitutional history; the possible forms or names of constitutional history (e.g. history of modern constitutions, history of parliamentarism, history of concepts) and their possible implications; sources and archives of constitutional history.

The experiences evoked here can obviously only offer a first sampling, certainly incomplete from various points of view. However, our intention was first and foremost to highlight the strategic importance of the topic and set up a preliminary construction site, one that will be able to offer other outcomes. This issue of our journal shows that reflecting on teaching opens up many questions and is another, original, way of reflecting on constitutional history, its problems, opportunities and challenges. Teaching depends always on the particular vision that every scholar has shaped over time about constitutional history in its national or supranational context.

The articles published here provide a wide range of experiences and specific situations. Of course, it is very difficult to offer a general overview of the different ways to teach constitutional history, as a standalone subject or, more often, as a topic taught within other disciplines. The authors interpreted their task according to their specific experiences, local traditions and cultural sensitivities, manifesting a very wide range of possibilities: the final picture is very rich and offers much stimulus to our reflections. The complex epistemological status of constitutional history comes out very clearly. Teaching issues highlight the plurality of registers (legal, political, social) and sources; we have different ways to bring out our practices and doctrinal backgrounds; there are trends focusing on comparison and global history, but national histories – and their specific topics and chronologies – remain the centre of gravity of teaching experiences.

Many of the contributions, which explore the vast field of textbooks and, more generally, the rich bibliography of texts dedicated to constitutional history, offer an in-depth analysis of the various approaches adopted. Textbooks have always played a fundamental role in education, acting as pillars that support the learning process. However, the nature of education itself is constantly changing, influenced by ever-shifting cultural, socio-political, and pedagogical factors. In this context, textbooks have not remained immune to the changes in the educational landscape. The papers gathered together here recognise this complexity and examine a wide range of methodologies used in textbook design and implementation, offering a unique perspective on how textbooks have changed over time to meet the challenges and opportunities of contemporary education.

In most cases, constitutional history seen from the point of view of research is in better health than the related teaching activity. In several academic contexts there are only a few autonomous chairs of constitutional history and this matter is often taught as a section of a more general discipline (constitutional law, legal history, history of political institutions, social history…). This aspect is not necessarily nega-

tive but raises the problem of a truly shared methodology.

This volume brings out the lights and shadows in today's teaching of constitutional history across a significant range of nations. It confirms the need to share teaching experiences and to reflect on the importance and the potentiality of constitutional history in university curricula concerning law, political science and international relations, history and the science of education. Constitutional history can be very useful for the training of students and the transmission of a culture of citizenship, offering the possibility of understanding better the past in order to build a more solid future. Moreover, various public actors (judges, members of representative assemblies and civil servants) could find it a useful tool. By adopting a historical perspective, those who are called to govern public institutions can benefit from it in order to better fulfil their role and interpret the constitutional transformations of their time.

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Il *Giornale di storia costituzionale* dedica entrambi i numeri del 2024 al tema dell'insegnamento della storia costituzionale. Questo volume (47, I) mette a confronto le esperienze didattiche sia in Europa che in Nord e Sud America. Il prossimo (48, II) sarà dedicato al modo di insegnare la storia costituzionale in Italia. Il nostro progetto parte dalla constatazione che la storia costituzionale è oggi un campo di ricerca fertile e innovativo, praticato da giuristi e storici di varia estrazione (storici del diritto, storici delle istituzioni politiche, storici del pensiero politico e i cosiddetti storici generali). Sebbene la storia costituzionale abbia fatto grandi passi avanti in termini di metodologia e di risultati come punto di intersezione tra diversi campi del sapere, non mancano questioni aperte che meritano ulteriori e più approfondite analisi.

Il *Giornale di storia costituzionale* ha già dedicato in altre occasioni riflessioni specifiche sul metodo e/o sui cambiamenti interni alla storia costituzionale[3]. Ma ora questo nuovo numero – partendo dalle questioni metodologiche[4] – vuole concentrarsi soprattutto sulla questione pedagogica, per cui abbiamo chiesto a studiosi di livello internazionale di rappresentare lo stato dell'arte della loro pratica didattica. Abbiamo posto una serie di domande: chi insegna storia costituzionale nei vari contesti accademici? Cosa significa parlare di tradizione dell'insegnamento della storia costituzionale? Perché è importante questo insegnamento? Quale cronologia per insegnare la storia costituzionale? Cosa insegna la storia costituzionale? Chi sono e chi dovrebbero essere gli studenti dei corsi di storia costituzionale? Più in generale, a chi dovrebbe essere rivolto l'insegnamento della storia costituzionale? Come la disciplina consolida e organizza le proprie conoscenze attraverso i libri di testo? In questa direzione, si tratta anche di capire quale potrebbe essere il ruolo della storia costituzionale nelle università del terzo millennio.

I temi e le questioni su cui riflettere sono molti. Ad esempio, problemi e prospettive nell'insegnamento della storia costituzionale; confini scientifico-disciplinari, intersezioni e contaminazioni nella storia costituzionale; la storia costituzionale e i suoi possibili beneficiari; i libri di te-

sto di storia costituzionale e l'articolazione interna dei corsi universitari; il metodo di insegnamento della storia costituzionale; le possibili forme o denominazioni della storia costituzionale (ad esempio, storia delle costituzioni moderne, storia del parlamentarismo, storia dei concetti) e le loro possibili implicazioni; le fonti e gli archivi di storia costituzionale.

Le esperienze qui evocate possono ovviamente offrire solo una prima campionatura, certamente incompleta da vari punti di vista. Tuttavia, il nostro intento è stato innanzitutto quello di evidenziare l'importanza strategica del tema e di avviare un primo cantiere che potrà offrire in futuro ulteriori esiti. Questo numero dimostra che la riflessione sull'insegnamento apre molti interrogativi ed è un altro modo, originale, di riflettere sulla storia costituzionale, sui suoi problemi, sulle sue opportunità e sulle sue sfide. L'insegnamento dipende sempre dalla particolare visione che ogni studioso si è fatto nel tempo della storia costituzionale nel suo contesto nazionale o sovranazionale.

Gli articoli qui pubblicati offrono un'ampia gamma di esperienze e situazioni specifiche. Naturalmente, è molto difficile offrire una panoramica generale dei diversi modi di insegnare la storia costituzionale, come materia a sé stante o, più spesso, come argomento insegnato all'interno di altre discipline. Gli autori hanno interpretato il loro compito in base alle loro specifiche esperienze, tradizioni locali e sensibilità culturali, mostrando una grande pluralità di opzioni: il quadro finale è ricco e offre molti stimoli alla nostra riflessione. Appare chiaramente il complesso status epistemologico della storia costituzionale. Le questioni didattiche evidenziano la pluralità dei registri (giuridici, politici, sociali) e delle fonti; abbiamo modi diversi di mostrare le pratiche e gli sfondi dottrinali; ci sono tendenze che si concentrano sulla comparazione e sulla storia globale, ma le storie nazionali – e i loro temi e cronologie specifici – rimangono il centro di gravità delle esperienze didattiche.

Molti dei contributi, esplorando il vasto territorio dei manuali e più in generale la ricca bibliografia di testi dedicati alla storia costituzionale, mettono proprio in risalto i molteplici approcci adottati. I manuali hanno sempre svolto un ruolo fondamentale nella formazione, fungendo da pilastri su cui si basa il processo di apprendimento. Tuttavia, la natura stessa dell'istruzione è in costante mutamento, influenzata da fattori culturali, sociopolitici e pedagogici in continua evoluzione. In questo contesto, la manualistica non è rimasta immune dalle trasformazioni del panorama educativo. I contributi qui raccolti danno conto di questa complessità, esaminando una vasta gamma di metodologie impiegate nella progettazione e nell'implementazione dei manuali, offrono una prospettiva unica su come questi si sono trasformati nel corso del tempo per rispondere alle sfide e alle opportunità dell'istruzione contemporanea.

Nella maggior parte dei casi, la storia costituzionale vista dal punto di vista della ricerca gode di migliore salute rispetto alla relativa attività didattica. In diversi contesti accademici esistono poche cattedre autonome di storia costituzionale e questa materia viene spesso insegnata come sezione di una disciplina più generale (diritto costituzionale, storia giuridica, storia delle istituzioni politiche, storia sociale...). Questo aspetto non è necessariamente negati-

vo, ma pone il problema di una metodologia realmente condivisa.

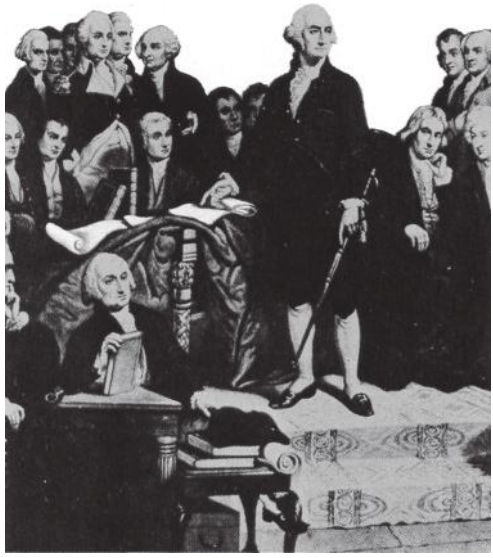
Il volume evidenzia luci e ombre dell'insegnamento odierno della storia costituzionale in un numero significativo di Paesi. Conferma la necessità di condividere le esperienze didattiche e di riflettere sull'importanza e sulle potenzialità della storia costituzionale nei programmi universitari di giurisprudenza, scienze politiche e delle relazioni internazionali, storia e scienza dell'educazione. La storia costituzionale può essere molto utile per la formazione degli studenti e la trasmissione di una cultura della cittadinanza, dando la possibilità di comprendere meglio il passato per costruire un futuro più solido. Inoltre, può essere uno strumento utile anche per i vari attori pubblici (giudici, membri delle assemblee rappresentative e funzionari civili). Muovendo dalla prospettiva storica, chi è chiamato a governare le pubbliche istituzioni può trarre giovamento per svolgere al meglio il proprio ruolo e interpretare le trasformazioni costituzionali del proprio tempo.

[1] See, especially, n. 19, 1/2010, *On constitutional history. Questions, methodologies, historiographies / Sulla storia costituzionale. Problemi, metodi, storiografie* http://www.storiacostituzionale.it/GSC19.html; n. 32, 2/2016, *Ripensare il costituzionalismo nell'era globale / Rethinking constitutionalism in the global era*, http://www.storiacostituzionale.it/doc_full-text/GSC_32_full-text.pdf; n.36, 2/2018, *Storia e storiografia costituzionale in Italia: caratteri originari e nuove tendenze. Per i 70 anni della Costituzione italiana / Constitutional History and Historiography in Italy: key-elements and new trends. For the 70 years of the Italian Constitution*; n. 41, 1/2021, *Venti anni del Giornale di Storia costituzionale / Twenty Years of the Journal of Constitutional History* http://www.storiacostituzionale.it/GSC41.html.

[2] What is the current state of constitutional history? What are the 'outer boundaries' of constitutional history? What are the relationships between disciplines and academic fences? Who does constitutional history and how are they to achieve cognitive goals (history of normative texts, history of concepts, history of institutions, history of constitutional practice and precedents, history of constitutional institutions, etc.)? How are historical method, philosophical method and legal method combined?

[3] Cfr., in particolare, n. 19, 1/2010, *On constitutional history. Questions, methodologies, historiographies / Sulla storia costituzionale. Problemi, metodi, storiografie* http://www.storiacostituzionale.it/GSC19.html; n. 32, 2/2016, *Ripensare il costituzionalismo nell'era globale / Rethinking constitutionalism in the global era*, http://www.storiacostituzionale.it/doc_full-text/GSC_32_full-text.pdf; n.36, 2/ 2018, *Storia e storiografia costituzionale in Italia: caratteri originari e nuove tendenze. Per i 70 anni della Costituzione italiana / Constitutional History and Historiography in Italy: key-elements and new trends. For the 70 years of the Italian Constitution*; n. 41, 1/2021, *Venti anni del Giornale di Storia costituzionale / Twenty Years of the Journal of Constitutional History* http://www.storiacostituzionale.it/GSC41.html.

[4] Qual è lo stato di salute della storia costituzionale? Quali i 'confini esterni' della storia costituzionale? Quali le relazioni tra le discipline e gli steccati accademici? Chi fa la storia costituzionale e quali i modi per raggiungere gli obiettivi cognitivi (storia dei testi normativi, storia dei concetti, storia di istituti, storia della prassi e dei precedenti costituzionali, storia delle istituzioni costituzionali, ecc.)? Come si combinano metodo storico, metodo filosofico e metodo giuridico?



Teaching constitutional history in France: challenges and prospects

MARCEL MORABITO[1], GALAAD DEFONTAINE[2]

Introduction

Who teaches constitutional history? Why is that subject important? What chronology should be chosen? What should constitutional history teach? To which students? More generally, to which audience? How is the knowledge built up by that topic organised in textbooks? *In fine*, what must be the role of the discipline in 21st-century universities? Those were the questions asked for the special issue of the *Journal of Constitutional History*, I, 47, 2024, on the topic of '*At the crossroads of constitutional history: teaching experiences, disciplinary articulations, target audiences*'. None of them must obviously be tackled less seriously than the others. For the sake of conciseness, they will be dealt with from the general angle of 'challenges and prospects of teaching constitutional history in France'.

This contribution was born of the cooperation of a professor and one of his former students, who is now a top civil servant. Such an association has appeared appropriate for an essential reason. To be dealt with efficiently, the issue of pedagogy presupposes taking into account the addressee's point of view. Not including it would amount to concealing an essential point which is that of the impact of teaching, its *raison d'être*. That is why, beyond the diversity of their careers, the authors of that article have chosen a common and concrete approach to the pedagogical stakes of constitutional history[3].

'History is not only a discourse on past forms. The special place it still has today, in the culture of politicians, amply shows it. Politics is not made from day to day. It is part of an evolution which determines it to a great extent. In that sense, history reveals geneses and highlights connections. However, being necessary to understand current affairs, it is also a component of the latter. It supports the building of the present time. To measure how important it is, one only needs to read the work of the members of the Constitutional Assembly

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which, since 1789 have from time to time tried to write the lasting rules that govern the relations among the superior bodies of the State into a solemn text. In that respect, France is a privileged field of investigation given its many and diverse experiments. Since 1789, our country has been governed by no fewer than sixteen constitutions[4], a number which is below that of our political regimes, for several transition regimes have operated in the absence of a constitution. To make that inventory complete, one should add that five completely drafted constitutions never came into force[5]. That succession of monarchical, Caesarean and republican experiences obviously needs to be rationalised.'

Those first lines of *Histoire constitutionnelle de la France de 1789 à nos jours*[6] recall, if need be, how important the historical approach to constitutional law is. Because it reveals ruptures and deciphers permanent features, history is necessary both for the understanding of the past and the building of the future. It is a fundamental element, not only of the training of our students, but also of the transmission of a culture of citizenship. Beyond the academic framework, the teaching of constitutional history is designed to give citizens the tools they need to know the institutions, which will enhance their capacity to reflect and act. From that point of view, France is quite a wealthy laboratory in which political tensions and chronic instability combine with legal creativity and international influence. The size of the field of study requires that its pedagogical limits be defined from the very beginning.

How is the teaching of constitutional history connected to research? What framework does it belong to? Let us focus for a while on those points which shape the reality of our project, which are its concrete side.

It is undeniable that the will to establish a tight relation between teaching and research, which was clearly set in the Law of 26 January 1984 and the birth of the professor-researcher status, is quite legitimate. High-quality teaching logically means high-quality research. Has that will produced the hoped for consequences? This question refers to the assessment of research and teaching. While the rules are quite clear for the former – despite increasing bureaucracy, the virtues of which are hardly convincing – the assessment of classes is rare, and, when it does happen, only exceptionally produces the expected effects. Therefore, in fact, research and pedagogy tend to work separately, and the needs of the many often come second to the power game among insiders.

If one only takes into consideration strictly pedagogical aspects, they are not devoid of complexity. The most visible is due to the multidisciplinary anchorage of constitutional history in constitutional law, but also in the history of law and political science. The institution in which teaching is done may also be a source of variations. On that point, the culture of law schools, where contents in constitutional law seem quite stable, is often opposed to that of political science institutes where strategic directions fluctuate more. Last, and above all, constitutional history is faced with doctrinal evolutions in constitutional law, especially with the ramping up of judicialisation, which tends to leave the history of political power in the background[7]. Those uncertainties unavoidably refer back to funda-

mental issues – which content should be favoured and to whom should it be taught?

At the risk of making trivial remarks, let us recall that the challenges and prospects of any teaching presume that the question of the latter's usefulness be put at the forefront. That conviction, which is widely shared in the domains of science and technology[8], is nonetheless not so well established in the domain of the law where the issue of social usefulness is hardly raised in debates, which do not focus on societal expectations but method issues[9]. Even though that choice may seem paradoxical in several respects, we will try to depict it carefully by tackling the issues that teaching constitutional history faces in a first part before dealing with its addressees and their needs.

1. *How to teach constitutional history? – The method issue*

In the French doctrine, the method issue[10] was acutely raised following a controversy between Michel Troper and François Furet at the moment of the bicentenary of the French Revolution[11]. The former, adopting a Kelsenian perspective, pleaded for the autonomy of constitutional history, while the latter, who was a major historian of the French Revolution, forcefully challenged that theoretical vision. It indeed seems difficult to think constitutional history without taking into account the power struggles that have overshadowed the drafting of the texts organising power or accompanying their implementation[12]. Constitutions are deeply set in the movement of political history, which they punctuate and from which they result[13]. That reality is confirmed both by the multidisciplinary anchorage of constitutional history and the objectives it has to fulfil.

A wealth of tools

Making a list of all the tools that are available to teaching constitutional history leads us to examine both the reference disciplines it depends on and the methods available to it.

Even though constitutional history may be studied in specific courses, which are usually taught in second year in law schools and institutes of political science, they are most often linked to a course on constitutional law or the history of law. That link is what we should focus upon as the expected benefits of history are strictly related to the evolutions of those disciplines. Though the latter have not followed the same pace or even the same developments, it is useful to recap their main phases.

For a long time, legal history remained focused on studying the pre-Revolution era. This was for reasons of erudition, but also because of a political attitude – that of a fascination for monarchy[14]. It was only at the end of the 1980s, and the bicentenary, that jurists-historians eventually dealt with 1789 and overcame a taboo that took them back to the School of the Revolution and the founding moment of modern constitutional law[15]. Constitutional law itself has evolved. It was first centred on the study of republican and parliamentary institutions, then from the 1930s it was linked to political science and analysed power – how it is obtained, exercised and transmitted – before it became juridical and judicialised in the 1970s under the influence of the Aix School around Louis Favoreu[16]. The impact

of those changes is clearly seen in the titles of courses which have evolved from 'History of the Institutions' to 'Constitution History' and 'History of Constitutional Law'[17].

The political history of constitutions has progressively been enriched with the guarantee of rights and constitutional litigation[18]. That is a known fact. Should that normative dimension lead to marginalising the analysis of power? Should the confirmation of the French *Conseil Constitutionnel* as the guarantor of freedoms and the development of research on the past modify the way a historian looks at the latter?[19] Must the study of the constitutional role of Parliaments of the Ancien Regime which fought against absolutism prevail over that of the principles consecrated by the Revolution? Can those principles – national sovereignty, separation of powers, human rights –, which are at the foundation of our legal culture, be neglected to the benefit of another history that would be dictated by the judicialisation of constitutional law?[20] To say it more directly, one cannot seriously rewrite history or delete it. Whatever the doctrinal or circumstantial stakes, studying constitutional history means first and foremost studying the history of political power[21].

That is how it is considered in the vast majority of constitutional law textbooks which regularly place it after the general theory of the State and main foreign regimes[22]. That being said, various methods can co-exist. The most common way is to follow chronology before moving onto main developments on the Fifth Republic. Some approaches are more original, such as that of Bernard Chantebout, who thinks that constitutional history must be 'relieved of what is only circumstantial and trivial; broadened, since while France has given a lot to the world, it has also received a lot, and its experience is better understood when compared to that of other countries; and thought anew to avoid the chronological study of the succession of regimes hiding the long-term evolution of the nature of power'[23].

The essential merit of that invaluable excerpt is to remind us that using history answers complementary objectives. It aims to highlight the crises that have divided us, the traditions which have united us and to give explanatory elements useful to the understanding of substantive law. Any teaching of constitutional history must be integrated into those two registers while trying to provide a rationalised perspective. Two readings of history may in that respect combine their effects – a political reading which deals with the cyclical tensions between the executive and legislative powers[24] and a legal one which focuses on how constitutional traditions and creativity are formed[25]. Over time, each of those methods appears to be necessary as they provide system-creating tools, which allow to go beyond the simple level of description, the explanatory virtues of which are by definition quite limited.

Constitutional history could not possibly be confined to exclusively examining constitutional texts, as it should take the utmost account of political life. From a historical point of view, it therefore seems impossible to analyse a constitution without carefully examining the debates that have led to its adoption. Similarly, if one does not study practice, it is not possible to understand to what extent the 1814 Charter was an evolution towards a parliamentary regime[26], how in 1879 the 'Grevy Constitution' disturbed the frail balance that

had been established by the Constitutional Laws of 1875 and revived the revolutionary tradition of parliamentary sovereignty[27], and how the Fifth Republic gave roots to a presidential reading of the institutions despite alternations and coalitions[28]. These remarks lead us to focus more precisely on the issue of the objectives of constitutional history.

Diverse objectives

Writing or telling constitutional history may pursue noticeably different objectives. Forgive us for going back to fundamentals, but one should not lose sight of the fact that the content of teaching does not result from a revealed truth. It depends on the field that one decides to analyse and on the period of time one chooses to explore.

What framework to set for one's investigation? Should one reject national approaches and select a more comparative one? The current doctrine is clearly evolving towards a broadened perspective. The development of globalisation[29] as well as, on a smaller scale, the progress of Europeanisation[30] have logically pushed in that direction. To only deal with the latter aspect, the building of Europe has made a transnational reflection on our institutions necessary. Many studies that were looking for a common constitutional heritage have therefore been conducted[31]. For a long time they were above all dedicated to fundamental rights[32], but they are now developing in the domain of the institutions. Such an evolution appears mostly to be quite justified[33]. However, it seems excessive to assert that national histories are gone for good[34]. We think on the contrary that they are still essential, first because the national framework is a crucial historical reference for the understanding of the concepts of constitutional history, and, second, because until a new European order emerges, national history will above any other have the capacity to unite a community of citizens around shared republican values. At a time when voter abstention in France reaches worrying levels, it does not seem wise to renounce that dimension of constitutional history.

That being said, which chronological limits to choose for one's teaching? The *terminus a quo* is more debatable that the *terminus ad quem*. Can one speak of constitutional law in France when there was no constitution yet, before the first ones were written, that is, before the end of the 18th century? The question has been legitimately raised by Middle Ages specialists who consider that the *lex vel constitutio* of August 1374, which set the age of majority for kings, is also, more broadly, a text on the organisation of power[35]. Even though the limits that were then considered were not procedural but ethical ones, one may indeed see that it was real constitutional work, which was concerned with giving roots to institutions over time[36]. We must pay close attention to those faraway origins. However, the Revolution, because of the radical ruptures it introduced and the important innovations it created, is the foundation on which our institutions are established[37]. Admittedly it did not completely erase the past. It nonetheless kept the concept of sovereignty, but, while inheriting its main characteristics – unity and indivisibility – from Bodin, it deprived the King of them and transferred them to the nation[38]. In so doing, it indisputably opened a new era which was completely different from that of the Ancien Regime.

«Vive la Liberté»: print celebrating the siege of Bastille (Musée Carnavalet)

If Revolution is considered as an inaugural moment, how far in time should the analysis extend? Only one answer is satisfactory on a pedagogical level: it must be extended until its end, that is, until the current state of affairs. Teaching constitutional history can only completely reach its goal if it integrates a reflection on the present times. It is concretely possible to measure the institutions of the Fifth Republic only by situating them within a complex historical movement, which is rich in the many constitutional experiments that existed before them and of which they are a unheard of synthesis – borrowing from revolutionary, parliamentary and Caesarean traditions – and contrasted – a rupture in some respects and successful realisation in others[39]. Teaching constitutional history is in that sense much more than practising a learned activity, it means transmitting the reflection tools which will allow to understand our society and favouring a long-term political vision.

Constitutional history and constitutional law are related in that respect. Current affairs are no more owned by positivists than history is by historians. At the juncture of those disciplines, the connections of which must be encouraged, constitutional history has a major role in the training of jurists and, more broadly, in that of citizens. Let us not sacrifice

it to the spirit of the times, for, before being its interpreters, we are its fruit[40].

2. *Prospects – why teaching constitutional history and to whom?*

Any professor or defender of their discipline tends to assert that the latter is essential, useful or fundamental. Then reflecting on the teaching of constitutional history makes it necessary to answer a fundamental question – why do it? What is the aim of such learning? A practical way of answering is to present its addressees in order to highlight how it may contribute to their general intellectual training and, more precisely, to the understanding of political phenomena and history, and to the interpretation of the law and its transformation. From that perspective, constitutional history is first useful to all the citizens as a pedagogical tool, because it gives them civic culture which makes it necessary to grasp the main political and legal concepts of which it is the matrix. It is then a heuristic and epistemological tool for the jurist, that is, a means of discovering the law, especially constitutional law, and understanding how its fundamental mechanisms were born. Last, it is a useful tool not only to understand and learn our political system and the law, but also to make them live and evolve. It is its double empirical and hermeneutic function for public actors which makes it a guide of past experiences – from which one may pick and choose to act –, like a textbook interpreting our Constitution based on history without which public actors that judges, top civil servants and elected representatives are may hardly do.

A pedagogical tool for the civic culture of any citizen

Constitutional history is an essential part of political history, a tool to understand our Constitution and its mechanisms and a fundamental corpus to conceive its future evolutions and revisions.

It is a necessary tool for any citizen who wants to understand where institutional balances come from and better grasp the political life of their country. In many respects, it is the (sometimes implicit) backbone of the citizen's training to public affairs and more specifically the republican and democratic culture. During the first years of the Third Republic, the stake was quite well identified by liberal republicans who saw it as a tool to reinforce the regime in the minds of all the citizens. As early as 1878, Senator Eugène Pelletan[41] wrote in his report on Ferdinand Hérold's bill, which aimed to create a constitutional law chair in each law school, that 'teaching constitutional law should be, in France as in America, the first catechism introduced in elementary school so that any citizen who will have to cast a ballot may know the scope and the limit of their rights from their childhood'[42]. The history of the main republican principles – which necessarily refers to our constitutional history in the background – has a natural place in the republican school as imagined by Jules Ferry[43]. As early as 1882[44], the courses of 'moral and civic instruction' resorted to notions borrowed from our constitutional history, which are essential for the training of the citizen. Though the importance of the moral and civic teaching has varied in the syllabuses depending on reforms[45], those notions have remained a keystone because

those founding texts do not change. The main republican principles were present as early as in the Declaration of the Rights of Man and the Citizen of 26 August 1789, which is 'implicitly or explicitly on the frontispiece of republican constitutions' as summed up in the famous conclusion of *Commissaire du Gouvernement* Corneille in the *Baldy* decision[46].

Beyond political history, constitutional history gives the citizen a comprehension grid of the operation of our institutions. 'All the constitutions include a combination of a criticism of passed-away political institutions, a philosophy of power and a particular diagram of government organisation'[47]. To understand the role of the executive, legislative or judicial branches and their interactions and relations, it is necessary to understand the context of the balance intended by the Constitution, which necessarily refers to the balance – and sometimes the imbalance – that used to exist and which is often inherited from the text or the practice that prevailed in the former Constitution. To give an example, it is to the instability of governments under the Fourth Republic – there were twenty-four of them in eleven years – that the framing of governmental responsibility provided for in Article 49 of the Constitution of 4th October 1958 answers[48]. Thus, Article 49 section 3, the usefulness of which a citizen may wonder about today[49], is an answer to the blockages that could appear under the Fifth Republic. In that respect, studying the archives of the preparatory work of the text of the Fifth Republic shows that it was two former Presidents of the Council, Pierre Pflimlin and Guy Mollet, who imagined that tool that is emblematic of rationalised parliamentarianism[50]. Constitutional history is here merged with the life and political experience of previous regimes, which are quite practical to conceive possible 'remedies' to past issues.

Constitutional history is not only a tool to understand past or present times, but also to build the future. Indeed, 'History is a gallery of paintings where there are few originals and many copies,' as Tocqueville wrote in *L'Ancien Régime et la Révolution*[51]. Constituents – whether primary of secondary – pay special attention to constitutional history, including comparative history. It Provides them with many examples of constitutional mechanisms and a set of variations which are quite rich, on the drafting level as well as on the balances that were reached. Analysing the practice of those constitutions which were tested through years of the so numerous constitutional crises of our political history is full of lessons to be learnt. In reality, constitutions have very tight relations with the past[52]. In 1848 and 1946, references to the debates of the time of the Revolution were constantly made in the debates of the constituent assemblies. In a completely different area, and as a form of Caesarean memory, the Fifth Republic is the first of our republics not to have resorted to a constituent assembly, but that does not mean that constitutional history was absent from Michel Debré's reflections, as is shown in his speech to the *Conseil d'Etat* on 27th August 1958, where he explicitly mentioned the Third Republic to explain the transformations of the legislative procedure which would be included into the Constitution of 4th October 1958: 'The rule is again that of the Laws of 1875'. Teaching constitutional history therefore means giving critical distance and a 'gallery of paintings' from which lessons may be drawn.

Thus, constitutional history allows to put our political system and its evolutions into perspective. While the Constitution is the backbone of institutional dynamics, the fundamental rule of the distribution of powers and their interactions, constitutional history allows a dynamic vision of it. It is in the light of those constitutional changes or review that we may understand the new institutional balances, ruptures and continuity.

A heuristic and epistemological instrument for the jurist

Constitutional history has a special importance in law schools and institutes of political science. The examination of course structures shows that it is implicitly or explicitly present in most syllabuses with a strong legal component, from the first year at university. It is at the same time an introduction to the law, because it is taught at the beginning of the syllabus or because it is necessary to the understanding of constitutional law, and a guide for its interpretation.

Constitutional law is often one of the first contacts a student has with legal matters. Being also among the introduction courses of the first year of the Bachelor's, it is a way in as far as methodology is concerned and a basis for the legal culture of first-year students. However, while history may be useful to the citizen, it is necessary for the student. To decipher the text of the Constitution of 4th October 1958, one must know to what it is an answer and therefore have elementary knowledge of constitutional history. Very often, introduction classes to constitutional law are thus about the birth of the Fifth Republic, between the institutional crisis of the Fourth Republic and the war in Algeria. It is a very efficient pedagogical way in for it allows to give a very concrete vision of the text and its organisation – a constitution lives, evolves and sometimes dies. It evolves to better reflect the balance of powers the Constituents wanted or to include concerns of their time. That dynamics is illustrated by the plan of the Constitution of 4th October 1958, in which Title II is about the President of the Republic, Title III is about the Government and only Title IV is about Parliament, while the latter preceded the other two in the Constitution of the Fourth Republic[53]. To explain the main ruptures General de Gaulle and Michel Debré wanted, it is again necessary to call upon history – how to understand the establishment of a 'domain of the law'[54] without explaining that the latter had a limited field in previous constitutions, in compliance with the French *légicentrisme* which for a long time consecrated the supremacy of the legislative body?[55]

Whether they study private or public law, the law students will always have to draw upon notions of constitutional law and therefore master the latter's historical evolutions to interpret it. It may not be necessary to know them well to be a good technician. However, to situate the technique within its political environment, *get an overview*, that is, think law as a means to an end, and not as an end in itself[56], history, and especially constitutional history, is an essential frame of reference. If one admits that a constitution is 'a spirit, institutions, *practice*'[57], then that practice is the result of a specific context, of a series of events which will allow to grasp the meaning and interpretation of the Constitution not as a purely theoretical object but as a living text. It is possible to consider that 'event after event,

the Algerian affair allowed to define and reveal the "logic" of the Constitution. […] No war in Algeria, no exceptional circumstances, and therefore no Constitution of 1958. No war in Algeria, no inflection, no presidential or presidentialist "meaning" of the new regime'[58]. Events are an element from which the constitutional court may apprehend or interpret some provisions of the very text of the Constitution differently[59]. The event being tightly linked to a specific moment, to the καιρός[60], it cannot be disassociated from the historical context. In that respect, as Michel Troper underlines in *Le droit et la nécessité*, 'all Constitution specialists are convinced of the importance of the history of law to understand today's positive law'[61].

Constitutional history must remain at the heart of the pedagogical project of law schools as well as institutes of political science to continue training enlightened practicians of public affairs[62].

A symbolic, empirical and hermeneutic function for public actors

As the Constitution permeates the whole legal order in keeping with its place in the hierarchy of norms, understanding its mechanisms is necessary for practitioners of public affairs that judges, civil servants – in particular top civil servants – and elected representatives are. One cannot study constitutional law without including at least a little constitutional history. The latter is crucial for those three categories of actors.

Constitutional history is first a tool for the interpretation of constitutional law for judges. Mastering it allows them to keep the Constitution alive while revealing fundamental principles taken from our republican tradition, which enrich the 'constitutionality bloc' and perfect our system. That is how the *Conseil Constitutionnel* drew upon constitutional history to reveal, in a praetorian manner, the 'fundamental principles admitted by the laws of the Republic'[63] and the 'principles that are especially necessary to our time'[64] and which were in the Preamble to the Constitution on 27th October 1946, to which the Preamble to the Constitution of the Fifth Republic referred. Constitutional history is at the same time a guide to interpret constitutional principles and a means to legitimise that interpretation by inscribing it within a 'traditional' practice, that is, a long-term one. That hermeneutic function is found in France and abroad. In countries where the text of the Constitution seldom varies, as in the United States[65], the interpretation of the judges allows to give it a modern and evolving meaning.

For civil servants and especially senior civil servants of the national public service, mastering the fundamentals of constitutional history is likewise necessary. It is explicitly or implicitly expected in competitive exams for top civil servants. The role of constitutional history in syllabuses shows its importance in the political and legal knowledge they are expected to master to take some distance and conduct their mission. It allows to understand the origin of some practices, notions or mechanisms they will be charged with.

Last but not least, constitutional history is a crucial element of the political culture of elected representatives. It is a body of knowledge they should have, in particular members of Parliament. It is a cultural background that is particularly present in the French political imaginary. This is

shown in the frequent references to the texts of previous republics in the Assembly room, or the omnipresence of the French Revolution and its constitutional debates which animate it as soon as the Constitution is said to have to be modified, or that the Fifth Republic should be ended. More generally, the revolutionary myth[66] – and the constitutional work it illustrates – remains omnipresent in the French political life, no matter the party. On the right, elected members lay claim to Michel Debré's constitutional 'genius' as to the Constitution of the Fifth Republic, on the left, the Fourth Republic and even constitutions which have never really come into force have been rehabilitated[67] as a democratic ideal, and they even suggest moving on to a Sixth Republic. Constitutional history is thus the point of reference to criticise the system or on the contrary defend it. To that symbolic value should be added an 'empirical' or experimental one in the past constitutions. They at the same time testify to different conceptions of the State, the law or institutional and political balances. Constitutional history shows multiple nuances of the role of the President of the Republic or Parliament or even fundamental rights. Where to draw inspiration from if not from those multiple, positive and negative experiences, as models and anti-models? When the question of a sweeping revision or a change of Constitution is raised, it is towards history that members of constituent assemblies turn to build the future. That constitutional legacy cannot be ignored. It must be known and exploited to make the Constitution live and to perfect its content, like a master's painting which would serve as an example for the formation of a new work. It is not possible to break away from the past or, on the contrary, choose continuation without knowing history.

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[3] Marcel Morabito has written the introduction and first part (*How to teach constitutional history? The method issue*) and Galaad Defontaine the second part (*Prospects: why teaching constitutional history and to whom?*).

[4] Constitution of 3-14 September 1791; Constitution of 24 June 1793; Constitution of 5 Fructidor Year III (22 August 1795); Constitution of 22 Frimaire Year VIII (13 December 1799); organic *sénatus-consulte* of 16 thermidor Year X (4 August 1802); *sénatus-consulte* of 28 Floréal Year XII (18 May 1804); Charter of 4 June 1814; Additional Act to the Empire Constitutions of 22 April 1815; Charter of 14 August 1830; Constitution of 4 November 1848; Constitution of 14 January 1852; *sénatus-consulte* of 7 November 1852; *sénatus-consulte* of 21 May 1870; Constitutional Laws of 1875; Constitution of 27 October 1946; Constitution of 4 November 1958.

[5] Girondin Constitution of 15 February 1793; Senatorial Consti-

tution of 6 April 1814; Bill of the House of Representatives of 29 June 1815; Draft Constitution of Marechal Pétain; Constitutional project / draft Constitution of 19 April 1946.

6 M. Morabito, *Histoire constitutionnelle* cit., n. 1, p. 19.

7 F. Saint-Bonnet, *L'histoire du droit constitutionnel*, in B. d'Alteroche and J. Krynen (dir.), *L'histoire du droit en France: nouvelles tendances, nouveaux territoires*, Paris, Classiques Garnier, 2014, p. 239ff; J.-L. Mestre, *Histoire du droit constitutionnel et de son enseignement*, in L. Favoreu et *alii*, *Droit constitutionnel*, 26th édition, Paris, Dalloz, 2024, pp. 1ff.

8 M. Morabito, *Recherche et innovation: quelles stratégies politiques?*, Paris, Presses de Sciences Po, 2014, p. 75ff.

9 C.M. Herrera and A. Le Pillouer (dir.), *Comment écrit-on l'histoire constitutionnelle*, Paris, Kimé, 2012.

10 Saint-Bonnet, *Nemo auditur suam propriam methodum allegans*, in *Comment écrit-on l'histoire constitutionnelle?*, cit., pp. 95ff; X. Magnon, S. Mouton (dir.), *Quelles doctrines constitutionnelles aujourd'hui pour quel(s) droit(s) constitutionnel(s) demain?*, Paris, LGDJ, 2022, p. 427ff.

11 M. Troper, *Sur l'usage des concepts juridiques en histoire*, in «Annales. Economies, sociétés, civilisations», n. 6, 1992, p. 1171ff. F. Furet, *Concepts juridiques et conjoncture révolutionnaire*, *ibidem*, p. 1185ff.

12 See *Giornale di Storia Costituzionale* 19, 2010, *Questions, méthodologies, historiographies*, Herrera et Arnaud Le Pillouer, *Faire l'histoire constitutionnelle: questions et problèmes*, in *Comment écrit-on l'histoire constitutionnelle?* cit., p. 7ff. See M. Troper, *La séparation des pouvoirs et l'histoire constitutionnelle française*, Paris, LGDJ, 1973.

13 J.-L. Mestre, *Note de lecture sur 'Comment écrit-on l'histoire constitutionnelle*, in «Jus Politicum», 10, 2014.

14 J.-L. Halpérin, *L'histoire du droit constituée en discipline: consécration ou repli identitaire?*, in «Revue d'Histoire des Sciences Humaines», n.4, 2001/1, p. 9ff.

15 M. Morabito and D. Bourmaud, *Histoire constitutionnelle et politique de la France (1789-1958)*, Paris, Montchrestien, 1991; G. Bigot, *Prendre l'histoire constitutionnelle au sérieux*, in «Journée d'études autour de Marcel Morabito et de son ouvrage 'Histoire constitutionnelle de la France de 1789 à nos jours» (Nantes, Droit et Changement Social, 14 April 2023), website of the Association des historiens du droit de l'Ouest.

16 L. Favoreu et *alii*, *Droit constitutionnel*, Foreword to the 1st edition, Paris, Dalloz, 1998; Mestre, *Histoire du droit constitutionnel et de son enseignement*, cit., p. 1ff.

17 Saint-Bonnet, *L'histoire du droit constitutionnel*, cit., p. 239.

18 A. Vidal-Naquet in P. Türk, *Quel enseignement du droit constitutionnel?*, in «Revue française de droit constitutionnel», n. 118, 2019/2, p. 434 ff.

19 Saint-Bonnet, 'L'histoire constitutionnelle est-elle tributaire du présent?'cit.

20 Foreword to A. Manouguian, *La juridictionnalisation du droit constitutionnel français. Étude d'un phénomène doctrinal*, Paris, Dalloz 2022, p. XVII ff.

21 Baranger, *L'histoire constitutionnelle et la science du droit constitutionnel*, cit., pp. 117 ff.

22 For example: J. Gicquel and J.-É. Gicquel, *Droit constitutionnel et institutions politiques*, 37th edition, Paris, LGDJ, 2023; P. Brunet, F. Hamon, M. Troper, *Droit constitutionnel*, 44th edition, Paris, LGDJ, 2023; Philippe Ardant, Bertrand Mathieu, *Droit constitutionnel et institutions politiques*, 35th edition, Paris, LGDJ, 2023.

23 Foreword to the 35th edition of *Droit constitutionnel*, Sirey, 2015.

24 Pioneering theory of constitutional cycles by Maurice Hauriou, quoted by J.Gicquel and J.-É Gicquel, *Droit constitutionnel et institutions politiques*, cit., p. 535ff; Hummel, 'Histoire et temporalité constitutionnelle. Hauriou et l'écriture de l'histoire constitutionnelle', in *Comment écrit-on l'histoire constitutionnelle? cit.*, p. 141ff.

25 Marcel Morabito, *Histoire constitutionnelle* cit., 566 p.

26 *Ivi.*, p. 197ff.

27 *Ivi*, p. 327ff.

28 *Ivi*, p. 431ff.

29 *Giornale di Storia Costituzionale* 32, 2016: 'Ripensare il costituzionalismo nell'era globale'.

30 L. Lacchè, *History & Constitution. Developments in European Constitutionalism: the Comparative Experience of Italy, Switzerland and Belgium, 19th-20th Centuries*, Frankfurt a M., Klostermann, 2016; Ph. Lauvaux, *Existe-t-il un modèle constitutionnel européen?*, in *La Constitution de l'Europe*, sous la direction de Paul Magnette, Bruxelles, Éditions de l'Université de Bruxelles, 2002, p. 21ff.; J. Varela Suanzes-Carpegna, *Histoire constitutionnelle comparée et espagnole*, Oviedo, Ediciones de la Universidad de Oviedo, 2013.

31 V. Constantinesco, *A la recherche du patrimoine constitutionnel européen*, in *L'identité du droit de l'Union européenne: Mélanges en l'honneur de Claude Blumann*, Bruylant, 2015, pp. 89ff; A. Pizzorusso, *Il patrimonio costituzionale europeo*, Bologna, Il Mulino, 2002; D. Rousseau, *La notion de patrimoine constitutionnel européen*, «Science et technique de la démocratie», n. 18, 1997, p. 8ff.

32 S. Cassese, *The Constitutional Traditions common to the Member States of the European Union*, in «Rivista trimestrale di diritto pubblico», n. 4, 2017, p. 939ff.

33 For evidence of our commitment, see M. Morabito and G. Tusseau (dir.), *Comparative Executive Power in Europe: Perspectives from Law, History and Political Science*, New York-London, Routledge, 2023; Id., *Regional Accountability and Executive Power in Europe*, New York-London, Routledge, 2024.

34 M. Stolleis, *Concepts, models and*

traditions of a comparative European constitutional history, in «Giornale di Storia Costituzionale», n. 19, 2010, p. 45ff.

[35] Albert Rigaudière, *La* lex vel constitutio *d'août 1374, première loi constitutionnelle de la monarchie française*, in *Un Moyen Âge pour aujourd'hui*, Mélanges offerts à Claude Gauvard, Paris. Presses Universitaires de France, 2010, p. 169ff. F. Foronda and J.-Ph. Genet (dir.), *Des chartes aux constitutions: autour de l'idée constitutionnelle en Europe (XII^e-XVII^e siècle)*, Paris, Editions de la Sorbonne, 2019.

[36] C. Leveleux-Teixeira, *Penser le droit constitutionnel avant les constitutions*, in *Journée d'études autour de Marcel Morabito et de son ouvrage 'Histoire constitutionnelle de la France de 1789 à nos jours' cit.*

[37] M. Morabito et G. Defontaine, *Qu'est-ce qu'une révolution juridique? Les enseignements de la Révolution française'*, in «Les Cahiers Portalis», n. 1, 8/2021, p. 29ff.

[38] F. Burdeau and M. Morabito, *Les expériences étrangères et la première constitution française*, in «Pouvoirs», n. 50, 1989, p. 97ff.

[39] M. Morabito, *Le pouvoir exécutif: perspective historique*, in P. Jensel-Monge et A. Vidal-Naquet (dir.), *Du pouvoir exécutif au pouvoir gouvernant. Réflexions sur la notion de pouvoir exécutif à partir de la Ve République*, Paris, Mare & Martin, 2021, p. 39ff; *ID.*, *Histoire constitutionnelle de la France cit.*, p. 431ff.

[40] See M. Morabito and K. Picard, *Constitution, histoire et mémoire, Rapport introductif XXXVIII^e Table ronde internationale de justice constitutionnelle*, in «Annuaire International de Justice Constitutionnelle 2022», n. 8, 2023, p. 57ff.

[41] See G Sacriste, *Chapitre 1. L'incongruité du droit constitutionnel dans les facultés de droit*, in Guillaume Sacriste (dir.), *La République des constitutionnalistes. Professeurs de droit et légitimation de l'État en France (1870-1914)*, Paris, Presses de Sciences Po, 2011, p. 73.

[42] Journal officiel, *Sénat, annexe 191, séance du 26 mai 1879*, Rapport au nom de la commission d'initiative.

[43] Voir H. Orizet, *Le service public de l'éducation nationale sous la Troisième République*, Paris, LGDJ, 2021.

[44] Law of 28th March 1882 on the organisation of primary education.

[45] See for example P. Kahn, *L'enseignement moral et civique": vain projet ou ambition légitime? Éléments pour un débat*, in «Carrefours de l'éducation», vol. 39, n. 1, 2015, p. 185ff; see also Th. Douniès, *Chapitre 1. Genèse et consécration d'une réforme de l'enseignement moral et civique*, in Thomas Douniès (dir.), *Réformer l'éducation civique? Enquête du ministère à la salle de classe*, Paris, Presses Universitaires de France, 2021, p. 37ff.

[46] CE, 17th August 1917, *Baldy, No 59855*.

[47] To quote N. Wahl, *Aux origines de la nouvelle Constitution*, in «Revue Française de Science Politique», n. 1, 9/1959, p. 30.

[48] Voir Morabito, *Histoire constitutionnelle cit.*, p. 445ff.

[49] L. Audouy, *La révision de l'article 49 alinéa 3 de la Constitution à l'aune de la pratique*, in «Revue française de droit constitutionnel», n. 3, 107/2016, p. 1ff.

[50] See J.-F. de Bujadoux, *Des rationalisations du parlementarisme en France*, in «Droits», n. 1, 71/2020, p. 173ff.

[51] A. de Tocqueville, *Livre II - Chapitre VI: des mœurs administratives sous l'Ancien Régime*, in *L'Ancien Régime et la Révolution*, Paris, GF - Flammarion, p. 158.

[52] As underlined by A. Vidal-Naquet in *Constitution et passé: du fait à la norme*, in Ariane Vidal-Naquet (dir.), *Constitution et passé*, Aix-en-Provence, DICE Éditions, 2023, p. 17.

[53] Respectively Title II for Parliament, Title V for the President of the Republic and Title VI for the Council of Ministers. As Jean Gicquel notes, the Government «as such was superbly ignored, maybe at most mentioned, under the generic name of Council of Ministers». *Le sens unique de la Constitution de la V^e République*, in «Titre VII», 1, n. 1, 2018, p. 5.

[54] See for example M. Long, *La Loi*, in «La Revue Administrative», 54, n. 324, 2001, p. 566ff.

[55] See for example É. Maulin, *Chapitre I. La suprématie de l'organe législatif*, in Éric Maulin (dir.), *La théorie de l'État de Carré de Malberg*, Paris, Presses Universitaires de France, 2003, p. 243ff.

[56] Given that the law does not exist in itself and that it is not its own end but a means for the politician. See Morabito et Defontaine, *Qu'est-ce qu'une révolution juridique?* cit., p. 29ff.

[57] Press Conference of 31st January by General De Gaulle.

[58] N. Roussellier, *La Constitution de 1958 allait-elle dans le "sens de l'Histoire"?*, in «Titre VII», 1, n. 1, 2018, p. 12.

[59] See for example M. Disant, *L'appréhension du temps par la jurisprudence du Conseil constitutionnel. À propos du changement de circonstances*, in «Les Nouveaux Cahiers du Conseil constitutionnel», 54, n. 1, 2017, p. 19ff.

[60] The 'adequate time' (*'moment propice'*).

[61] M. Troper, *Chapitre IV. Histoire constitutionnelle et théorie constitutionnelle*, in *Le droit et la nécessité*, Paris, Presses Universitaires de France, 2011, p. 269. Further on in this chapter (p. 274) he adds that 'it is commonplace to say that constitutional law, like other branches of the law, results from history.'

[62] Today Legal theory and history are disassociated, or even isolated from each other, as if it were possible to do without the latter to understand constitutional law or elaborate a doctrinal reflection. That disassociation, which is recent, seems disputable. Constitutional theory may hardly

do without history: they are both linked. As Denis Baranger rightly writes, theory «has nothing more urgent to do than studying history», see *L'histoire constitutionnelle et la science du droit constitutionnel*, cit., p. 117.

63 Decision No71-44 DC of 16 July 1971, a law that complements Articles 5 and 7 of the Law of 1st July 1901 on the association contract, see B. Lecoq-Pujade, *1971, une révolution de palais?*, in «Revue française de droit constitutionnel», 130, n. 2, 2022, p. 283ff.

64 Decision No 74-54 DC of 15 January 1975, a law on abortion.

65 See for example E. Zoller, *Le sens d'une constitution vu par les États-Unis. Le point de vue des juristes*, in «Titre VII», 1, n. 1, 2018, p. 53ff.

66 F. Furet, *Penser la Révolution française*, Paris, Gallimard, 1978, 264 p.

67 The elected members of the La France Insoumise Party thus regularly refer to the Mountain Constitution of 24th June 1793.

Teaching Experiences of Constitutional History in a Comparative Perspective – Germany

ULRIKE MÜßIG

1. *Introduction: Teaching Experiences, Content and Target Audiences*

Teaching Constitutional History started as «Europäische Verfassungsgeschichte» (European Constitutional History) in Passau 2000. At the heart of the nowadays well established lecture lie the specific European rationales of historic constitutionalization processes. The amended Study and Exam Regulations of the Law Faculty 2022 complemented this course by a second lecture on the Contemporary History of European Integration («Zeitgeschichte der Europäischen Integration») and further English taught courses on the «Rule and Legal Reasoning in the Western World with courses on Constitutional Discourse, Judiciary as Constituted Power, Comparative Constitutional Law post 1945, Common and Civil Law Methodology, English and American Common Law and Modern Law and Political Theory»[1]. In addition, the author is in charge of an online programme designed by her, "Klausurenkurs in der europäischen Rechtsgeschichte" ("exam questions with regard to European Legal History", available to students outside Passau via the Virtual University of Bavaria (https://www.vhb.org/)[2]. The latter offers learning content from all fields of legal history (including the Roman Law) for the general audience of all Bavarian universities and also for the advanced level required for the first state law examination (the so-called "Schwerpunktbereich" = area of specialisation, in the following abbreviated with SP)[3].

In the winter semester 2023/2024, the other Bavarian universities offer a variety of lectures, courses and seminars with reference to constitutional history, both in the general curriculum and in the specific curriculum of the area of specialisation. At Augsburg University the courses offered in the field of legal history cover constitutional history including references to general political science (SP IX, Prof. Dr. Matthias Rossi), Legal History I (Basics,

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Prof. Dr. Christoph Becker), Legal History II (Roman Legal History and Roman Private Law, Prof. Dr. Phillip Hellwege), Historical Foundations of European Legal Systems (SP I, IX, Prof. Dr. Christoph Becker), Modern History of Criminal Law (SP IX, V, Prof. Dr. Arnd Koch), Older History of Criminal Law (SP IX, V, Prof. Dr. Arnd Koch) and Source Exegesis of Roman Law (Prof. Dr. Christoph Becker)[4]. Thus, within the Augsburg study programme constitutional history sits within the specialisation area studies. At Bayreuth University the courses taught in the field of legal history are as follows: Legal History, Constitutional History, SPB XI (including the seminar "Constitutional History of the Modern Era", the protagonist Prof. Dr. Bernd Kannowski being a renowed expert for human dignity)[5]. At the Friedrich Alexander University Erlangen-Nuremberg the courses offered in the field of legal history include German legal history (Chair of Civil Law, German and European Legal History), constitutional history (Chair of Canon Law, Constitutional and Administrative Law) and Roman legal history (Chair of Civil Law, Roman Law and Ancient Legal History)[6]. At the Ludwig Maximilians University Munich the courses provided in the field of legal history are annonced as "German Legal History", SPB 1.1 Fundamentals of Law: Legal History (incl. seminars, no constitutional history expressively announced, but comprised as a matter of course), SPB 1.2 Fundamentals of Law: Philosophy of Law and Modern Legal History[7]. At Regensburg University philosophy of law is at the forefront of announcements offered, and the local doyen of legal history, Prof. Dr. Martin Löhnig, stands for an excellent teaching in constitutional history, especially in an international context. In the summer semester 2023, the seminar "Contemporary Legal History" took place as part of the specialisation area, and legal history in its full richness including constitutional history was provided in the lecture programme[8]. At the Julius Maximilians University Würzburg, the university of my academic teacher Prof. Dr. Dr. hc. Dietmar Willoweit[9], students have access to the full range of legal and constitutional history: Legal History I (German and European Legal and Constitutional History), Legal History II (European Civil Law Tradition), Foundations of the Law as a specialisation[10]. All Bavarian law faculties offer teaching in constitutional history; with a focus on the comparative range, Augsburg, Erlangen-Nürnberg, Passau and Würzburg seem to be ahead; this finding is concluded from the online listings of the last two semesters, and is in no way intended to make a statement regarding any standing of constitutional history in publications or academic activities outside of university teaching.

This might be due to the specific challenges of communicating the European context to a general or a more advanced, specialized audience. It is complex to explain what is the European aspect in different, past constitutionalization processes. Simple answers are not an option, as «[e]verything colossal and uniform is clearly un-European» (Oskar Halecki)[11]. Rather, the diversity of levels of constitution-building processes appears to be specifically European compared to the developments of Byzantine, Mongolian, Ottoman or Great Russian neighbours. In Europe small countries, city-states or federative entities have been constitutional players producing normatively shaped ar-

eas of rule, next to empires and nations. Thus, the pluralistic rivalry of powers has always been the motor of power-forming structures, as well as a drive for the growth of single state powers[12]; any aspiration for hegemony was combatted, precluded or at least not permanent due to aristocratic and other competitors, be it the Habsburg world empire of the 16th century or the French hegemonic efforts under Louis XIV, be it the French revolutionary armies or the Napoleonic troops.

2. *Challenges of the European Context*

Analyzing the specific European rationales of past constitutionalization needs an etymological reconsideration of context in the original Latin sense of *contexere*: weave together, link, connect. Taking such an integral[13] observing approach towards various, sometimes disparate historic developments corresponds to the hypothesis that the European context amounts to a certain kind of self-identification. Europe seems to be (only) the idea of those who feel European towards others. This idea, though, has no given reference; there is no precise geographical determination: Europe is a peninsula of the Eurasian landmass[14]. The eastern border lacks immutable realities, and its vagueness due to thought conventions becomes all the more painfully aware in the current Ukraine war[15].

Taking such an integral observing approach (*contexere*) meets the response structures of law and constitutional formation. Domination and its constituted regulation never arise or exist in themselves. Rather, they evade any ontological absolutisation[16] due to the immanent relatedness of human beings (towards other human beings, to materials, to the natural environment or to transcendental levels)[17]. Supplementing earlier research on the functionality of law as a language-bound instrument to shape a political sphere of rule[18] or on the broad understanding of constitution formation beyond norm-related textuality[19] further explanation is needed on the response structures of legal and constitutional formation[20]. Law creation results from subjective entitlements, asserted or disputed in the case of conflict[21]; the decisive arguments amount to a web of legal customs according to the conceptual world of the historical contemporaries. Since law happens to be in language, a pragmatic linguistic approach[22] is focused on the formative power of words; this addresses – far beyond the Brunner/Kosseleck interest in 'key terms'[23] – the building of political spheres of rule through the determination of meanings, contextualisation and semantic networks of relationships. Due to the lack of literacy of the (historical) common man non-verbal communication about constituting a community by means of art and architecture is included in the lecture hall[24].

In doing so, teaching specific European rationales of historic constitutionalization processes is neither concerned with any relativistic Foucaultian scepticism towards institutionalized consistency of expressions nor with any phenomenological subjectivism as within the early *Annales* of Marc Bloch. Rather, the functional access to the protective rationales, the focus on conflict situations and conflicting interests[25] distinguishes the teaching of European Constitutional History from general expla-

nations about historic institutions, legal or social historian analyses and politological comparisons of historical systems of government.

The following considerations on specific European rationales of historic constitutionalization processes start with the Basics of Europe as an Idea without given reference (III.), and deal with the European Commingling of Culture and Politics (IV.). Finally, an outlook onto the Impulses for the Future of Europe (V.) complete the deliberations on the specific challenges of teaching constitutional history on a comparative European scale.

3. *The Basics of Europe as an Idea without Given Reference*

The abduction of the beautiful Phoenician daughter from Sidon (today Lebanon) to Crete on the bull's back of Zeus is not only the legendary origin of the Minoan advanced civilisation. Rather, it alludes to a fundamental peculiarity of Europe as an idea of self-identification: Europe as an idea without given reference emerges in the reflection on its borders[26]. As any 'structures of justification'[27] depend on the orientation towards the opposite it is not by chance that the so-called Europa saga happens to have its origins in a cultural clash with influences from outside (for Crete: from the Near East, the Levant and Africa).

All historic uses of European identification correspond with demarcation against the Non-Europeans. This will be illustrated in this article in accordance with various sources all over the centuries.

3.1 *Hellenising Identifications*

For the ancient Greeks, neither law nor Europe played a role. For those, who consider themselves to be Europeans, ancient Greece is associated with the emergence of writing, the Socratic questioning of self-awareness (*Gnṓthi seautón*), the legal philosophical foundations by Plato and Aristotle, and the Herodotean, mythological exaltation of Greek freedom (*élευthería*) in contrast to the Persian oppression. Through the mediation of Neoplatonism, Stoic philosophy and early medieval patristics these basics agglomerated into a specific European preference for individuality over any collective, and for freedom over any (constituted) state power. Nevertheless, it seems questionable whether this preference was only triggered in the Europe wide sympathy for the Greek struggle for freedom from Ottoman oppression in the 19th century.

3.1.1 *Cradle of European Writing*

It is true that the Minoans were the first Europeans who had known how to write, and the fabulous ride on the bull's back perpetuates the thereto related initiating impulses from the Near East. Of course, the exact routes remain to be research desiderata[28]. For those interested in constitutional history, though, it is sufficient to understand how the Greek alphabet has developed from the Phoenician letters[29], and how the first has godfathered the Latin and the Cyrillic[30]. Despite our present ignorance about the Minoan Linear A Crete is to be appreciated as the cradle of

European writing[31]. Most probably, it has been the Minoan abstraction of phonetic complexes[32] away from the ideogrammatic correspondence of hieroglyphic characters[33] that contributed to the efficiency of European languages in developing legal terms. This may be studied from the earliest written statutes, like those of Gortyn 500 BC[34]. Interestingly enough, it was the use of the Asia Minor Ionic alphabet (with its 24 characters) for the recording of legal texts in Athens in 403 BC that established a common Greek alphabet[35].

3.1.2 *Democratic Idealisation of the Polis*

Even if the Attic polis has little in common with today's representative democracies[36], the neoclassicist parliamentary style with its balanced proportions according to the golden ratio (*proportio divina*) is its architectural reminiscence all over Europe[37]. The Greek concept of *democratía* (rule of the people) shows an early synonymy with *politeía* (constitution) as well as a conceptual proximity to *isonomía* (equality through law)[38]. Its crucial goal is justice as the highest value, «represented by the state, in which the happiness of the individual is determined by the good of the whole»[39]. In this the cave allegory (in the Platonic Politeia)[40], the charioteer metaphor (in the Platonic dialogue Phaidros)[41] and the Aristotelean state forms theory[42] concur – the latter including the Attic radical democratic distribution of offices according to lots and rotation[43].

The democratic idealisation of the *polis* includes a further basic narrative tradition: one's dignity lies in obeying the decisions of the people's assembly (*ékklesía*) by one's own free will. This has been immortalised in the Platonic Apology by the Socratic decision in favour of the cup of hemlock and against flight. Often before his final sympathy for the Attic statutes Socrates has taken a stand for their legitimatory strength (*nómoi ischyroí*) due to practical reason (*phrónēsis*)[44], contrary to the sophistical mockery of Attic 'statute making'. At the same time, the earliest relativisation of unjust law became discussed[45]. Europeans owe to the Greek theatre not only the *prósopon* as the ethymological basis for the conceptualisation of the person[46] but also the «holy wrath»[47] of the Antigone.

To be very precise: The Greek antique has coined legal philosophy, but not European legal thinking. Ionian natural philosophy[48] reached rational scientific abstractions by looking for the primordial substance, from which the diversity of all sensually perceptible phenomena was to be derived in an explanatory manner. Law was not yet part of this. It had been only the Ciceronian natural law (*iustitia natura*), schooled on the Platonic and Stoic philosophy[49], that explained natural law as the ideas of justice common to all men (*consensus omnium*)[50], to be the inherent rationality (*ratio scripta*) of the classic Roman law, promoting thereby not only the antique Roman claim to govern the *Imperium Romanum*, but also the attractiveness of its medieval learned version for medieval emperors. Before the reception of the learned law any differentiation of law, from the 'inherently right' was unknown and inconceivable.

3.1.3 *Contrasting Greek Freedom with Persian Oppression*

Both Greek antiquity[51] and contemporary discourses[52] have known and know a clichéd contrasting of Greek freedom with Persian oppression, a kind of (idealised) understanding of freedom as a right to justification instead of any (barbaric)[53] subjection to rulers' commands. This was first found in Herodotus' account[54] of the Persian Wars (VII 102). Thus, it originates from the same century as the mentioned first writing of the city statutes, the premiere of Antigone, the beginnings of Ionian natural philosophy and the sophistic relativisation of democratic 'statutemaking' in the Attic *poleis*[55]. Herodotus puts it into the mouth of Demaratos, a Greek serving in the Persian army, that freedom (*ἐleuthería*) together with wisdom (*sophía*)[56] enabled the Greeks under Themistocles to win at Salamis[57], despite all the Persian technical superiority. None of the Near Eastern languages knows an equivalent for the Greek '*ἐleuthería*'. And the etymological connection between «free» and «belonging to the people» also fits in with this: the Mycenaean Greek (=Linear B) *ἐleútheros* is originally related to Latin *līber* «free» and meant something like «belonging to the people» in the basic Indo-European language (where **h₁ leu̯dʰ-* is reconstructed)[58].

Not factuality, but the 'threatening other' seems to motivate the (European) identification pattern in favour of freedom. Herodotus' mythological-symptomatic reminder of the «incompatibility of the culture of the Occident with Eastern barbarism»[59] did not aim at any geographical factuality; all the more so, as the later causality claim of Thucydidean historiography has still been unknown. Rather, the west coast of Asia Minor including the offshore Ionian islands and thus geographically Asia was the home of the Presocratics[60], who had been the very first with a rational desire for knowledge. And it is only from the Persian point of view that Herodotus equates Greece with Europe; for the Greeks[61] themselves, a reference to Europe played no role, neither in Marathon, nor at Thermopylae, nor before Salamis.

3.2. *Rationality Mediated by the Latin Christianity (universitas christiana)*

3.2.1 *Christian Charge of the Frankish Empire*

Neither for Alexander the Great's empire nor for the Romans and their world empire Europe has been a reference point. It is only after the end of the Western Roman Empire that Europe reappears in the sources – again as a term of identification in a 'perceived' threat from the East: Islam had spread from Arabia (especially due to its cultural and scientific progressiveness) via the Maghreb to Spain[62], and its expansionist urge beyond the Pyrenees encountered Francogallia, which had been Latin-Christian since Clovis' baptism in 496/98. In the defensive battle at Tours and Poitiers in 732, the Franks led by the Carolingian house-meier Charles Martell called themselves «Europeans», for the first time in the Latinized form «*Europaeenses*»[63]. Nevertheless, one should be critically aware of retrospect[64] longings for a narrative of a world-historical victory over the 'enemies of Christianity'[65], – probably also to legitimise the Carolingian usurpation of

5th century BCE Greek red-figure pottery vase showing the myth of Europa and Zeus disguised as a bull (Tarquinia Archaeological Museum, Italy)

the Merovingian kingship. It hardly corresponds to the facts of military history that Christian Gaul would have been in danger of being overrun. Rather, the Christian hallmark of the emerging European *imperium occidentale* appears to be a well propagated justification, as it is the «superiority of the justification structure»[66], that makes an ideology. Therefore, some truth lies in Hobbes' sarcasm that the «papacy is no other than the Ghost of the deceased Roman Empire sitting crowned upon the grave thereof»[67].

It is the reference to Europe that vests the Frankish emperorship with a Christian 'charge'. When claiming the (Western) Roman imperial title, Charlemagne calls himself *pater Europae*. The imperial claim

to rule over the *gens latina* (or the *tota latinitas*) is formulated as «*Renovatio Imperii Romani*» in the circumscription of Charlemagne's seal. It was the reference to Rome and Latinity[68] that made the late antique idea of empire usable for the rise of the Frankish emperor[69]. This early medieval European identification with the Latin ecclesia has nothing to do with the imperial-ecclesiastical *symphonia* of the Eastern Roman emperor. Rather, the integrating effect of Latinity can be exemplified by the difference of the *Slavia latina* from the *Slavia orthodoxa*: While Latin as written *lingua franca* provided access to the antique masterminds, the Roman legal terminology and standardizable hierarchizations[70], (Old) Church Slavonic was an archaic dialect of the Bulgarian Slavonic; though intelligible in all spoken Slavic languages[71], it has never allowed any lordly standardizations, be it as a liturgical or legal language.

The 'propagandistic' Christian 'charge' can also be comprehended by the legitimizing integration of the Western emperorship into the Augustinian *ordinatio ad Unum*[72]; it connects the Platonic primordial idea with the Christian creator God: philosophical universality met all-encompassing catholizism (in the original wording of katholikós: *katá* „according" and (*hólos*) „total, complete"). Such a 'celestial orientation' towards the *civitas dei* included the very wordly claim to subordinate the class hierarchy[73] to the Frankish emperorship in the irrevocable sense of the Augustinian *ut non conturbaretur ordo*[74]. The same is true for the designation of Charlemagne as *pater fidelium* in the double meaning of the Latin *fidelis* «loyal» (in the feudal sense) and «faithful» (in the religious sense) [75]. Nevertheless, the religious-political unity[76] of the early medieval *res publica christiana* has faced the fundamental duality between God and world[77], a salvatory individualism[78] and the upgrade of personhood to the image of God (*imago Dei*)-appreciation[79].

Additionally, there is no contradiction between faith and recognition in the (medieval scholastic) rationalism of the Latin Christian book religion[80], and the questioning of an argumentative theology[81] makes the church (*ecclesia*) a *semper reformanda* one. The Thomasian unity of faith and knowledge (*fides et intellectus*)[82], relying on the necessity of the general and the contingency of the individual[83], motivated a kind of 'learning mode'[84] within the Latin Christianity. This is not meant in a naïve trivialization of military atrocities in the name of the Christian faith. Rather, the expression 'learning mode' addresses the (typical European) legitimising reference back to fundamental traditions – in short: Jerusalem, Athens and Rome – and the therein comprised emancipatory potential of renaissances and reformations. From my point of view, European constitutional history owes a good amount of premodern individualism to the rationality of the medieval Latin Christian book theology[85], and it would be a tackling research project to extend the Jellinek thesis[86] far back beyond the enlightenment.

As already rooted in the mentioned dualism of heavenly and wordly realms (between imperial assets and God's ones)[87], the salvatory individualism[88] and the *imago dei*-sacralization of personhood, there seems to be a specific European trust in or readiness for secularisation[89]. The idea of creation declared as *lógos* (Prologue to the Gospel of John) has always motivated a Christian demythologisation of the

world: nature is 'God's second book', to be directly 'revealed' in its experimental determinability[90]. Even if the official church has been hostile to science and Gallilei's excommunication was only withdrawn in 1992, there is a major impact of Christianity to make European constitutional history profitting from a secularization or mathematization of natural law. Facing the Spanish conquests in South America, the masterminds in late Spanish scholasticism enforce an 'eccentric'[91] argumentation of the Indians' 'just' defensive war against the Spanish *conquistaderos* (Vitoria, de Indis I/1, 1, 1), and Hugo Grotius' law of nations «*etiamsi deus non daretur*» (IBP Prol. 11) is based on the natural human freedom to act voluntarily according to the natural law, valid irrespective of God's existence[92].

3.2.2 *The Church's Interest in Wordly Power Affairs and the Worldly Interest in Church's Affairs*

Beyond the decisive contribution to the European rational concept of justice[93], a further specific rationality of Latin Christianity can be observed from the papal approval of the legitimacy of the Carolingian rule: 'obedience' produced order, and it was in the literal sense here that it mattered (*oboedientia*, Latin deriving from listening *audire*). Namely, via a papal wisdom Pope Zacharias answered[94], that it is preferable to call the one who has the power (*potestas*) the king over the one with the mere royal title (*auctoritas*), «so that the order is not disturbed» (the Augustianian *ut non conturbaretur ordo*, De civitate Dei, l. 19, c. 13). Thus preventing the 751-coup to be interpreted as dangerous precedent, the papal wisdom legitimized the usurpatory replacement of the Merovingians by the Carolingian house magistrates (*majores domus*)[95] and made Pippin III (r. 751-768) king.

However, this event was so sensitive, as it meant, in fact, breaking one's oath of fidelity towards one's king, that Pippin needed an extra covenant with the divine, relying on the papal apostolic authority. He became the first Frankish king to receive a Pope's visit at his court 753, and to be anointed in St. Denis 754 for his help against the Lombard threat to the Byzantine exarchate. Even though such annoiting rituals (*consecrationes*) had been in use in Visigothic Spain and Ireland, the particular redress to the Old testament allowed the contemporary imagination of a special Carolinian royal dignity as a 'New David' (*Novus David*).

The exchange of papal estates (*Patrimonium Petri*) for anointing might be too simplified[96]. Yet, the formulaic reference to the origin of the Frankish kingship 'by God's grace' (*Dei gratia)* arose around the Frankish royal-papal alliance of interests. The Carolingians' recognition as the rightful Frankish kings was ennobled by their protective function for Rome (*Patricius Romanorum*), the Frankish church introduced the Roman liturgy instead of the Gallican one. The Frankish guarantee for the Papal States (so-called Pippine Donation) enabled the Roman emancipation from Eastern Rome. The alliance between the Frankish kingship (774 together with the Lombard crown) and the Papal Church amounted to a continuum in 'occidental' imperial politics: both the Latin Church and the Roman Empire are the decisive universal identities of Carolingian Europe[97], and their 'transfer'

via the *translatio imperii Romanorum* was only logical.

There are two remarkable traces of the Latin church's interference with wordly power structures, contributing to specific European rationales of Constitutional history: the political signature of Latin episcopal structures (infra 3.2.2.1) and top down standardizations via Latinity (infra 3.2.2.2). The latter's spread was forstered not only by the Papal rule via jurisdiction, but also by the Frankish kingship (Carolingian renaissance) on the basis of extending monasteries to academic learning centers.

3.2.2.1 *Political Signature of Latin Episcopal Structures*

Organizing Frankish rule between the Pyrenees and the Weser relied on the city-based episcopal structure of the Roman Church[98]. The dioceses offered reference points for territorial competences, and the canonistic adoption of the Roman *iurisdictio* for episcopal jurisdiction[99] took place at a time when the concept of '*border, frontier, frontière, frontera, frontiera*' has still been completely unknown[100]. In the old Roman centers, the office of bishop and the rule of the city coincided often under the influence of local nobility. It was exactly this continuity as an ancient provincial capital, whereby Reims (documented as a bishop's see since 314) has established itself as the baptismal site of the Merovingian king Clovis and as the coronation church of the French Capetian kings.

The singularity of the bishops' local seats within the Roman administrative tradition of the provinces with their suburbs (*civitates*) promoted not only the ecclesiastical territorialization, but also fostered the special position of the Frankish and later German bishops, who increasingly exercised rule in a secular sense and finally became imperial princes. Thereby, the Frankish *regnum Europae* was distinguishable from its Celtic, Slavic, Scandinavian and Baltic neighbours, and the latters' connection to Europe around 1000 required Latin Christianisation.

3.2.2.2 *Standardisation through Scientific, Legal and Liturgical Language*

The Latinity of the Roman canonical church order provided the Carolingians with lordly standardisations, – be it the specifications for a uniform liturgical language (*unitas*)[101], be it the regularity of the Greogorian chant (*cantus Romanus*) for the singing (*consonantia*)[102].

In addition, general schools[103] became established at the cathedral chapters (787 *Epistula Litteris Colendis*)[104], to spread knowledge of antique and scripture-based Latinity (Carolingian Renaissance). This turned monasteries into cultural institutions, as at Fulda, Lorsch, Reichenau, St. Gall, Weißenburg and Murbach in Alsace. Thereby, the Frankish school system at monasteries and cathedral schools amounted to a nucleus of scholasticism. On the other hand the scholastic *credo ut intelligam*[105] strengthened the royal rule[106] and helped a great deal to consolidate the imperial patronage over the Church: Through privileges with immunity and later imperial immediacy, imperial abbeys were closely bound to the king's rule. The bishops were appointed with royal involvement. Abbots and bishops became appointed as vassals

and subjected to the (secular) oath of allegiance, imperial synods met under imperial presidency[107].

Though, rationality and willingness to learn never existed vis-à-vis the Judaism of Christ, and even nowadays Jewish influences on European constitutional history are still a research desideratum[108], even though the terminology of the so-called 'European Age of the Jews'[109] is well known. The Passau teaching and this essay do not offer more than some superficial sketches, though they hope to be essential and to trigger further attention.

3.2.3 *Jewish Distinctiveness due to a Focus on Religious Identity and Specific Settlements*

The Jewish religion is older than any constitutional processes in Europe, and significant influences are hard to spot, as Hebrew law contrary to canon law has never cared about the concurrence with or legitimization of wordly ruling[110]. Rather due to its divine revelation, Hebrew law has always been eager to remain true to itself and kept away from 'statal business'. However, it is shortsighted to settle for an exclusive Christian authorship for European legal terms and constitutional thinking. It was a mixture of salvation ideas by prophetic Judaism and Christian narratives that made up the empires' sequence according to the Second Epistle to the Thessalonians (the Pantocrator Christ overcoming the Roman Empire)[111], which served as a narrative to legitimize the Carolingian emperorship. In adition, there is an obvious contribution by the Mishnah (2nd till 3rd century CE=AC)[112] to 'sanctify' human individuality by likeness, even though the ideas of the true essence of being human differ widely[113].

As a unique religious community with international trade contacts, good language skills and medical talents[114], the Jews live under various legal ideas based directly on God's Word (*Halacha*=the path to follow)[115] and various interpretations[116], independent from secular statehood[117]. The diaspora- or even more exile-situation hands down a kind of 'apocalyptic mentality', be it the perceived intimidation of religious identity[118], be it the exposure to foreign domination[119]. Early medieval crusades have forstered Christian revenge phantasies for a 'murdererd' God[120], and the historic rise of the money economy[121] witnessed resentments against the so-called usury and interest transactions by Jews.

Their settlement via economic privileges has always been an essential factor for the 'segregation' of Jewish communities[122]. Privileging by the king meant immediate royal protection – by jurisdiction and royal ban e.g. in the later Hohenstaufen chancery. There was also the well established practice to include the Jews in land peace regulations (*Landfriedensregelungen*). Thus, settlement by privileging resulted in a network of competing protective powers. As long as their balance was preserved (and even if pitted against each other) the Jewish communities could gain advantages, which often motivated envy. When the balance broke down, persecution or expulsion happened, and any rationality as argued for in the previous sections seems to have been forgotten.

Putting the analyzed European identification patterns in a nutshell, a specific European swap of levels becomes obvious: mixing cultural and political levels and

'selling' cultural matches as political accordances. The lingustistic abstractness of Latin, still nowadays the common root of many European languages, left enough space for this. The formative influence of standardizing constitutional notions resulted significantly out of its distinctiveness from the oral naming of practical realities. Beyond the liturgical, literary and scientific standardization (supra) there is a special constitutional impact of this 'linguistic gap'. No other constitutionally coherent area apart from Europe has been embossed in such a way by the difference between a learned written language and the orally spoken uniform dialects. This might be one reason for a specific European 'confusion' to take cultural concordance as a substitute for political unification.

4. *The European Commingling of Culture and Politics*

At Charlemagne's court, Europe was the cultural label for the Christian Frankish dominion between the Rhineland and northern Italy, and denominated a vast incoherent domain as different from its pagan neighbours, but also from Byzantium and from the Christendom[123] as a whole. Interestingly enough, the 1951 map of the original Coal and Steel Community corresponds pretty closely to the areas of the Carolingian 'Empire'. No historian would be ready to reformulate the previous sentence by using the term 'borders' of the Carolingian Empire, as it has been tied together by and onto the person of Charles. Significantly, it is the name of Charles that has entered the Slavic languages as the generic term for 'king, ruler' via the assumed Common Slavic *korlj*[124]. The ruler's person as political programme is not uncommon to medieval constitutional thinking, but for the Frankish Carolingian Empire a further observation seems justified: according to the Carolingian sources it is quite likely, that the universal identities Holy and Roman left no room (and no need) for any further supra-regional connotation of the Frankish claim to rule. This assumption can be examined by means of the following arguments: The instrumentalization of the ancient educational canon for the renaissance of the Roman imperial idea made the *translatio* not only a unity of thought, but motivated 'thought' unity; the medieval canon *ordinabiliter habitum* met the Augustinian *ordinatio ad unum*[125]. This combination resulted in a standardized definitory framework for organizing rule, – abstract from the concrete everyday realities; thereby, kingship amounted conceptually to an autocracy, when (and even if) the Merovingians «in Latin European post-Roman societies … [were still] multi-rulers rather than autocrats»[126].

The linguistic abstractness to derivate *regnum* from royal autocracy was owed to the fact that Latin is the patristic and the scholastic language, as well as the legalized means of communication by the papal legal church (via the decretals). At the very same time when the synonymy of Latin writing with rational, abstract, nuanced and strictly logical expression has started[127], the Carolingian minuscule – still present today in Times New Roman -(font) – has offered the appropriate tool to provide every monastery with an authentic copy of the Rule of St. Benedict.

This difference or even more distinctiveness of written Latin from local dialects

and indigenous languages is a European peculiarity, especially in regard to the constitutional naming[128]. Only from the 6th century onwards, there emerges a vulgar oral Latin variant, coincidently with the *leges barbarorum* of the Migration Period. Interestingly and from my point of view not by chance, Frankish Latin writing amounted to a bulwark against the regional differentiation of spoken vulgar Latin in the times between the *Lex Salica* (511) and the Aachen Capitular (811) – or roughly between the Merovingian royal baptism in 498 and the Carolingian imperial coronation in 800. It is therefore no surprise, that only from the 9th century the earliest uses of French[129], Spanish, Catalan, Portuguese, Romanian, can be traced[130].

Additionally, in later centuries the cultural unity on the basis of the Latin *lingua franca* prevailed. It remained the learned language at the first universities Bologna, Oxford and Paris, and still half a millennium later than those medieval foundations Latin frames legal arguments and debates, even though the *usus modernus* produced the first vernacular lectures for the prospective *iurisperiti*. Also, scientific classics (Copernicus 1543[131], Galilei 1610[132], Kepler 1619[133], Bacon 1620[134], Newton 1687[135]) and further mathematical works of later centuries (Euler 1744/46[136], Gauss 1801[137]) addressed their readers in Latin.

Even if today's Europeans have nothing to do with Christianity or the France of the Vth Republic has even elevated laicism (*laïcité*) to a constitutional principle[138], the (Latin) linguistic contexts[139] of Catholic Christianity run by the Papal Church remain the historic fundaments that have enabled the adoption of late antique structures of rule and law in the Roman-Germanic synthesis of the Franks[140]. This integration effect of Latinity[141] has borrowed from its coexistence with and difference from the spoken colloquial languages, which shape the world of experience and the immediate reality of life of the contemporaries; it enabled cultural unity without political subjugation[142]. This might be regarded as a specific strength, but it also comprises the pitfall of 'covering' political diversity up to and including pettiness with scientifically shaped legal-cultural unity. Therefore, «Shallow Europe» (Umberto Eco, La Stampa 2012)[143], takes cultural unity already for a granted political unity, all too familiar with Eco's pointed statement that «we are European by culture… we must remember that it is culture, not war, that forges our identity». In my point of view, it is exactly the commingling of culture and politics, that the contemporary integration process of the European Union, oscillating between a federal union and united European states, still 'suffers' from.

The commingling of culture and politics might be owed to Europe's origin as an idea (of self-identification) without given (political) reference (supra). This can be observed in the centuries, following the Carolingian integration of medieval Europe. After the Carolingians, the term 'Europe' lost its identification function[144]. It was not until the fall of Constantinople in 1453 that 'Europe' as the 'signal word' against the 'danger from the East' was back in *vogue*. Enea Silvio Piccolomini, the later Pope Pius II, projected the cultural level of identification[145] onto the spiritual-religious unity of Christianity; in his speech at the Frankfurt Turks' Day in 1454, he used this bracket between cultural and religious unity as if «Europe, fatherland, our

own house, our abode»[146] were a political dominion. This crossing of cultural and political levels sprouted a wide variety of blossoms. Listening to Schiller's inaugural lecture in Jena (1789)[147], the cultural claim to «bring the light» to other peoples, as the Enlightenment metaphor implies, was the breeding ground for political exploitation via colonisation. The *Sturm und Drang* had only known the nation, the fatherland. The latter also applies to Napoleon, the 19th century 'choreographer' of Europe: France (but not Europe) was the decisive political factor in asserting his imperial claims. The lacking political idea of Europe also accompanied the 'legal-cultural European imprint' on the constitutional making of America. It was the familiarity of the *founding* fathers with European antiquity that has shaped the representative form of the republic in the union of initially 13 states[148]. Their educated bourgeois caution towards the people as sovereign caused the 'almost hidden' reference to popular sovereignty in the initial wording of the 1787 text, balanced with the (learned) trust in a meritocracy of judges and representatives, which also permeates the *federalist papers* penned by Alexander Hamilton, James Madison and John Jay under the common pseudonym "Publius". The worldwide 'triumphal march' of freedom and democracy, associated with «the old continent» (Goethe Tame Xenia)[149] since the Herodotean narratives of the Persian wars, left Europe between French revolutionary turmoil, monarchical sovereignty and longings for safety, varieties of co-determination (also including aristocratic brotherhood like in the Polish May Constitution of 1791), or the Kantian republicanism, to which the French credo of freedom through participation in the *volonté générale* together with the explosive power of the triad «liberty, equality, fraternity» sounded monstrous. These uncertainties of the '*Zeitenwende*/turn of time' between the late 18th and the early 19th centuries triggered the romantic movement; and for its German protagonists Novalis[150] and Schlegel[151] it was the *topos* of a European Christian Occident that became revived, without any concrete political conclusions in the sources of the 19th century.

5. *Outlook: Impulses for the Future of Europe*

Only after the National Socialist reign of terror, the world war traumas and the division by the Iron Curtain does Europe become a political idea in which the impulse to unite for reconciliation and peace among the peoples manifests itself. What unites the Europeans, who until 1989 were the Western, Eastern, Southern and Northern Europeans? For some, the Herodotus motif, danger from the East, plays an important role, for others the romantic motif of the Christian Occident. In the political processes themselves, however, the Enlightenment tradition prevails[152]. The states that have joined together in the European and Atlantic associations demand from each other the recognition of human rights, the rule of law, democracy and a competition-oriented but anti-monopolistic market economy. Since 1989, however, the situation has changed fundamentally. The East Central European and Eastern European countries have joined the Atlantic and European associations. Beyond the logic of European legal Art. 7 procedures or budget blockades, the core issue is a self-defini-

tion of the Europeans. For this, a Western European re-labelling of former socialist countries cannot suffice. This only feeds ethnicism and nationalisms or a post-communist decadence bashing of the so-called Western world, in which anti-modern resentments combine with post-communist nostalgia and ecclesiastical claims to property preservation; what else unites us as Europeans?

This essay is an attempt to answer this from the perspective of constitutional history. It might come to an end by highlighting the overall aim of teaching constitutional history in a comparative perspective: To contribute to the self-awareness of young Europeans and their responsibility within a 'new' world. By 'responsibility' (literally: how to respond to the world) I mean the tolerance of ambiguity as the essential teaching topic[153].

This leads us back to the starting point of hellenising identifications and their trias of writing, democracy and liberty: Legally translating human dignity's essence into respectfulness for the individuality of others to the others' condition builds on the 'tolerance of ambiguity'[154], which bars democracies from totalitarian degenerations[155]. Any tolerating of intolerance would undermine any critical rationalism in open societies[156]. This is all the more urgent as there is no immunity of democracies against totalitarian distortions[157]. Dignity's legal practicability can be established via the 'right to justification'[158] also offering a modern translation of the constitutive cliché of European freedom (contrasted to Chinese, Russian oppression). Such a categorical right to justification reminds us of the Socratean trust in the practical reason (*phronêsis*), and it is also the essence of statehood respecting its people as being its author, rather than treating them merely as the 'means of the state'. Civic self-mastery as the indispensable prerequisite for the functional efficacy of dignity for legitimization and legality is a major goal of teaching European constitutional history.

1 https://www.jura.uni-passau.de/muessig/schwerpunktbereiche/schwerpunktbereich-ii/ausgestaltung-und-pruefungen (accessed on 13/11/2023); https://www.jura.uni-passau.de/studium/studienangebote/zusatzqualifikationen/vorlesungsverzeichnis (accessed on 09/11/2023).

2 https://kurse.vhb.org/VHB-PORTAL/kursprogramm/kursprogramm.jsp? (accessed on 14/11/2023).

3 https://www.jura.uni-passau.de/muessig/schwerpunktbereiche (accessed on 14/11/2023).

4 https://www.uni-augsburg.de/de/studium/organisation-beratung/vorlesungsverzeichnis/lehrveranstaltungen-juristische-fakultat/ (accessed on 09/11/2023).

5 https://www.jura.uni-bayreuth.de/pool/dokumente/studienplaene/Studienverlaufsplan_WS_2022_23.pdf (accessed on 9/11/2023).

6 https://campo.fau.de/qisserver/pages/cm/exa/coursecatalog/showCourseCatalog.xhtml?_flowId =showCourseCatalog-flow&_flowExecutionKey=e1s1 (accessed on 9/11/2023).

7 https://lsf.verwaltung.uni-muenchen.de/qisserver/rds?state=wtree&search=1&trex=step&root120232=681010%7C674090%7C669729%7C673071%7C681066%7C684100&P.vx=kurz (accessed on 9/11/2023).

8 https://campusportal.uni-regensburg.de/qisserver/pages/cm/exa/coursecatalog/showCourseCatalog.xhtml?_flowId=showCourseCatalog-flow&_flowExecutionKey=e1s1 (accessed on 9/11/2023).

9 (1936-2023). This article is dedicated to him in gratitude and honourable remembrance.

10 https://wuestudy.zv.uni-wuer-

zburg.de/qisserver/pages/startFlow.xhtml?_flowId=showCourseCatalog-flow&_flowExecutionKey=e2s1 (accessed on 9/11/2023). See also the Bavarian State Ministry of Science and the Arts, https://www.stmwk.bayern.de/wissenschaftler/hochschulen/universitaeten.html (accessed on 9/11/2023).

[11] O. Halecki, *Europa - Grenzen und Gliederung seiner Geschichte*, Darmstadt, Gentner, 1957, p. 6. The quotation continues: «and this is the secret of all the refinement and peculiarity of European civilisation. At the same time, it is the deepest reason for the development of local autonomies and for the importance of small countries, even city-states, in European and especially in the comparative history of individual cultural contributions to a common legacy». (English paraphras. transl. mine, as all subsequent non English quotes, if not indicated otherwise).

[12] Instead of many cf. W. Reinhard, *Geschichte der Staatsgewalt, Eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur Gegenwart*, München, Beck, 1999, p. 25.

[13] Cf. «integral conceptions of European history» (B. Jussen, *Einleitung*, in: idem (ed.), *Die Macht des Königs. Herrschaft in Europa vom Frühmittelalter bis in die Neuzeit*, München, Beck, 2005, p. XII).

[14] Therefore there is a deliberate farewell to any Western centrism, when lecturing European Constitutional History.

[15] The first world map by Hekataios from the end of the 6th century BC shows a southern Asia and a northern Europe; this is coincident with the Homeric 'Hymn to Apollo', which distinguishes a 'Europe' from the 'Peloponnese and from the islands in the sea' (Homer, *Hymne an Apoll*, in: A. Weiher (ed.), *Homerische Hymnen*, 6th ed., München/Zürich, Artemis, 1989, p. 49). Most probable is the synonymous use of «Europe» for Greece from the centre to the Bosporus. For Hekataios cf. Ch. Schubert, *Konstruktionsprinzipien des Weltbildes: Die Hippokratische Schrift De aeribus und die Suche nach der Mitte der Welt*, in «Medizinhistorisches Journal», n. 35.3/4, 2000, p. 201 ff., 202.

[16] This, however, would be the inherent consequence of the concepts by Hobbes, Bodin and Schmitt, (still followed today: instead of many H. Bredekamp, *Bild Recht Zeit, Ein Plädoyer für die Neugewinnung von Distanz*, ed. by H. Meier, München, Siemens Stiftung, 2021, p. 14 ff). Against such an absolutized approach cf. already the research programme of the Advanced Grant ReConFort, infra note 19 and the last manuscript of Dietmar Willoweit, *Rechtsdenken. Zwischen innergesellschaftlicher Rechtsbildung und hoheitlicher Rechtssetzung*, ed. by Steffen Schlinker on the basis of the author's nearly completed manuscript, Baden-Baden, Nomos, 2024.

[17] Cf. the *nostri*-Anapher by Manetti (U. Müßig, *Drafting Dignity*, in «Journal of Constitutional History / Giornale di Storia Costituzionale», n. 44/II, 2022, pp. 157 ff., 159.

[18] U. Müßig, *Reason and Fairness, Constituting Justice in Europe*, Leiden, Brill, 2019, p. 27 ff. idem, *Recht und Justizhoheit, Der gesetzliche Richter im historischen Vergleich von der Kanonistik bis zur Europäischen Menschenrechtskonvention, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, England und Frankreich. Schriften zur Europäischen Rechts- und Verfassungsgeschichte*, vol. 44, 2nd, corrected and supplemented edition, Berlin, Duncker & Humblot, 2009, pp. 36-38.

[19] Cf. ReConFort, Reconsidering Constitutional Formation, ERC-AG-SH6 - Advanced Grant No. 339529, and https://link.springer.com/book/10.1007/978-3-319-42405-7,; ttps://link.springer.com/book/10.1007/978-3-319-73037-0.

[20] Cf. H. Rosa, *Resonanz. Eine Soziologie der Weltbeziehung*, 4. ed., Berlin, Suhrkamp, 2020, pp. 52 ff., 144 ff., 365, 381 ff., 435 ff., 747 ff.

[21] D. Willoweit, S. Schlinker, *Deutsche Verfassungsgeschichte. Vom Frankenreich bis zur Wiedervereinigung Deutschlands*, 8th ed., München, Beck, 2019, § 1 II 2, Rn. 6. Fundamentally D. Willoweit, *Gerechtigkeit und Recht, Zur Unterscheidung zweier Grundbegriffe der Jurisprudenz*, BayAkademieWiss, München, 2018; also: https://publikationen.badw.de/de/044876905/pdf/CC%20BY (accessed on 25/7/2023); idem, *Art. Recht, Handwörterbuch zur deutschen Rechtsgeschichte* (=HRG), 2nd ed., col. 1079-1084.

[22] Vgl. D. Busse, W. Teubert, *Ist Diskurs ein sprachwissenschaftliches Objekt? Zur Methodenfrage der historischen Semantik*, in D. Busse, F. Hermanns, W. Teubert (eds.), *Begriffsgeschichte und Diskursgeschichte. Methodenfragen und Forschungsergebnisse der historischen Semantik*, Westdeutscher Verlag, Opladen 1994, pp. 10 ff.

[23] D. Busse, *Historische Semantik, Analyse eines Programmes*, Stuttgart, Klett-Cotta, 1987, p. 65 ff. is already critical of the approach of the Geschichtliche Grundbegriffe edited by O. Brunner, W. Conze and R. Koselleck ed. (*Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 1-8/2, Stuttgart, Klett-Cotta, 1972-1997). On decontextualisation, recontextualisation, narrative formation, see also G.W. Most, *Preface*, in Id. (ed.), *Aporemata. Kritische Studien zur Philologiegeschichte*, vol. 5, Göttingen, Vanderhoeck & Ruprecht, 2001, p. VII (VIII).

[24] Cf. e.g. Müßig, *Drafting Dignity*, cit.

[25] Ivi, n. 18.

[26] Cf. Homer, *Iliad*, XIV, pp. 231-322 (With introduction, commentary, and facing-page translation by

S. Pulleyn, Oxford, OUP, 2020); Ovid, *Metamorphoses*, II pp. 833-875 (Translation by A.D. Melville, *Oxford's World's Classics*, Oxford, OUP, 2009). The topicality, facing the unresolved challenges of rescuing refugees in the Mediterranean sea, could not be greater.

[27] In the sense of the structure ontology by H. Rombach, *Strukturontologie, Eine Phänomenologie der Freiheit*, 2nd ed. Freiburg/Munich, Alber, 1988, p. 345 ff., p. 362 f. (=Die Grenzen des europäischen Denkens, in: Nachwort zur 2nd edition). Furthermore p. 366: «Structural ontology has set out to give a 'phenomenology of freedom'. By this is meant that the free character of human existence does not appear merely as a metaphysical assertion, a postulate or quite simply a positing, but proves itself in a very concrete form, namely as the only appropriate relation of structures to structures. … Liberty is the 'causal nexus' in the structural context». I.e. reaction is possible as «free response» (ivi). Cf. also p. 330: «Freedom is the ultimate essence of being».

[28] Around 1100 BC, the Phoenicians developed the alphabetic script, by assigning a character to each spoken sound, which were only consonants (like modern Arabic and Hebrew). According to Adelheid Schlott Greek emerged from a reinterpretation of the Phoenician consonants Alef He Jod Ajin Waw in a e i o u-vowels (A. Schlott, *Schrift und Schreiber im Alten Ägypten*, München, Beck, 1989, p. 19-22; this reference is owed to my former colleague Ulrich Manthe, who is kindly thanked for it). This seems plausible, due to the rather arbitrary distribution of vowels in, for example, the modern German alphabet. Similarly H.J. Störig, Abenteur Sprache. Ein Streifzug durch die Sprachen der Erde, München, dtv, 2002, p. 93 f. Differently K.-Th. Zauzich, the Egyptologist emeritus of Würzburg, who assumes a derivation of the Greek alphabet from the hieratic script; although he concedes adherence to the Phoenician idea of deriving the letters from the hieratic ones, he assumes that the Greek script developed independently from the Phoenician alphabet (Hieroglyphen mit Geheimnis. Neue Erkenntnisse zur Entstehung unseres Alphabets, Darmstadt, Zabern, 2015).

[29] Be it 16 Phoenician letters (Pliny the Elder, *Naturalis Historia* VII, 56, 192: …*in Graeciam attulisse e Phoenice Cadmum sedecim numero* …, https://www.oxfordscholarlyeditions.com) or 17 (Isidore, *origines* (lat.=*Ethymologiae*, translated by M.L. Wallis, Oxford Classical Library, Reprint Oxford, OUP, 1957), Book I, chap. III, 6: *Cadmus Agenoris filius Graecas litteras a Phoenice in Graeciam decem et septem primus attulit*), which Kadmos, Europe's brother, is said to have brought with him in search of his sister. Cf. also Herodotus, *Histories*, vol. 1: Books I-V, 5th ed., Zurich, Hildesheim, 1995, V 58, p. 697; Tacitus, P. Cornelius, *Annalen*, 3rd edition, Stuttgart, Teubner, 2013, XI 14, p. 320.

[30] The oldest form of Slavonic that can be grasped by research, Church Slavonic, spoken in the 11th century, has been preserved within the liturgical language of the Orthodox Church.

[31] Even though their linear script A has not been deciphered to this day and probably ends in 1500 BC, it has not been reused until Homer's Iliad in 800 BC. Homer's language belongs to the Ionian language group, to which Attic also belongs, the language of the Athenians; the latter gained supralocal impact due to the political and cultural rise of antique Athens. The subsequent Macedonian kings and the Diadochi made Attic their official and court language; thereby in the age of Hellenism, it amounted to the common language of the eastern Mediterranean and of the New Testament.

[32] In contrast to the principle of word writing, in which each word corresponds to a pictorial sign, the meaning of the sign is linked to a phonetic complex; the combination of characters as phonetic signs, without regard to the original meaning of the signs (principle of *rebus*) is suitable for the (logographic) reproduction of words.

[33] Notwithstanding the fascination for the Phaistos Disc, a clay disc with hieroglyphics as the earliest evidence of letterpress printing (almost 3000 years before Gutenberg).

[34] Ancient saga tradition locates the begetting of Minos in Gortyn, the site of the oldest tablets of the law carved in stone in Greek script (around 500 BC). Today, twelve of the 20 tablets are preserved, consisting of a total of 42 stone blocks. The text of the law has a total of about 17 000 letters. The writing runs alternately from left to right and then mirror-inverted from right to left. The civil and criminal laws decreed on it formed the inheritance and family, divorce and criminal law of the city-state 2500 years ago.

[35] The research challenge of the interdependency of the genesis of antique ubran statutes and the emergence of the arbitrary determinability of the connection between written characters and designated reality (linguistic arbitrariness) reaches far beyond the adequate teaching niveau (of legal history), but appears to be a promising interdisciplinary desideratum.

[36] The Greek *pólis* understood itself primarily personalistically, not territorially.

[37] Echoes of the Parthenon Temple on the Athenian Acropolis can be found, for example, in the Austrian Parliament designed by the architect Theophil Hansen or in the Palais Bourbon of the French Assemblée Nationale conceptualized by Lorenzo Giardini and Jules Hardouin-Hansart. See also

L.-M. Weischede, *Parlamentskunst - Zur Staatsästhetik freiheitlicher Demokratie*, GRW (=Grundlagen der Rechtswissenschaft, ed. by U. Müßig, M. Auer, H. Dreier), Vol. 43, Tübingen, Mohr Siebeck, 2022.

38 The Aristotelian *zóon politikón*, man as being related to the statutes of the *pólis* (as opposed to the shortened mistranslation 'political being'), fits in with this.

39 H. Pleticha, O. Schönberger, *Die Griechen. Ein Lexikon zur Geschichte des klassischen Griechenlands*, Bergisch Gladbach, Lübbe, 1984, Art. *Plato*, p. 356.

40 *Politeia*, *Der Staat*, Siebtes Buch, 514a ff., griechisch-deutsch, translated by R. Rufener, ed. by Th.A. Szlezák, Düsseldorf, dtv, 2000 (Tusculum), p. 566 ff.

41 Socrates' second speech (22-38) begins with the essence of the soul (its immortality, representing the principle of all movement, due to the fact that it [the soul] always moves of its own accord). The following image of the unequal steeds of the soul, ch. 25, is followed in chapters 26-28 by the actual charioteer metaphor (Phaidros, ed. and translated by W. Buchwald, München 1964 (Tusculum), p. 60 ff. Decisive is the quote at 253d, p. 79: «As in the beginning of this myth we divided each soul threefold, into two horse-shaped entities and into the third, that of the steer, so shall it be to us even now».

42 According to the Nicomachean Ethics, political action is an object of ethics; the political production of constitutional rules enables good action. The standard of good action is efficiency (*arētḗ*; translation as virtue, top form), whereby moral efficiency lies in middle between excess and deficiency (2nd book, 5, 1106a (Greek-German translat. by O. Gigon, ed. by R. Nickel, Düsseldorf, dtv, 2007, p. 71 (Tusculum). The honour (*timḗ*), associated with a public office, is the standard of magnanimity (*megalopsychía*) and amounts to external dimension of happiness through setting an example for other citizens (4th book,7, 1123b, p. 159 (Tusculum). The fifth book of the Nicomachean Ethics (1129a ff., p. 187 (Tusculum) is dedicated to the justice.

43 The basis of the democratic form of government is 'freedom' (Aristotle, *Politics*, 6th book 1317a line 40-1317b line 29, dtv-classic-edition, transl. and ed. by O. Gigon, Zürich/Munich 1971, p. 202 f.).

44 Within practical reason (*phrónēsis*) lies the strong (*ischyrós*), invincible knowledge that following the laws (*nómoi*), i.e. the perfection, enables not only 'right' but 'virtuous' action.

45 This also includes the Aristotelian opposition of what is just by nature and what is just by virtue of statute, as well as the Platonic idea of *dikaiosýne*, when each of the three ranks in the poleis/three parts of the soul follow their natural virtue (*arētē*; Politeia 435a), up to the Thomasian Cicero-adaptation that what contradicts natural law cannot be declared just by positive human law (*Summa Theologica* I/II q. 94a5; q. 9 a2, vol. 13, Die deutsche *Thomas-Ausgabe*, Heidelberg Graz, Kerle, 1977; Summa Theologica, II/II q. 57a2ad2, vol. 18, idem, Heidelberg München, Kerle, 1953.

46 Müßig, *Drafting Dignity* cit., p. 159.

47 H. Hofmann, *Rechtsphilosophie*, 4th ed., Stuttgart, Teubner, 2008, p. 6, 72 ff. Cf. Sophocles, *Antigone* Z. 452 ff, in the translation by W. Kuchenmüller, Stuttgart, Reclam, 1957, p. 24: «Your command, the mortal one, did not seem so great to me, that it could surpass the unwritten commandments of God, the heavenly ones.» Her 'pious sacrilege' was, according to Sophocles' tragedy, the tragic opposition of nature and law. (Hofmann, *ibid*., p. 80 f.).

48 First and foremost the Milesians Thales (ca. 624-547 BC), Anaximander (ca. 610-550 BC) and Anaximenes (ca. 575-525 BC). While Thales (water) and Anaximenes (air) assumed a material primordial substance from which all other elements were to arise through condensation and dilution, Anaximander assumed an imperishable unlimitedness as an abstract explanatory principle (cf. von K. Fritz, *pre-Socratic philosophy*, Encyclopaedia Britannica, https://www.britannica.com/biography/Alcidamas, accessed on 27/7/2023).

49 *De legibus* I 42 f. (Leipzig, Goerenz, 1809, BSB A.lat.b. 498-1; *De legibus/Paradoxa Stoicorum. Über die Gesetze/Stoische Paradoxien*, lateinisch und deutsch, Tusculum, 3rd ed., München, dtv, 2004, p. 46). De legibus reads like a counterpart to Plato's «Nómoi», and at the same time as an indispensable supplement to Cicero's six books on the state (*De re publica*). Nature is to be recognised as the real source of right statutes and well-understood positive law – this is radically new compared to the traditional *populus legem iubet* (the Roman people, after all, are not nature). If the Roman people, at the request of the official, command the statute, and thus positive Roman law is based on the totality of the Roman consensus, nothing yet distinguishes Roman law from a *ius proprium*. Only the congruence between the statute command of the Roman people and the law command of nature (as ideas common to all men), undertaken for the first time by Cicero, makes Roman law a *ius commune* in the literal sense.

50 *De re publica* III 22: «Est quidem uera lex recta ratio, naturae congruens, diffusa in omnes», Cicero, Marcus Tullius, De re publica quae supersunt, ed. A. Maio, Tübingen/Stuttgart, Cotta, 1822, p. 251, available at: https://www.digitale-sammlungen.de/de/view/bsb10244658?-page=310,311, (accessed on 29/7/2023); or Cicero, Disputes in Tusculum I 30 («omni autem in

re consensu omnium gentium, lex natura putanda est», p. 14; «Quid si omnium consensu, natura vox est», p. 16), Cicero, Marcus Tullius, Tusculanarum Quaestionum Libri Quinque, ed. Joann. Caspari Bencard, Dillingen, 1685, p. 14, 16 (BSB A. lat. B. 537d; https://www.digitale-sammlungen.de/de/view/bsb10244635?page=,1).

51 In Cornelius Nepos' biography of Themistocles (school edition by Fr. Maier, *Cornelius Nepos: Berühmte Männer*, series 'Antike und Gegenwart', Bamberg, Buchners, 2004) this contrast becomes explicit: «Sic unius viri prudentia Graecia liberata est Europaeque succubuit Asia» (Them.5,3). The Greeks had been victorious at Salamis, but the danger posed by Xerxes and the Persians remained still very present. Themistocles had the cunning to send another messenger to Xerxes to tell him that the Greeks intended to destroy the bridge over the Hellespont on which the Persians had entered Europe. Xerxes, believing in Themistocles' words, retreated to Asia with all his troops.

52 E.g. Manfred Fuhrmann, «Europe [...] is always an antithesis to Asia in Herodotus.» (*Zur Geschichte einer kulturellen und politischen Idee*, Konstanz, Univ. Verl., 1986, p. 20).

53 The original linguistic meaning *bárbaroi*, as antonym towards the *polítēs*, the citizens of the Greek city states, can be traced back even in Linear B.

54 On the excellence (*arētē*) as a connecting line between the Thermopylae narrative (Herodotus, Persian Wars) and Antigone's (and also Electra's) acting according to higher values cf. F. Egermann, *Herodotus - Sophocles. Hohe Arete*, in: *Herodot, Eine Auswahl aus der neueren Forschung*, ed. by W. Marg, Darmstadt, WB, 1962, p. 249 ff. Ivi for the friendship between Herodotus and Sophocles.

55 This list could be continued endlessly: Aeschylus' Persians as one of the oldest surviving plays was first performed in the 5th century BC (Therein, the Greeks are introduced to the Persians with the words: «Servants of no man are they, subject to no man.»); Pre-Socratics and Socrates himself appeared on the scene in this 5th century BC. Hippocrates founded a school for physicians on the island of Kos. The temples of the Acropolis were rebuilt (with the new Parthenon for Pallas Athena), and Pericles shaped the Athenian democracy.

56 Wisdom through love for and practice of science, art, literature and rhetoric. Western music is also based on the number-mystical tonal system of Greek antiquity.

57 Cf. also W. von Kaulbach, *Die Seeschlacht bei Salamis*, Munich, Stiftung Maximilianeum, 1862/4.

58 In the basic Indo-European language, one reconstructs **h₁ leu̯dʰ*. These include ahd. *Liut* (plural *Liuti* "people"), Anglo-Saxon *lēod*, Lithuanian *liáudis* "common people" (cf. D. Nestle, *Eleutheria*, Part I: *The Greeks*, Tübingen, Niemeyer, 1967, p. 6 f.). Whether this connection has been preserved in Herodotean=classical Greek has not been handed down.

59 M. Gigante, *Herodot der erste Historiker des Abendlandes*, in W. Marg (ed.), *Herodotus, Wege der Forschung*, Vol. XXVI, Wissenschaftliche Buchgesellschaft, Darmstadt 1982, pp. 259 ff., 262.

60 Modern summary for all those who before Socrates (470 to 399 BC.) sought to know what existence is about and what is the real, irrespective of the differences between the Ionian thinkers and the school of Pythagoras.

61 And only the technical superiority of the Persians welds 'the Greeks' together.

62 After the first landing in Spain in 710, the Visigoths were defeated in 711; in 719, the Arabs occupied the entire Iberian peninsula, except for Asturias in northwestern Spain, and founded the Caliphate of al-Andalus (756 to 1014) with its capital in Cordoba, as well as the Nasrid Caliphate of Granada (until 1492).

63 Cf. the contemporary Anonymus of Cordoba: «*Europaeenses in suas se laeti recipiunt patrias*» (Quoted according to Fr. Maier, *Europa – ein übergreifender Bildungsauftrag, Was der Unterricht der klassischen Sprachen dazu beitragen kann und soll*, in «Forum classicum», n. 1, 2023, pp. 11-18, 14).

64 Significantly through the retrospective of the Charlemagne biographer Einhard almost 90 years later.

65 Exemplarily J. Fischer, *Oriens-Occidens-Europa: Begriff und Gedanke. Europa in der späten Antike und im frühen Mittelalter*, Wiesbaden, Steiner, 1957, p. 31.

66 N. Luhmann, *Wahrheit und Ideologie*, in: H-J. Lieber (ed.), *Ideologie -Wissenschaft-Gesellschaft*, Darmstadt, WB, 1970, p. 35 ff.

67 Th. Hobbes, *Leviathan or, The Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil* part 4, chap. 47, in: *The English Works of Thomas Hobbes*, ed. by W. Molesworth, vol. III, London, 1839, Reprint Aalen, Scientia, 1962, p. 697 f.

68 N. H. Trunte, *Slavia Latina, An Introduction to the History of the Slavic Languages and Cultures of East Central Europe*, Munich/Berlin, Peter Lang, 2012, p. 54.

69 Europa becomes the «name of that one civitas Dei of which Charlemagne had become the head [with his coronation as emperor on 25 December 800]» (Fischer, *Oriens-Occidens-Europa* cit., p. 77). The Frankish emperorship secured the European cohesion of various peoples (*regnum Europae*) as an area of Christendom, if necessary also with violence against Saxons, Huns and Avars. Later it would be the Christianisation of Great Moravia, Bulgaria, Bohemia, Poland, Hungary and the Kievan Rus that could shift the borders of Latin Christendom. Differentiating on the Jewish tradition of the Novus David Reinhard, *Geschichte der*

Staatsgewalt, cit., p. 39.

70 Esp. via Papal Rule by Jurisdiction and Judicial Competence in Canon Law (Müßig, *Reason and Fairness*, cit., pp. 41 ff.) Cf. the Latin literature in the Slavia Latina in Trunte, supra n. 68, pp. 132 ff.

71 On Church Slavonic, fundamentally Trunte, *Slavia Latina*, cit., p. 82 f.

72 The orientation towards the One, i.e. towards salvation.

73 According to Bishop Adalbero of Laon (d. 988), the three estates *oratores* (orators), *pugnatores* (warriors), *laboratores* (workers) are God-given (R. Lesaffer, *European Legal History, A Cultural and Political Perspective*, Cambridge, CUP, 2009, p. 168).

74 In regard to *ordo* and *ordinabiliter habitum* Müßig, *Reason and Fairness*, cit., pp. 41 ff., 502 ff.

75 J. Fleckenstein, Art. *Karl*, LexMA (=Lexikon des Mittelalters), Vol. V: Hiera-Mittel till Lukanien, München, Artemis und Winkler, 2002, col. 960 symptomatically mentions the Oath of Allegiance of 802, which combines the subjects' duties of loyalty with their religious duties to respect the 10 commandments.

76 E. Ewig, *Zum christlichen Königsgedanke im Frühmittelalter*, in *Spätantikes und Fränkisches Gallien - Gesammelte Schriften* (1952-1973), ed. by H. Atsma, vol. 1, Zürich/München, Artemis, 1976, pp. 3-71, 40 ff. Cf. also E. Eichmann, *Die Kaiserkrönung im Abendland - Ein Beitrag zur Geistesgeschichte des Mittelalters mit besonderer Berücksichtigung des kirchlichen Rechts, der Liturgie und der Kirchenpolitik*, vol. 1, Würzburg, Echter, 1942, pp. 105 ff., 109 ff. with evaluations of 1 Sam 24,7 and 1 Sam 26,16 and the reference to the parallels between the consecration of a bishop and the consecration of an emperor. Cf. also C. Sieber-Lehmann, *Um 1079, Warum es für das Verhältnis von Papst und Kaiser kein erfolgreiches Denkmodell gab*, in Jussen (ed.), *Die Macht des Königs*, cit., pp. 150 ff.

77 Cf. the parable of interest rates Mk 12,17: Render unto Caesar the things that are Caesar's, and unto God the things that are God's. The effect is anti-monistic, anti-centralist. Not even in the Papal State political polity and church are identical (P. Prodi, *Il sovrano pontefice. Un corpo e due anime: La monarchia papale nella prima età moderna*, in «Francia», n. 10, 1982, pp. 249-293.

78 In the late medieval universal controversy, this was a strong nominalist argument: God does not love man, i.e. the genus, but Peter or Paul, i.e. individuals. Therefore, the individuals, not the genera, must be primarily real. Cf. also the See Genezareth narrative of the calling of the disciples: if you want to follow me, you shall not say goodbye at home.

79 Exemplary for this is the innovative use of «sêle» by Heinrich von Morungen, who no longer equates it only with man's immortal share in God's spirit. Cf. his Minnelied 125, 24: «*der mir durch sêle mîn mitten in daz herze gie.*» (quoted according to K. Lachmann, *Des Minnesangs Frühling* 30th ed., edited by K. von Kraus, Leipzig, Hirzel, 1950, p. 162; H. von Morungen, Lieder (Mittelhochdeutsch, Neuhochdeutsch), text, translation, commentary by H. Tervooren, Stuttgart, Reclam, 2003, p. 34 (IV «*In sô hôher swebender wunne*»). A paraphrased translation would read: «which penetrated through my soul right into the heart». Cf. also the classification in H. Eggers, *Deutsche Sprachgeschichte*, vol. 1: *Das Althochdeutsche und das Mittelhochdeutsche*, Rowohlts Enzyklopedie, Vol. 185, Reinbek near Hamburg, Rowohlt, 1966, p. 398. 398.

80 U. Müßig, *Review of Josef Isensee, Hermeneutik. Studien über den Umgang der Jurisprudenz mit Normtexten im Vergleich zur biblischen Theologie und zur Literaturwissenschaft*, Frankfurt am Main 2023, in «Giornale di Storia costituzionale», n. 45/I, 2023, pp. 181-183.

81 Scholasticism, so often ridiculed, was probably less faithful to authority than usually assumed; since there were too many authorities they became necessarily questioned according to the method 'sic et non' or 'videtur quod …,' – 'sed contra'. Crucial from the constitutional history point of interest is the scholastic textual orientation, which neither rigidly canonised the late antique tradition, as happened in Eastern Rome/Byzantium and widely in the Orthodox Church, nor eliminated it, as did the Islamic world after its flowering on the Iberian peninsula.

82 In contrast, the Scotist voluntarism claims, that God as the initial cause of all being is free will. For Duns Scotus, the will directed towards the good is free. According to him the individual cannot be understood, but can be experienced (*experientia*; *haecceitas*). Scotus' criticism of the 'unity' of the scholastic world, the Thomasian primacy of being (*esse*) as the epitome of God, fits in with this. It has been only Ockham's proof in favour of nominalism that has finally overcome scholasticism, accepting that there is no exact *aequatio rei et intellectus*. General concepts=universals have no real counterpart. What really exists, is always a single, particular thing. For more details cf. *Legal Thinking between Art and Mathematics*, Macerata, eum, forthcoming.

83 Summa I, q. 83, Resp. «*Homo agit iudicio … ideo agit libero iudicio potens in diversa ferri. Ratio enim circa contingentia habet viam ad oppositе*».

84 Cf. also O. Köhler, *Abendland*, in H.R. Balz, R.P.C. Hanson, (eds.), *Theologische Realenzyklopädie*, Berlin u.a., De Gruyter, 1977, Vol. I: Aaron - Agende, pp. 17-42 (25). The notion 'learning mode' tries to express the Latin Christian speciality that faith is idealiter sensed and understood.

85 Far before the Reformation of the 16th century.

[86] Cf. lately, A. Meier, *Die »Jellinek-These« vom religiösen Ursprung der Grundrechte*, Tübingen, Mohr Siebeck, 2023 (GRW, 47).

[87] Mk 12,17 and Mt 22, 21.

[88] Already in the calling of the disciples (Lk 5, 1-11).

[89] This lies at the heart of the ambiguous term 'learning mode'.

[90] Thus, for Hannah Arendt, the modern era begins with the discovery and use of the telescope by Galileo Galilei (as impressively confirmed by the 2020 Nobel Prize in Physics for the experimental detection of black holes; H. Arendt, *Vita Activa oder Vom tätigen Leben*, Stuttgart, Kohlhammer, 1960, p. 244). Cf. the exhibition «Rivoluzione Galileo» by the Fondazione Cassa di Risparmio di Padova e Rovigo, together with the Università degli Studi di Padova in 2017. Copernicus, Gallilei, Kepler sought God's plan of creation with the help of mathematics. Newton, for example, has been a constant reader of his more than 30 editions of the Bible and saw no contradiction in it in relation to his mechanics equations.

[91] Eccentric is used here in the double meaning off-centre (away from Madrid) and unusual (innovative and groundbreaking).
[In regard to its own centre] lying outside the centre of the circle or pivot.

[92] «*Principia enim eiuus iuris…, per se patent atque evidentia sunt, ferme ad modum eorum quae sensibus externis percipimus*» (H. Grotius, Prolegomena 39, *De iure Belli ac Pacis, Libri Tres*, edition by B.J.A. De Kanter, T. Van Hettinga, Aalen, Reprint Scientia 1993 on the basis of the Leiden edition 1939, p. 20). See recently M. de Wilde, *Hugo Grotius's De societate publica cum infidelibus, Justifying overseas expansionism or religious toleration?*, in «TRG» (=Tijdschrift voor Rechtsgeschiedenis), n. 88, 2020, pp. 422-439.

[93] On the reasonable fairness of the *ordo judiciarius* and the *ordinabiliter habitum* of learned canon law, cf. Müßig, *Reason and Fairness*, cit., pp. 502 ff.

[94] Cf. on the request delivered by Burchard, Bishop of Würzburg, and Chaplain Fulrad P.E. Dutton (ed.), *Carolingian Civilization: a Reader*, Peterborough, Broadview, 1993; Lesaffer, *European Legal History*, cit., p. 130.

[95] The Carolingian house magistrates (*majores domus*) at the head of the royal court administration came from the Austrasian part of the empire on the Rhine, Moselle and middle Meuse, to which the economic centre began to shift at the end of the 7th century. From 720 onwards, Pippin II's illegitimate son Charles Martell ruled the entire Frankish kingdom as head of the household (*major domus*). In 725, he was also able to subdue the native duchy in Bavaria and to renew Frankish suzerainty in Alemannia in 730. Pippin III was the son of Charles Martel and father of Charlemagne. Historians have debated the origins of the anointing ritual (*consecratio*), which had already been in use in Visigothic Spain and Ireland. Pippin's most obvious source of inspiration, however, was the Old Testament itself (A. Angenedt, *Rex et Sacerdos. Zur Genese der Königssalbung*, in: N. Kamp, J. Wollasch (eds.), *Tradition als Historische Kraft. Interdisziplinäre Forschungen zur Geschichte des Früheren Mittelalters*, Berlin New York, de Gruyter, 1982, pp. 101-118, 109, https://www.mgh-bibliothek.de/dokumente/a/a091523.pdf, (accessed on 27.7.2023; Id., *Pippins Königserhebung und Salbung*, in M. Becher, J. Jörd (eds.), *Der Dynastiewechsel von 751: Vorgeschichte, Legitimationsstrategien und Erinnerung*, Münster, Scriptorium, 2004, pp. 179-208, 207.

[96] The patrimonium covers the area around Rome and the former Byzantine exarchate of Ravenna. In regard to the ‚exchange'-connexus cf. F. Hartmann, *Nochmals zur sogenannten Pippinschen Schenkung und zu ihrer Erneuerung durch Karl den Grossen*, in «Francia - Forschungen zur westeuropäischen Geschichte», n. 37, 2010, pp. 25-47, 32.

[97] In a letter by the Anglo-Saxon priest Cathwulf in 775, there is a call to thank Charles because God had raised the king «to the honour of the glory of the Empire of Europe» (*in honorem gloriae regni Europae*).

[98] Cf. also Robert Bartlett's observation of the expansion of Latin Christianity on the basis of a multiplication of bishopric structures (*The Making of Europe, Conquest, Colonization, and Cultural Change, 950-1350*, Princeton, Princeton University Press, 1993, pp. 5 ff.).

[99] Cf. with further details Müßig, *Recht und Justizhoheit*, cit., p. 56-57.

[100] Interestingly, the German word «Grenze» (border) has etymological roots in the Polish, corresponding with the permanent struggles for spatial affiliation since the late 12th century (H-J. Karp, *Grenzen in Ostmitteleuropa während des Mittelalters. Ein Beitrag zur Entstehungsgeschichte der Grenzlinie aus dem Grenzsaum* (Forschungen und Quellen zur Kirchen- und Kulturgeschichte Ostdeutschlands 9), Köln, Böhlau, 1972, p. 7 ff.).

[101] On the importance of the liturgical language, cf. R. Picchio, *Letteratura della Slavia ortodossa (IX-XVIII sec.)*, Bari, Dedalo, 1991, pp. 13, 55-56 and Trunte, *Slavia Latina*, cit., pp. 45 ff.

[102] Carolus Magnus Imperator: *Capitulare ecclesiasticum Anno 789*. PL 97, Col. 180. Quotation and German translation according to E. Kohlhaas, *Musik und Sprache im Gregorianischen Gesang*, Stuttgart, Steiner, 2001, p. 17.

[103] Cf. Alkuin's letters in: H.R. Loyn, J. Percival (eds.), *The Reign of Charlemagne, Documents on Carolingian Government and Administration*, Southhampton, St. Martin's press, 1975, 119 ff.

[104] Cit. in *Monumenta Germaniae*

Historica, Karoli Magni Capitularia; A. Boretius, V. Krause; Volume 1; Hannoverae 1883 (https://daten.digitale-sammlungen.de/0000/bsb00000820/images/index.html?id=00000820&page=90). Cf. on its understanding as a programmatic letter of Carolingian educational reform Th. Martin, *Bemerkungen zur Epistola de litteris colendis, in: W. Heinemeyer* (ed.), *Schriftgeschichte, Siegel- und Wappenkunde*, 31st vol., Köln, Böhlau, 1985, pp. 270 ff.

105 Anselm of Canterbury, *Proslogion, Capitulum I*, Latin/German translation and annotations by R. Theis, Stuttgart, Reclam, 2005, p. 20: «*Neque enim quaero intelligere ut credam, sed credo ut intelligam*».

106 H. Schilling, *Europa zwischen Krieg und Frieden*, in M-L. von Plessen (ed.), *Idee Europa, Entwürfe zum ewigen Frieden. Ordnungen und Utopien für die Gestaltung Europas von der pax romana zur Europäischen Union, eine Ausstellung als historische Topographie; Katalogbuch zur gleichnamigen Ausstellung des Deutschen Historischen Museums, Berlin, zur Neueröffnung der Ausstellungshalle von Ieoh Ming Pei, 25. Mai bis 25. August 2003*, Berlin, Henschel, 2003, pp. 23-32. Ecclesiastical forces were among the most important pillars of royal rule, especially since the Carolingians had built a court chapel.

107 Thus, at the Council of Frankfurt in 794, Charles rejected the decisions of the 7th General Council of Nicaea.

108 Prominent are the treatises by the Jewish legal historian Guido Kisch (*Forschungen zur Rechts- und Sozialgeschichte der Juden in Deutschland während des Mittelalters*, Sigmaringen, Thorbecke 1978; idem, *Ausgewählte Schriften*, vol I, Sigmaringen, Thorbecke, 1978, p. 13 and p. 237 f; Id., *The Jews in Medieval Germany; A Study of their Legal and Social Status*, Chicago, UCP, 1949). Particularly productive are the works of Dietmar Willoweit (*Vom Königsschutz zur Kammerknechtschaft. Anmerkungen zum Rechtsstatus der Juden im Hochmittelalter*, in Id., *Staatsbildung und Jurisprudenz, Spätmittelalter und frühe Neuzeit – Gesammelte Aufsätze 1974-2002*, Stockstadt a.M., Nomos, 2009, pp. 301*-319*). Cf. also F-J. Ziwes, *Studien zur Geschichte der Juden im mittleren Rheingebiet während des hohen und späten Mittelalters*, Hannover, Hahn, 1995. Lately, D. Forster, *Konfliktlösung im talmudischen Recht*, 43th Rechtshistorikertag Zürich 2022.

109 F. Battenberg, *Das europäische Zeitalter der Juden. Zur Entwicklung einer Minderheit in der nichtjüdischen Umwelt Europas*, Vol. 1, Darmstadt, WB, 2000, p. 6 following C. Roth, *The European Age in Jewish History*, in L. Finkelstein (ed.), *The Jews. Their History*, 4th ed. New York, Schocken, 1970, pp. 225-304; Cf. Raphael Straus on the occasion of founding the «Zeitschrift für die Geschichte der Juden in Deutschland», n. 1, 1929, in his programmatic essay *Forschungsmethode der jüdischen Geschichte* (p. 5): «Jewish cultural historians have often idealised the medieval Jew out of touch with reality, because the limits set by bourgeois facts were unclear to them. In contrast, Christian economic historians 'materialised' him because the facts of the Jewish-spiritual world remained foreign to them».

110 Regularly, Jewish communities enjoyed relatively extensive autonomy in legal matters.

111 The lines 1-11 of the Second Epistle to the Thessalonians is directed towards the appearance of the Antichrist and his destruction. Therefore, it is widely assumed in research today that 2Thess is the writing of an unknown author who wrote under the pseudonym of the apostle. There has been much speculation in the history of the text's impact about the power able to restrain the Antichrist. The most probable interpretation is that of the Imperium Romanum, but a clear decoding of the enigmatic statements does not seem possible.

112 According to Jewish tradition the earliest writing of the orally transmitted Torah from Sinai, probably compiled in the second century and with a final redaction from the 3rd century CE=AC. The name Mishnah comes from the Hebrew shanah =to repeat, to learn.

113 Unlike Christianity under Platonic influence (as the here mentioned Phaidros dialogue) Rabbinic Judaism does not think the soul to be separated from the body. Of course, the Jewish idea of grace does not need the redemptive death of the Messiah Jesus, but lies in the act of creation.

114 With his economic and social history of the Jews, Georg Martin Caro offers a profound European perspective (*Sozial- und Wirtschaftsgeschichte der Juden im Mittelalter und der Neuzeit*, Vol I: *Das frühere und das hohe Mittelalter* (reprografical reprint of the 2nd edition Frankfurt 1924), Vol II: *Das spätere Mittelalter* (reprografical reprint of the edition Frankfurt 1920), Hildesheim, Olms, 1964.

115 On *Halacha*, especially in view of the differences between Orthodox, Liberal and Conservative Judaism, cf. W. Homolka, *Das Jüdische Recht Eigenart und Entwicklung in der Geschichte*, «HFR» (=Humboldt Forum Recht), n. 17, 2009, pp. 250-282, 273 ff., https://www.rewi.hu-berlin.de/de/lf/oe/hfr/deutsch/2009-17.pdf (accessed on 17/7/2023).

116 The most important source is the Hebrew Bible, especially the Torah (=teaching, i.e. the five books of Moses). Therein, traditional Jewish legal conception recognizes 613 legal regulations (so-called *mitzwot*), which form the basis of all Jewish legal codifications, e.g. the so-called Book of the Covenant (Ex 20, 23-23, 19) or the Ten Commandments (Ex 20, 1-17 and Dt 5, 6-21). Other au-

thoritative sources of Jewish law are the prophets (e.g. 1 Sam 8; 1 Kings 21) and the hagiographers. In the post-biblical period, between the destruction of the Second Temple (70 CE=AC) and the conclusion of the Talmud (600 CE=AC), the classical sources *Mishnah, Tosefta*, the Palestinian and the Babylonian *Talmud* (=oral Torah) as well as the halakhic midrashim (=legal interpretation of the Hebrew Bible) emerged. In this regard, there seems to be a history of codification between the generations of *Taanaim* via *Amoraim* (200 CE=AC bis 500 CE=AC), which seems to have anticipated the development of the later *ius commune*. In addition, there is also a response literature comparable to the papal rescripts, which answers submissions questioning the Jewish law in a systematic way.

[117] Jewish law here is not the law of a state, but of the people of Israel.

[118] The Mainz pogrom of 27 May 1096, which took place during the Crusades, represents a major turning point in European Jewish history, as for the first time – in addition to the massacre – the Kiddush HaShem (suicide to preserve the name Jahwe, here to avoid compulsory baptism) was practised here, proving Jewish resistance within a Christian-dominated world; see also E. Haverkamp, *Martyrs in rivalry: the 1096 Jewish martyrs and the Thebean legion*, in «Jewish History», n. 23, 2009, pp. 319-342, 320, https://www.mgh-bibliothek.de/dokumente/b/bo33556.pdf (accessed on 28/7/2023).

[119] Since the religious literature of ancient Judaism, reflecting the ongoing conflict of foreign powers with Jewish claims to self-domination and the latters' felt threat of their religious identity, a repertoire of 'apocalyptic' forms and motifs developed. They contain revelatory messages of a transcendent divine plan of salvation. The decisive difference between Jewish and early Christian apocalyptic is that for Christians salvation has already taken place, while the Jews still hope for it.

[120] Cf. O. Stobbe, *Juden in Deutschland während des Mittelalters in politischer, socialer und rechtlicher Beziehung*, Braunschweig, Schwetschke, 1866, p. 103 (with note p. 234), where for the 10th and 11th centuries he contrasts the trading Jews and the "Germans" cultivating the fields, and in this context he sees the crusade pogroms of 1096 as being based not only on religious fanaticism but also on «national antipathy», p. 144, that «the Jew belongs to a foreign nationality and has his own special right». (https://www.digitale-sammlungen.de/de/view/bsb10570854?page=,1, accessed on 6/3/2023.

[121] Instead of land- and soil-based economic forms of exchange.

[122] Exemplary is the privileging of Jews in Speyer in September 1084 by Bishop Rüdiger Hutzmann: «*Cum ex Spirensi villa urbem facerem, putavi milies amplificare honorem loci nostri, si et iudeos colligerem.*» (J. Aronius, *Regesten zur Geschichte der Juden im fränkischen und deutschen Reiche bis zum Jahre 1273*, Berlin 1902, Reprint Hildesheim, Olms, 1970, no. 168, pp. 69-71; cit. also in S. Schiffmann, *Die Urkunden für die Juden in Speyer 1090 und Worms 1157*, in «Zeitschrift für die Geschichte der Juden in Deutschland», n. 2, 1930/31, pp. 28-39, 28 ff.). More extensively Willoweit, *Staatsbildung und Jurisprudenz*, cit., vol. 1, p. *305. The author of the Annales Egmundani took down a similar wording in the subsequent century: «In civitatibus orientalis Franciae circa Renum constitutis habundant synagogae ludeorum» (G.H. Pertz (ed.), MGH (=*Monumenta Germaniae Historica, Inde ab anno Christi quingentesimo usque ad annum millesimum et quingentesimum*), Hannover, Scriptorum, vol. XVI, 1859, pp. 442, 458; https://www.dmgh.de/mgh_ss_16/index.htm#page/458/mode/1up, accessed on 28/7/2023); cf. Aronius, *Regesten*, cit., no. 254, p. 115).

[123] Christianity has never been exactly congruent with peninsular Europe. The Christianity known to Pope Stephen II (r. 752-757), when he crossed the Alps for the frankish court in 753 was different from that in 1453, when the Turks battered the walls of Constantinople.

[124] Russian *korol*, Polish *król*, Czech *král* etc.

[125] There are four elements of the *ordinatio ad unum*: the necessity of rule due to the sinfulness of man, the unity of the ruling body through the unity of faith, the ideal of the *Civitas Dei*, and the God-givenness of worldly rule, cf. e.g. the opening words of Charlemagne's Admonitio generalis: «Unter der Herrschaft unseres Herrn Jesus Christus auf ewig. Ich, Karl, dank der Gnade und Barmherzigkeit Gottes König und Leiter des Frankenreichs, ergebener Verteidiger und demütiger Helfer der heiligen Kirche, entbiete sämtlichen Gliedern kirchlicher Huld und allen Würden weltlicher Macht in Christus, dem Herrn und ewigen Gott, den Gruß immerwährenden Friedens und Glücks.» Paraphrased translation mine: «Under the reign of our Lord Jesus Christ for ever. I, Charles, thanks to the grace and mercy of God, king and leader of the Frankish kingdom, devoted defender and humble helper of the holy church, greet all members of church favour and all dignities of worldly power in Christ, the Lord and eternal God, with perpetual peace and happiness» (H. Mordek, K. Zechiel-Eckes, M. Glatthaar (eds.), *Die Admonitio generalis Karls des Großen*, Hannover, Harrassowitz, 2012, p. 180, 181 (Monumenta Germaniae Historica (=MGH) Fontes vol. XVI). Cf. also Charlemagne's Augustinian preference (J. Fried, *Karl der Grosse. Gewalt und Glaube. Eine*

Biographie, Munich, Beck, 2013, pp. 45, 312 f.). The latter reference summarises the «Order of the Church, struggle against illiteracy, heresy and superstition, Christianisation of the people.»

126 Jussen, *Einleitung*, in: idem (ed.), *Die Macht des Königs*, cit., p. XIX.

127 At the same time, a proliferation of translations enriched the Latin vocabulary with numerous words from Greek and Arabic.

128 «And of the act of taking possession that happens when you give a new name to what you find.», review by J. Kincaid, SZ (=Süddeutsche Zeitung, 5/6 December 2020, p. 22. In the scriptless Germanic-Celtic representationalism terms like sin, guilt, grace, forgiveness or mercy are completely unknown.

129 On Vulgar Latin with references to the emergence of French, cf. C. Tagliavini, *Einführung in die romanische Philologie*, 2nd edition, Munich, UTB, 1998, pp. 158-207.

130 Chapter 6 in Störig, *Abenteuer Sprache*, cit., pp. 145 ff. P. Swiggers, *La comparaison des langues romanes, du Moyen Âge jusqu'au milieu du 19e siècle, Jalons des approches grammaticographiques et lexicographiques comparatives*, Tübingen, Niemeyer, 2005; E. Werner, *Zur Grammatikographie des Italienischen. Vom 15. bis 20. Jahrhundert*; M.Á. Esparza, H-J. Niederehe, *Grundzüge einer Geschichte der spanischen Grammatikographie. Vom Mittelalter bis zur zweiten Hälfte des 20. Jahrhunderts*, in P. Schmitter (ed.), *Sprachtheorien der Neuzeit* III/1, part 1, 1.7-1.9, Tübingen, Narr, 2005, pp. 239-286, pp. 287-366, pp. 367 ff-398.

131 *De revolutionibus orbium coelestium 1543* (On the Revolutions of the Heavenly Spheres, transl. By A.M. Duncan, New York, Newton Abbot, 1976). Cf. in regard to Copernikus and his Italian contacts U. Müßig, *Kopernik and ReConFort: A Copernican Turn in Comparative Constitutional History?*, in «Journal of Constitutional History/ Giornale di Storia Costituzionale», n. 37, 2019, pp. 5-24.

132 According to the *Sidereus Nuncius* (News of new stars), edited and introduced by H. Blumenberg. 2nd ed., Frankfurt am Main, Suhrkamp, 2002, Galileo published, among others the *Dialogo sopra i due massimi sistemi del mondo*, Florence 1632 (German: *Dialog über die beiden hauptsächlichsten Weltsysteme*, Leipzig, Teubner, 1891) and the *Discorsi e dimostrazioni matematiche interno à due nuoue scienze*, Leiden 1638 (German: *Unterredung und mathematische Demonstrationen über zwei neue Wissenszweige die Mechanik und die Fallgesetze betreffend*. Leipzig, Teubner, 1890).

133 *Mysterium cosmographicum*, Tübingen 1596; *Harmonices mundi libri V*, Linz 1619, https://www.digitale-sammlungen.de/de/view/bsb10497369?page=5 (accessed on 28/7/2023.

134 *Instauratio magna*, London 1620 (The Great Renewal).

135 *Philosophiae naturalis principia mathematica* (Mathematical Foundations of Natural Philosophy).

136 Among others, Methodus inveniendi lineas curvas maximi minimive proprietate gaudentes sive solutio problematis isoperimetrici latissimo sensu accepti, Lausanne/Genf 1744 (https://www.digitale-sammlungen.de/de/view/bsb10053439?page=5, accessed on 17/7/2023); Introductio in analysin infinitorum. vol 1, Lausanne 1748, https://www.digitale-sammlungen.de/de/view/bsb10860438?page=2 (accessed on 17/7/2023); vol. 2, Lausanne 1748. https://www.digitale-sammlungen.de/de/view/bsb10860439?page=6,7 (accessed on 28/7/2023); cf. also Eneström, Gustaf, Verzeichnis der Schriften Leonhard Eulers, 1st ed., Leipzig 1910, https://archive.org/details/enestromtest/mode/2up (accessed on 28/7/2023).

137 Among other titles Disquisitiones Arithmeticae (English edition on the basis of the 2nd edition, ed. by E.C.J. Schering), Göttingen 1870, translated by A.A. Clarke (for the Yale University Press edition 1966), revised by W.C.Waterhouse with the help of C. Greither and A.W. Grootendorst, New York a.o., Springer, 1986.

138 Fundamental J. März, *Zwischen Laizismus und Religionsfreiheit, Das Religionsverfassungsrecht der Dritten Französischen Republik im Vergleich mit der Weimarer Republik*, Berlin, Duncker & Humblot, 2021 (Schriften zur Rechtsgeschichte, vol. 197, also Diss. iur. Passau 2020, supervised by the author), with references in fn.22 (p. 4) to H-G. Franzke, *Die Laizität als staatskirchenrechtliches Leitprinzip Frankreichs*, in DÖV (= Die Öffentliche Verwaltung) 2004, pp. 383-386, 383; P. Fiala, *Les termes de la laïcité. Différenciation morphologique et conflits sémantiques Mots 27* (juin 1991: *Laïc, laïque, laïcité*), pp. 41-57 (45, 50 ff. and 53 f.) with explanations of *laïcisme* understood as more militant and radical than *laïcité*, https://www.persee.fr/issue/mots_0243-6450_1991_num_27_1 (accessed on 17/7/2023).

139 Contexts are understood in the original sense of the word as weaving together, braiding, linking; Voltaire: «Les paroles sont aux pensées ce que l'or est aux diamants: il est nécessaire pour les mettre en oeuvre, mais il en faut peu.» (*Le Sottisier*, avec une préface par L. Léouzon Le Duc, Paris, Diterbitkan, 1880, p. 60, https://ia902702.us.archive.org/12/items/lesottisierdevol00volt/lesottisierdevol00volt.pdf, accessed on 17/7/2023).

140 Masterly on the Roman-Germanic clash in the Migration Lesaffer, *European Legal History*, cit., p. 125 ff.

141 The linguistic question of a *lingua franca* arises not only for Latin in the Western Roman Empire, but also for the Greek in the Hellenistic East, for French as the interna-

tional language of diplomacy, and for German as an official language in the Habsburg multiethnic empire or for Sabir/Petit mauresque in the Levant trade between Venice and the Middle East.

142 P. Häberle, M. Kotzur, *Europäische Verfassungslehre*, 8th ed. Baden-Baden, Nomos, 2016, p. 131.

143 G. Riotta, *Umberto Eco's "Shallow" Europe and dreams of a different sexual revolution*, 31 January 2012, https://www.lastampa.it/esteri/la-stampa-in-english/2012/01/31/news/umberto-eco-s-shalloweurope-and-dreams-of-a-different-sexual-revolution-1.36509140/ (accessed on 20/7/2023).

144 The Romance-Germanian-West Slavic-Hungarian Europe calls itself *Corpus Christianum*, the Christendom.

145 «What loss, then, science has met with after the ignominious destruction of Greece, you can all observe, who know well that all Latin learning was fed from the sources of the Greeks.» (Nunc contrita deletaque Graecia quanta sit facta litterarum iactura, cuncti cognoscitis, qui Latinorum omnem doctrinam ex Graecorum fontibus derivatam non ignoratis), cit. according to Pius II, Oratio XIII, in: J.D. Mansi (ed.), *Pii II. P.M. Olim Aeneae Sylvii Piccolominei Senensis Orationes Politicae, Et Ecclesiasticae*, Luca, Ex typographia Philippi Mariae Benedini, 1755, pp. 263, 270, https://reader.digitale-sammlungen.de/de/fs1/object/display/bsb10686109_00312.html (accessed on 22/2/2021).

146 «Now, however, we have been shaken and beaten in Europe, i.e. in the fatherland, in our own house, in our abode.» (Nunc vero in Europa, idest in patria, in domo propria, in sede nostra percussi caesique sumus), cit. according to Pius II, Oratio XIII, *ibid.*, p. 263 (263), https://reader.digitale-sammlungen.de/de/fs1/object/display/bsb10686109_00305.html (accessed on 22/2/2021).

147 *Was heißt und zu welchem Ende studiert man Universalgeschichte?*, edited by V. Wahl on behalf of the Friedrich Schiller University Jena, https://www.friedrich-schiller-archiv.de/historische-schriften/was-heisst-und-zu-welchem-ende-studiert-man-universalgeschichte/ (accessed on 2/2/2021).

148 U. Müßig, *Republicanism and its 'gentle wings' (Ode to Joy). The Republican Dignity to be Governed, not Mastered as Founding Rational Legitimacy*, in Giornale di Storia Costituzionale, n. 41/I, 2021, pp. 117-176, 127, 134 f., 141.

149 J.W. von Goethe, *Zahme Xenien: Den vereinigten Staaten*, in: idem (ed.), *Nachgelassene Werke*, vol. XVI, Stuttgart and Tübingen, Cotta, 1842, p. 96: «America, you are better off than Our continent, the old».

150 German Romanticism (e.g. Novalis, *Friedrich von Hardenbergs Europa-Rede Die Christenheit oder Europa. Ein Fragment. Geschrieben im Jahre 1799*, in L. Tieck, F. Schlegel (eds.), *Novalis. Schriften*, 4th ed., Berlin, Reimer, 1826, vol. 1, pp. 187-208, https://www.deutschestextarchiv.de/book/view/novalis_christenheit_1826?p=9, accessed on 28/7/2023) developed a different awareness of Europe. Cf. H. Uerlings, »Eine freie Verbindung selbständiger, selbstbestimmter Wesen«. Friedrich von Hardenbergs (Novalis) Europa-Rede, in K. Armborst, W-F. Schäufele (eds.), *Der Wert »Europa« und die Geschichte. Auf dem Weg zu einem europäischen Geschichtsbewusstsein*, Mainz 2007-11-21 (Veröffentlichungen des Instituts für Europäische Geschichte Mainz, Beiheft online 2, https://www.ieg-mainz.de/uploads/_ieg_supplements_pdf_5315d70dafd0f/VIEG-Beiheft-online-2.pdf, accessed on 17/7/2023).

151 The brothers August Wilhelm and Friedrich Schlegel evoked the "Christian Occident", inspired by Novalis. Based on a concept of Europe based primarily on cultural traditions the countries united by their Romanesque, Germanic and Christian heritage form a single European cultural area in antinomy to an Orient or Oriental world conceived in Islamic terms and were to be nominated as "Christian Occident". The anti-reformation, anti-Enlightenment and, in view of the ideas of the French Revolution, also anti-democratic thrust on the topos "Christian Occident" can even nowadays be realized in Catholic journalism.

152 Cf. especially the Anglo-Saxon discussion: P. Burke, *Did Europe exist before 1700?*, in «History of Ideas», n. 1, 1980, pp. 21-29; J. Hale, *The Civilisation of Europe in the Renaissance*, London, Simon & Schuster, 1993, pp. 3-50; L. Wolff, *Inventing Eastern Europe: The Map of Civilization in the Mind of the Enlightenment*, Stanford, SUP, 1994; and the essays J.G.A. Pocock, *Some Europes in Their History*, in A. Pagden (ed.), *The Idea of Europe from Antiquity to the European Union*, Cambridge, CUP, 2002, pp. 55-71; W.Ch. Jordan, *"Europe" in the Middle Ages*, in: ibid, pp. 72-92, both https://web.p.ebscohost.com/ehost/ebookviewer/ebook/bmxlYmtfXzEyMDQ4OV9fQU41?sid=424aee54-7ef2-453f-a0d5-f270d9d9c0f1@redis&vid=0&format=EB&lpid=lp_55&rid=0 (accessed on 28/7/2023).

153 Adds another aspect to the understanding of the term 'learning mode'.

154 Müßig, *Drafting Dignity*, cit., p. 17.

155 Borrowing from Frenkel-Brunswik's title "The intolerance as an emotional and perceptual personality variable" (1949) = "Environmental Controls and the Impoverishment of Thought.", in: idem, *Selected Papers*, eds. N. Heiman, J. Grant. New York, International Universities Press, 1974, pp. 261 291 (=reprint from *Totalitarianism*, ed. C.J. Friedrich. Cambridge Mass, Havard University Press, 1954, pp. 171, 202).

156 K. Popper, *The Open Society and*

its Enemies, London, Routledge, [1945] 2012.

157 H. Arendt, *Elemente und Ursprünge totaler Herrschaft: Antisemitismus, Imperialismus, Totalitarismus*, München, Piper, 1955; C. Lefort, *L'intervention démocratique, les limites de la domination totalitaire*, Paris, Éd. Fayard, 1981; *Die Frage der Demokratie*, in U. Rödel (Hg.), *Autonome Gesellschaft und libertäre Demokratie*, Frankfurt am Main, Suhrkamp, 1990, pp. 281-297.

158 R. Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*, in «Ethics», n. 120, 2010, pp. 711-740. In fact, this corresponds to the Kantian ban of human beings' instrumentalisation (U. Müßig, *The Kantian Legal Turn of 'Republicanism': 'Rightfulness' by a Categorical Right to Justification*, in «Journal of Constitutional History / Giornale di Storia Costituzionale», n. 42/II, 2021, pp. 183-202, 193 ff.).

L'insegnamento della storia costituzionale in Spagna: un'impresa incompiuta

IGNACIO FERNÁNDEZ SARASOLA

1. *La situazione attuale: impegno accademico e metodologico*

La storia costituzionale in Spagna gode di un diverso stato di salute nella ricerca e nell'insegnamento. Nel primo caso, la situazione è molto più lusinghiera grazie alla rilevanza che questi studi hanno avuto in Spagna. In particolare, sono soprattutto gli storici più che i giuristi ad aver dato contributi in quantità maggiore (e quasi sempre con qualità migliore). La Spagna ha anche una cattedra e una rivista monografica dedicate alla storia costituzionale, cosa insolita in altre parti del mondo[1].

La situazione dell'insegnamento è molto diversa. La storia costituzionale non viene insegnata monograficamente in quanto tale. Lo è stata in alcune università come l'Università Autonoma di Madrid, dove ha iniziato a essere insegnata nel 1993, in coincidenza con il ritorno all'università, da Francisco Tomás y Valiente, dopo il suo periodo alla Corte costituzionale. Qui si formarono due gruppi: uno dedicato al costituzionalismo comparato e l'altro al costituzionalismo spagnolo, il primo sotto la direzione di Clara Álvarez Alonso e il secondo guidato dallo stesso Tomás y Valiente fino al suo vile assassinio. In seguito, l'insegnamento è stato mantenuto sostanzialmente nelle mani di Clara Álvarez – che ha prodotto un magnifico manuale didattico –, con la presenza intermittente di Marta Lorente.

Attualmente la materia è scomparsa dagli studi universitari. In un'altra università, l'Università di Oviedo, Joaquín Varela Suanzes – il più grande storico del costituzionalismo che questo Paese abbia mai avuto[2] – ha avviato una materia che è stata insegnata nella Facoltà di Giurisprudenza come materia opzionale tra il 1995 e il 2014, alternando ogni due anni accademici l'insegnamento della storia costituzionale spagnola con quello di storia costituzionale comparata. In quest'ultimo anno, l'adeguamento al cosiddetto "piano di Bologna" (Spazio Europeo dell'Istruzione Superiore) ha imposto la soppressione della maggior

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parte delle materie opzionali dall'offerta formativa e la storia costituzionale, nonostante il suo successo tra gli studenti (con circa duecento iscrizioni all'anno), è stata sacrificata. La riduzione dei crediti, imposta dai nuovi curricula, ha comportato l'eliminazione di quelle materie ritenute meno essenziali e formative, tra le quali, erroneamente, è stata inserita anche la storia costituzionale. In realtà, questa visione pragmatica degli studi universitari – basata su una prospettiva molto americana in cui i "rankings" sono più importanti dell'istruzione – si è diffusa in Spagna anche ai livelli di istruzione non universitari, dove la filosofia e le materie umanistiche sono state quasi completamente eliminate, con le ovvie carenze culturali che ciò comporta a livello sociale.

Il risultato è che oggi la storia costituzionale non è altro che una sezione all'interno di materie più generaliste. Ovviamente viene studiata nelle facoltà di storia, all'interno dei programmi di storia contemporanea, intrecciata con una prospettiva politico-sociale e lontana dall'analisi giuridica. Esattamente il contrario di quanto accade nelle facoltà di giurisprudenza, dove alcune nozioni di storia costituzionale sono incluse nei programmi di Diritto costituzionale e talvolta di Storia del diritto. In questo caso, l'immagine che rimane agli studenti è quella di un testo puramente normativo, incentrato sull'analisi degli articoli costituzionali e privo della necessaria contestualizzazione politica e dottrinale.

Nel campo dell'insegnamento, la storia costituzionale ha perso completamente la sua autonomia per diventare una materia puramente strumentale, al servizio di altri saperi considerati più essenziali. Così, nell'insegnamento della storia contemporanea, la storia costituzionale non è altro che un segmento della contestualizzazione globale (politica, economica, sociale) che lo studente ottiene da ogni tappa cronologica che deve conoscere. Nella storia del diritto non rappresenta altro che un quadro normativo che si aggiunge (a volte allo stesso livello) ai processi di codificazione e alle altre disposizioni normative che hanno forgiato il complesso istituzionale di ogni periodo storico. E nel caso del Diritto costituzionale si presenta solo come un precedente dell'attuale Costituzione spagnola, al fine di tracciare le analogie e le differenze tra il passato e il presente.

Questo quadro desolante rivela che, a livello accademico, la storia costituzionale è regredita in Spagna a livelli che non si vedevano dagli anni '80, rifugiandosi nel campo della ricerca. In questo senso, può sembrare paradossale che ci sia un abisso tra l'ostracismo della storia costituzionale nell'insegnamento e il suo straordinario sviluppo nel campo della ricerca, in cui il numero di pubblicazioni, convegni, progetti di ricerca e tesi di dottorato ad essa dedicati è maggiore che mai. Ma questa situazione non deve sorprendere più di tanto perché in Spagna l'insegnamento universitario e la ricerca seguono spesso percorsi separati.

2. *Una disciplina senza metodo*

Il fatto che la storia costituzionale in Spagna manchi di autonomia come disciplina e che sia usata strumentalmente soprattutto nelle facoltà di Giurisprudenza e Storia ha portato con sé conseguenze che hanno un impatto negativo su di essa. La prima è l'assenza

di un metodo comune di analisi proprio della storia costituzionale.

La storia contemporanea, infatti, studia la storia costituzionale con una sua particolare metodologia storiografica in cui si intrecciano fattori socio-economici e politici. In questo modo, lo studente ottiene un'adeguata contestualizzazione, essenziale per la comprensione della storia costituzionale, ma può essere privato di altri strumenti senza i quali quest'ultima è necessariamente parziale. Da un lato, l'analisi dottrinale non è di solito abbondante, per cui si tralascia la storia del pensiero politico e l'evoluzione concettuale delle categorie su cui si basa il costituzionalismo. E senza una buona conoscenza delle idee politiche, è impossibile ottenere una comprensione approfondita della storia costituzionale. Spesso manca anche la conoscenza dei concetti giuridico-costituzionali da applicare all'analisi. È vero che molti storici hanno fatto un enorme sforzo per utilizzare le categorie fornite dagli studi giuridici, ma sono ancora molti quelli che confondono i concetti, li omettono o li usano con poca correttezza. Termini come "sovranità popolare" contro "sovranità nazionale", "riforma" contro "mutazione costituzionale", "monarchia parlamentare" contro "monarchia costituzionale" (per fare solo alcuni esempi) non sono sempre adeguatamente differenziati, mancando così del necessario rigore concettuale.

Questo non accade quando la storia costituzionale è insegnata da giuristi. Tuttavia, essi incorrono in problemi forse ancora più gravi. Il più rilevante è quello della decontestualizzazione: concentrandosi su un'analisi puramente normativa, tendono a ignorare (Diritto costituzionale) o a omettere (Storia del diritto) il contesto socio-politico in cui queste norme sono state attuate. Ciò significa che, in larga misura, giuristi e storici sono agli antipodi: i primi hanno una buona padronanza dei concetti ma non conoscono il contesto; i secondi comprendono quest'ultimo ma non usano con facilità le categorie giuridiche. Ed entrambi spesso mancano di apporti dottrinali, un aspetto che hanno in comune.

L'analisi puramente normativa e decontestualizzata dell'insegnamento della storia costituzionale nelle facoltà giuridiche comporta un inconveniente molto comune: il presentismo. Le istituzioni del passato vengono analizzate secondo i paradigmi interpretativi del presente, dando luogo a un'immagine completamente distorta. A volte, questa ignoranza del contesto (politico, sociale, ma anche dottrinale) fa sì che l'uso delle categorie giuridiche – proprio la specialità dei giuristi – possa essere un'arma a doppio taglio perché se un termine che compare in una norma viene analizzato senza tener conto del tempo in cui è stato creato si possono commettere errori notevoli. Ad esempio, il significato del termine "repubblica federale" in Spagna all'inizio del XIX secolo non ha nulla a che vedere con il significato che ha oggi. È necessario sapere cosa la dottrina di allora intendeva con questo concetto, e non trasferire semplicemente ciò che noi oggi consideriamo tale a una realtà concepita due secoli fa.

Infatti, è questo il dibattito che si è aperto in Francia quando Guillaume Bacot ha rivelato quanto l'analisi di Carré de Malberg sulla distinzione tra sovranità nazionale e sovranità popolare nella Francia rivoluzionaria non fosse altro che una trasposizione nel passato di categorie del XX secolo che i costituenti francesi non avevano in mente[3].

Allegory of the Spanish Republic, *litografia dal disegno di J. Barrera (Archive National Historique, Section Guerre Civil, Salamanque)*

Questo problema è attenuato nel caso degli studi di scienze politiche. In queste ultime, la materia del diritto costituzionale è generalmente limitata allo studio del diritto positivo, ma vi sono corsi di storia politica in cui è presente una componente essenziale di storia costituzionale. Tra questi, l'analisi delle dottrine politiche e la storia del pensiero politico, che sono scarsamente trattati, o del tutto assenti, nei programmi delle facoltà di Storia e Giurisprudenza. In questo caso, però, il problema è che il contesto storico o i concetti giuridici non ricevono la stessa attenzione. In ogni caso, è vero che la laurea in Scienze Politiche presenta un'interdisciplinarità molto interessante, assente nelle lauree in Storia e Giurisprudenza. Così, negli studi universitari in Scienze Politiche, il fatto di avere materie giuridiche (come Diritto Costituzionale o Teoria Generale del Diritto) fornisce ai laureati la necessaria conoscenza dei concetti del Diritto; allo stesso tempo, la presenza di materie di storia moderna e contemporanea permette di comprendere il contesto in cui operano le dottrine politiche. Il risultato di questo approccio interdisciplinare è che, nel complesso, essi raggiungono una conoscenza eterogenea, con diversi prismi (normativo, politico-sociale e dottrinale) che permette loro di ottenere una visione più completa della storia costituzionale. Il problema sta nel fatto che queste conoscenze vengono fornite in modo frammentario, come se si trattasse di un puzzle, i cui pezzi possono essere incastrati solo con lo sforzo dello studente, che si farà un'idea dell'insieme a partire dai frammenti forniti. In effetti, sarebbe quasi come un puzzle senza il disegno guida corrispondente, che può essere completato solo dal modo in cui i pezzi si incastrano. Si tratta ovviamente di un compito molto complicato.

Il problema metodologico è molto rilevante perché impedisce un dialogo proficuo tra specialisti che si sono formati in storia costituzionale in facoltà diverse. Lo storico privilegerà il metodo storico, il giurista il metodo giuridico e il laureato in scienze politiche il metodo politico. Non esiste, quindi, un metodo comune di approccio alla storia costituzionale e gli studi che possono derivare dall'una o dall'altra branca del sapere finiscono per rimanere confinati nel proprio linguaggio, dando origine a una Torre di Babele.

Che esistano diversi modi di affrontare la storia costituzionale è un fatto che, d'altra parte, alcuni autori hanno iniziato a proporre isolatamente nel secolo scorso. Il primo a farlo fu Jerónimo Bécker, membro della Real Academia de Historia, tra il 1922 e il 1924. Sebbene la sua attività di ricerca fosse orientata principalmente allo studio delle relazioni estere della Spagna, nel 1896 aveva pubblicato un interessante libro sulla storia del pensiero politico spagnolo[4]. L'opera rivelava già il suo interesse per la dottrina politica, che avrebbe poi ripreso in un libro ancora più interessante dal punto di vista metodologico: *La reforma constitucional de España* (1923)[5].

Questa monografia analizzava ogni tappa costituzionale spagnola studiando innanzitutto i suoi antecedenti, che costituiscono sostanzialmente una storia politica del periodo che ricomprende la formazione del testo costituzionale. Successivamente, si concentrò su quella che chiamò la storia di ciascuna delle Costituzioni, in cui si delineò il processo costituente, soffermandosi sui diari di seduta e sui processi verbali delle Cortes; infine, incluse una terza sezione dedicata al "Diritto costituzionale", in cui si analizzarono gli articoli dei testi normativi.

In breve, questa fu la prima opera che fece un chiaro tentativo di analizzare la storia costituzionale da una triplice prospettiva politico-istituzionale, dottrinale e normativa, pur non integrando ciascuna di queste visioni, ma trattandole separatamente.

Questa struttura sistematica è stata ampiamente ripresa da Joaquín Tomás Villarroya mezzo secolo dopo, nella sua breve storia del costituzionalismo spagnolo, pubblicata per la prima volta nel 1975. Come Bécker, Villarroya collocò l'origine del costituzionalismo spagnolo nel 1812, e non nello Statuto di Bayonne del 1808, e poi approfondì ogni tappa seguendo uno schema in cui prima si concentrava su una breve contestualizzazione storica, poi analizzava la "natura e i principi" (dove includeva la parte dogmatica), le "fonti" della Costituzione e gli organi costituzionali, e infine chiudeva l'esposizione con un breve riferimento all'applicazione costituzionale. L'obiettivo era quindi quello di fornire una visione sfaccettata, anche se necessariamente parcellizzata, del contesto storico (dimensione politico-sociale), degli articoli costituzionali (analisi normativa) e, infine, dell'effettiva applicazione del testo (analisi istituzionale). Alcuni aspetti di questa struttura colpiscono: ad esempio, il fatto che nella parte organica l'attenzione si concentri sulla configurazione dei rami esecutivo e legislativo, dimenticando il potere giudiziario.

Si può quindi affermare che i testi di Bécker e Tomás Villarroya hanno rappresentato un notevole progresso nella metodologia della storia costituzionale, tentando almeno di offrirne una visione da diverse prospettive. Il limite principale dei loro contributi derivava dalla compartimentazione dell'analisi: i quadri normativi, dottrinali e istituzionali apparivano totalmente separati, come se formassero realtà distinte, cosicché spettava al lettore completare il puzzle e interconnettere i pezzi che gli autori offrivano solo separatamente.

Questa carenza è stata colmata da Joaquín Varela Suanzes, che è stato, senza dubbio, l'autore spagnolo che ha contribuito maggiormente alla metodologia della storia costituzionale nel nostro Paese[6]. E lo ha fatto su più fronti. Da un lato, è stato il primo a riflettere espressamente su questioni metodologiche[7]. Si può dire che i contributi di Bécker e Tomás Villarroya siano stati, in una certa misura, taciti, poiché non hanno mai analizzato la particolarità del loro approccio metodologico. Joaquín Varela, invece, ha dedicato numerose opere alla trattazione specifica della metodologia, che quindi non solo può essere dedotta dai suoi studi storico-costituzionali, ma è anche espressamente formulata in testi monografici dedicati al metodo da lui impiegato. D'altra parte, Joaquín si è spinto molto oltre rispetto agli autori che lo hanno preceduto: non solo ha apportato la dimensione comparativa come elemento imprescindibile per l'analisi del costituzionalismo spagnolo (in contrapposizione a coloro che sono rimasti, e talvolta rimangono, accecati dall'idea che il nostro costituzionalismo sia autoreferenziale e che non sia altro che il vecchio cliché che "Spain is different" che ci ha tanto isolato), ma anche per il fatto che ha finalmente utilizzato un triplice approccio integrato (normativo, dottrinale e istituzionale). Quest'ultimo contributo è essenziale e rende anche la storia costituzionale molto più complessa: lungi dal trattare i tre approcci in modo indipendente, Joaquín Varela ha insistito sulla necessità di esaminare il costituzionalismo dai tre punti

di vista contemporaneamente, dando così un'immagine tridimensionale, integrata e onnicomprensiva che fino ad allora mancava.

Va notato che l'interesse di Joaquín Varela per gli aspetti metodologici rispondeva alla sua ferma convinzione che la storia costituzionale rappresentasse una disciplina autonoma e che, pertanto, non fosse in alcun modo parte integrante di altre materie, come la Storia contemporanea, il Diritto costituzionale, la Storia del diritto o la Scienza politica. E questa autonomia rendeva necessaria la progettazione di un proprio corpus metodologico.

3. *Una disciplina quasi orfana di libri di testo (I): precedenti del XIX secolo*

La presenza di libri di testo sostanzialmente orientati all'insegnamento universitario è di solito un buon termometro per misurare la salute di una disciplina. Nel caso spagnolo, la scarsità, la semplicità o l'obsolescenza di materiali specificamente orientati alla storia costituzionale – sia spagnola che comparata – rivela quanto questa sia una disciplina in cui c'è ancora molta strada da fare.

Va da sé che, in mancanza di un sufficiente *background* costituzionale, nei primi due terzi del XIX secolo si moltiplicarono le analisi delle sole Costituzioni in vigore o degli eventi politici in testi vicini nel tempo, generalmente narrati dai loro stessi protagonisti. È il caso, per fare solo qualche esempio, delle opere del Conte di Toreno[8] o di Agustín Argüelles[9]. La creazione di cattedre di diritto costituzionale nella breve parentesi del Triennio Liberale (1820-1823) diede luogo, da parte sua, alla comparsa di testi analitici sulla Costituzione di Cadice, anche se ovviamente, essendo all'epoca un testo in vigore, tali opere non rappresentano un precedente dei manuali di storia costituzionale, ma di quelli di diritto costituzionale positivo.

Negli anni Sessanta del Novecento, Juan Rico y Amat inaugurò quella che oggi si può propriamente definire la storia politica della Spagna liberale, narrando le vicende politiche della prima metà del XIX secolo[10] e recuperando la memoria dei deputati delle varie Cortes costituenti a partire dal 1812[11]. Nello stesso periodo apparve l'opera del conte tedesco di Hamel (tradotta in spagnolo da Baltasar Anduaga y Espinosa) che, sulla scia di Sempere y Guarinos[12], descriveva la "Historia Constitucional" del Medioevo, pur estendendo la sua esposizione alla data della morte di Fernando VII[13]. L'opera dedicava solo poche pagine, per altro molto critiche, alla Costituzione di Cadice, senza menzionare quella di Bayonne. Ciò è perfettamente comprensibile, dato che si trattava di un'opera scritta per la maggior gloria dei Borboni.

Lo studio analitico della storia costituzionale alla fine del XIX secolo sembrava trovare la sua sede principale nei trattati di Diritto politico, alcuni dei quali comprendevano una sezione storica in cui, in generale, si descriveva l'intera storia politica e le istituzioni della Spagna, sfumando alla fine della narrazione la fase costituzionale. In questo senso, si può affermare che l'approccio manualistico alla storia costituzionale affonda le sue radici nel Diritto Politico, ed è quindi legato nelle sue origini al Diritto Costituzionale.

Ciononostante, nei primi trattati di diritto politico, la storia costituzionale spa-

gnola aveva una presenza marginale. Così, occupò poco spazio nel manuale di Colmeiro, pubblicato nel 1858[14], poiché, dopo aver dedicato ampia attenzione alle istituzioni dell'*Ancien Régime*, la Spagna costituzionale meritava a malapena un'epigrafe in cui si limitava a citare le Costituzioni, per poi indicare i contenuti che un buon codice politico avrebbe dovuto includere. La presenza di una sezione di storia costituzionale aumentò nei trattati di Aller del 1875[15] e di Santamaría de Paredes del 1880[16], anche se la Spagna medievale occupava ancora la maggior parte della narrazione storica. Altri testi, come quelli di Izaga e di Enrique Gil Robles[17], non contenevano quasi nessun riferimento storico, essendo più interessati alla trattazione teologica e morale.

Lo scarso peso che l'analisi della Spagna costituzionale aveva nei trattati di diritto politico, in contrasto con il resoconto dettagliato della storia politica dell'Ancien Régime, comincerà ad essere invertito con il testo di Ricardo Rovira y Rabassa, in cui l'analisi della storia costituzionale occupa un posto di rilievo[18]. Tuttavia, dovremo aspettare Adolfo Posada – a cui farò riferimento quando tratterò della Seconda Repubblica – per trovare una trattazione davvero importante e profonda della storia costituzionale spagnola.

Il decennio precedente la proclamazione della Seconda Repubblica vide la pubblicazione di una serie di opere di interesse per la storia costituzionale, sia di politici che di storici, che completavano la visione offerta dai giuristi nei loro trattati. Particolare attenzione merita il già citato testo di Jerónimo Bécker (*La reforma constitucional en España*, 1923), che sarà seguito poco dopo da *Orígenes del régimen constitucional en España* (1928) di Melchor Fernández Almagro, una breve opera di sintesi, in linea con la linea di lavoro di questo autore, poco incline a un uso massiccio di fonti, ma con una grande capacità di divulgazione. Quest'ultima risente dell'influenza di Sanz Cid[19], di Adolfo Posada (che vedremo nella sezione successiva) e di altri precedenti studiosi di storia costituzionale (che cita a più riprese nel testo), mentre l'aspetto forse più rilevante è l'analisi delle diverse sezioni materiali della Costituzione di Cadice: il potere reale, i Segretari di Stato e d'ufficio, i Consigli, le Cortes, la vita locale e i diritti individuali. Si allontana così dalla mera narrazione cronologica tipica degli storici.

4. *Una disciplina quasi orfana di libri di testo (II): dalla Seconda Repubblica alla transizione politica*

La Seconda Repubblica non è stata, da parte sua, un periodo molto fertile per la storia costituzionale, forse trascinata dal vortice costituente e dalle "tendenze moderne" del diritto costituzionale, per usare la conosciuta espressione di Mirkine-Guetzevitch[20], o forse motivata dalla crisi del parlamentarismo, o dal fatidico ricordo del costituzionalismo della Restaurazione. Tuttavia, anche la brevità della Seconda Repubblica è un fattore decisivo per spiegare l'assenza di testi di storia costituzionale.

In questo periodo si distinsero nella trattazione della storia costituzionale due pubblicisti intellettualmente legati tra loro: Adolfo Posada e il suo discepolo Nicolás Pérez Serrano. Entrambi avevano un elemento in comune che poteva spiegare il loro interesse per la storia: l'allontanamento dal modello normativista all'epoca

in voga a seguito delle esperienze di Weimar e dell'Austria.

Adolfo Posada, uno dei giuristi più brillanti (e prolifici) del Novecento spagnolo, dedicò il secondo volume del *Tratado de Derecho Político*, pubblicato per la prima volta nel 1893, all'analisi del "Diritto costituzionale comparato", dove analizzò la storia costituzionale inglese, americana, francese, tedesca e, naturalmente, spagnola, sulla base della sua concezione chiaramente liberale delle Costituzioni come prodotto storico dell'affermazione della libertà di fronte al potere pubblico[21]. Questa visione comparativa distanziava l'opera di Posada dagli altri trattati di diritto politico dell'epoca e anche dagli studi di storia politica spagnola, che mancavano di riferimenti alle esperienze costituzionali straniere. Lo studio della storia costituzionale comparata fu così inaugurato in Spagna.

Per Posada, il costituzionalismo del presente non poteva essere pienamente spiegato senza precedenti storici e quindi, quando dedicò una monografia a un'analisi approfondita della neonata Costituzione repubblicana del 1931[22], lo studio della storia costituzionale – con un contenuto in molti casi identico a quello del *Tratado* – occupò quasi la metà del libro.

In breve, Posada avrebbe trasformato la storia costituzionale in una conoscenza essenziale per la formazione degli insegnanti di diritto politico. Egli stesso, infatti, riconosceva che era stato proprio studiando questa materia all'Università di Oviedo sotto la guida di Rafael de Ureña che aveva percepito «l'interesse che lo studio della politica ispanica ha per la formazione del giurista e del politico spagnolo»[23].

Come Posada, anche Pérez Serrano prese le distanze dal normativismo. Nel suo studio metodologico sul Diritto politico, criticò il metodo kelseniano e sottolineò la necessità di analizzare anche gli antecedenti politici e costituzionali, avanzando così «dall'antico al moderno, dallo storico all'attuale»[24]. Per questo motivo, non deve sorprendere che nella sua dissertazione Pérez Serrano abbia incluso, all'interno della "Parte speciale", diverse lezioni dedicate alla storia costituzionale comparata. Egli stesso si era fatto carico di sottolineare l'importanza di mettere in relazione il costituzionalismo spagnolo con quello straniero, mostrando le concomitanze e le differenze e collocando il diritto pubblico spagnolo nel posto di rilievo che, a suo avviso, gli corrispondeva. Il rafforzamento dell'elemento nazionale si percepisce nel fatto che egli iniziò questi argomenti proprio con la Spagna. Con il titolo "La evolución constitucional en España", Pérez Serrano illustrò in dettaglio l'argomento a partire dalla Costituzione di Bayonne (e non dall'"Estatuto") fino al processo costituente del 1931. Solo dopo continuava l'analisi concentrandosi sulla storia costituzionale inglese, americana, francese e mitteleuropea.

Anche altri professori di Diritto Politico includevano lezioni di storia costituzionale nella loro cattedra, come nel caso di Eduardo L. Llorens e, in misura minore, di Francisco Ayala. L'opera Llorens mostra fino a che punto la storia costituzionale fosse ancora concepita come una conoscenza strumentale, il cui scopo era quello di comprendere meglio il diritto positivo: «senza la comprensione delle circostanze che le hanno precedute [le attuali Costituzioni], la conoscenza delle istituzioni politiche in un determinato momento non è completa»[25].

L'impulso dato ai manuali e all'insegnamento della storia costituzionale durante

la Seconda Repubblica fu necessariamente effimero, a causa della breve durata del periodo, cui seguì un lunghissimo periodo di siccità durante il regime di Franco. È chiaro che il nuovo regime non era interessato a nulla che riguardasse il costituzionalismo e il regime liberale.

Ciò non ha impedito, tuttavia, la nascita di alcune opere di riferimento per la storia costituzionale. Storici come Miguel Artola e Federico Suárez – ideologicamente opposti tra loro – produssero studi sulle origini del costituzionalismo spagnolo. Ma i trattati di storia costituzionale dovettero aspettare che un professore di diritto politico li rilanciasse. Nel 1955, Luis Sánchez Agesta pubblicò presso l'*Instituto de Estudios Políticos* la sua *Historia del constitucionalismo español*, che sarebbe diventata il principale riferimento della disciplina per quasi mezzo secolo. Due furono le principali novità introdotte da Sánchez Agesta rispetto ai precedenti trattati di altri professori di Diritto politico: da un lato, il suo fu il primo testo dedicato monograficamente alla storia costituzionale, dandole sostanza in sé e non solo una parte esplicativa del presente. Ovviamente, il momento era propizio per questo: durante la dittatura franchista, non era possibile considerare il costituzionalismo storico come un precedente per il regime attuale. La seconda caratteristica distintiva del lavoro di Sánchez Agesta è che la sua analisi è molto incentrata sull>aspetto dottrinale, cioè non tanto sull>analisi normativa delle Costituzioni quanto sulle ideologie sottostanti. Come chiarisce il titolo del volume, la sua è una storia del "costituzionalismo", e non delle Costituzioni.

Negli anni Sessanta, dopo l'approvazione della *Ley Orgánica del Estado* (1967), parte della dottrina iniziò a parlare di "costituzionalizzazione" del regime[26]. E, sebbene si trattasse di una valutazione poco realistica, permise almeno di attenuare la carica negativa che lo stesso termine "costituzionalismo" aveva per il regime dittatoriale. Di conseguenza, in questa fase iniziarono a essere pubblicate raccolte di Costituzioni storiche, il cui punto di arrivo furono le Leggi fondamentali di Franco. La più rilevante fu senza dubbio quella del giurista Diego Sevilla Andrés, del 1969[27].

Già negli anni Settanta, un altro professore di diritto politico, Joaquín Tomás Villarroya, pubblicò quello che è forse il manuale di storia costituzionale spagnola più letto fino ad oggi. Con più di una dozzina di edizioni, la sua *Breve historia del constitucionalismo español* (prima edizione del 1975) fu un buon complemento al manuale di Sánchez Agesta poiché ciò che mancava al primo era proprio l'analisi dottrinale presente nel secondo.

Dopo la Transizione politica, il recupero del passato costituzionale della Spagna è diventato un aspetto di straordinaria importanza, non solo accademica ma anche politica. Questo spiega le numerose sintesi di storia costituzionale spagnola che proliferarono, soprattutto negli anni Ottanta e nei primi anni Novanta, come quelle scritte, tra gli altri, da Francisco Fernández Segado (1981), Jordi Solé Tura ed Eliseo Aja (1988), Antonio Torres del Moral (1988), Emilio Attard (1988), Bartolomé Clavero (1989) e Rafael Jiménez Asensio (1992)[28]. Vale la pena notare che gli autori di questi manuali sono stati professori di diritto costituzionale, piuttosto che gli storici e, d'altra parte, che tutte le opere citate erano ancora sintesi molto stringate di storia costituzionale, descrittive e, in questo senso, più adatte come

manuali per le scuole superiori o per i corsi universitari che come opere utilizzabili anche dai ricercatori.

Proprio per superare questo limite è stato realizzato quello che è senza dubbio il più importante manuale di storia costituzionale attualmente esistente in Spagna: *Historia Constitucional de España* (2020), un'opera postuma di Joaquín Varela Suanzes[29] a cui ha dedicato gli ultimi anni della sua vita, anche se la sua progettazione e la sua ideazione sono state lunghe più di due decenni. Opera di straordinaria importanza, riunisce la visione tridimensionale della storia costituzionale (normativa, dottrinale e istituzionale) apportata da Joaquín Varela, creando un testo difficilmente superabile.

5. *Una disciplina quasi orfana di libri di testo (III): la storia costituzionale comparata*

Come si è già sottolineato, la prospettiva comparativa è stato un aspetto poco esplorato dalla storiografia spagnola fino a quando non è stata ripresa dai professori di Diritto politico, in particolare da Adolfo Posada. L'importanza delle esperienze costituzionali straniere durante la Seconda Repubblica spiega perché proprio in quel periodo la storia costituzionale spagnola – indissolubilmente legata all'insegnamento del diritto positivo – fu spiegata come parte di una più ampia esposizione del costituzionalismo occidentale.

Tuttavia, questa dimensione comparativa è stata presto dimenticata e lo studio della storia costituzionale comparata è un settore in cui gli accademici spagnoli non hanno abbondato. Per molto tempo, l'opera di riferimento è stata il libro *Derecho Constitucional Comparado*, scritto dal professore di diritto politico Manuel García Pelayo[30] e pubblicato in Messico, dove rimase fino alla caduta del regime di Franco, quando tornò per essere eletto come primo presidente della Corte costituzionale spagnola. In realtà il libro di García Pelayo si occupava di diritto positivo, la cui esposizione storica era solo una parte e, per di più, priva di qualsiasi riferimento alla Spagna. In questo senso, la storia costituzionale continuò ad assumere un ruolo puramente strumentale rispetto all'insegnamento delle Costituzioni in vigore. Questo spiega perché, quando il volume è stato scritto durante il regime di Franco, la storia costituzionale spagnola era assente.

Oltre al libro di García Pelayo, tra i pochi autori che hanno scritto di storia costituzionale comparata, spiccano due autori, Joaquín Varela Suanzes e Clara Álvarez Alonso che, come ho già sottolineato, hanno insegnato materie sull'argomento rispettivamente all'Università di Oviedo e all'Università Autónoma de Madrid. Il primo ha scritto alcune interessanti note che a tutt'oggi sono rimaste inedite e che speriamo di pubblicare a breve nell'ambito di un progetto di *Opera Omnia* che sta curando la *Cátedra de Historia Constitucional "Martínez Marina"* dell'Università di Oviedo. Per quanto riguarda la materia insegnata da Clara Álvarez Alonso, essa ha dato vita a un magnifico studio di storia costituzionale comparata, di straordinario spessore dottrinale[31], in cui uno degli aspetti più rilevanti è l'idea del diritto di proprietà come elemento fondamentale sull'origine del costituzionalismo occidentale; una teoria in cui non si può ignorare l'influenza che Paolo Grossi ha avuto sulla professoressa madrilena.

Con queste poche eccezioni, la mancanza di manuali che potessero essere utilizzati nell'insegnamento universitario per analizzare la storia costituzionale comparata (cosa più presente nelle facoltà di storia che in quelle di giurisprudenza) è stata colmata attraverso la traduzione di alcune opere straniere rilevanti. Forse la più popolare vi è stata quella di Nicola Mateucci[32], seguita da quelle di Maurizio Fioravanti, Dieter Grimm, M. J. C. Vile e Horst Dippel[33]. Tra i pochi spagnoli che si sono impegnati in questa direzione, la maggior parte sono stati tutti giuristi[34] ad eccezione di Miguel Artola[35], uno degli storici più influenti e perspicaci del XX secolo[36], che è stato seguito da altri storici spagnoli, con poche eccezioni[37].

Questa carenza di manuali di storia costituzionale comparata può essere colmata, in una certa misura, solo dalle raccolte di costituzioni storiche che sono apparse – anch'esse a sprazzi – in Spagna. Una delle prime è stata l'opera del già citato Miguel Artola, anche se dedicata esclusivamente alle dichiarazioni dei diritti e che incorpora le fonti originali solo in forma frammentaria[38]. Molto più ambiziosa è stata senza dubbio la più rilevante raccolta di Costituzioni storiche in prospettiva comparata, ancora una volta di Joaquín Varela[39].

6. *Due parole per concludere*

L'insegnamento della storia costituzionale in Spagna (sia essa spagnola o comparata) continua ad essere eccezionale nel nostro Paese. Integrata negli studi di Diritto, Storia o Scienze Politiche, ha smesso di essere una materia autonoma (uno status di cui ha goduto solo per poco tempo) per acquisire un carattere puramente strumentale rispetto alle altre materie. Questa circostanza non solo le ha impedito di acquisire autonomia, ma genera anche un'enorme confusione metodologica, fornisce allo studente una visione frammentata e scoraggia la stesura di manuali specificamente dedicati alla storia costituzionale.

Tutto ciò è in contrasto con il magnifico stato di salute di cui gode la storia costituzionale tra gli accademici spagnoli. Si può dire, infatti, che mai prima d'ora in Spagna si è registrata una così grande attenzione al tema da parte di giuristi, storici e politologi. Vale la pena chiedersi, tuttavia, perché la ricerca e l'insegnamento seguano percorsi divergenti.

[1] La *Cátedra de Historia Constitucional "Martínez Marina"* dell'Università di Oviedo è stata creata nel 2019, ma in realtà è nata nel 2008 come Seminario, creato dal Vice-Rettorato di Estensione Universitaria. La rivista "Historia Constitucional", invece, è stata creata nel 2008, sempre presso l'Università di Oviedo. Entrambe le iniziative sono state promosse da Joaquín Varela Suanzes-Carpegna. Nel caso della cattedra, devo sottolineare che la sua visita a Macerata e la sua collaborazione con il Laboratorio "Antoine Barnave" di quell'università italiana sono state decisive per incoraggiarlo a creare in Spagna un'istituzione dedicata alla storia costituzionale, anche se più modesta.

[2] Sebbene questa possa essere considerata un'affermazione soggettiva (alla quale non mi sottraggo dato il mio rapporto accademico e personale con Joaquín Varela), ci sono circostanze che la cor-

roborano: non solo il fatto che è praticamente l'unico accademico che ha dedicato tutta la sua vita di ricerca alla storia costituzionale (con quasi 300 pubblicazioni sull'argomento), ma anche il fatto che ha creato l'unica cattedra e l'unica rivista in Spagna dedicate a questa disciplina, come accennato nella nota precedente. D'altra parte, è stato l'unico ricercatore che ha cercato di apportare il proprio metodo, riflettendo, contribuendo con numerose pubblicazioni alle riflessioni metodologiche sulla storia costituzionale. Su queste circostanze rimando al dossier incluso nel numero 24 della rivista *Historia Constitucional*, dedicato a Joaquín Varela nel quinto anniversario della sua morte.

[3] G. Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, Paris, Éditions du Centre National de la Recherche Scientifique, 1985.

[4] J. Bécker, *La Tradición política española: apuntes para una biblioteca española de políticos y tratadistas de filosofía política*, Madrid, Tipolitografía de Raoul Péant, 1896.

[5] J. Bécker, *La reforma constitucional en España. Estudio histórico-crítico acerca del origen y vicisitudes de las Constituciones españolas*, Madrid, Imprenta de Jaime Ratés Martín, 1923. Esiste un'edizione anastatica pubblicata da Analecta editorial, Navarra, 2005.

[6] Ne parlo nel primo capitolo di I. Fernández Sarasola, *Utopías Constitucionales. La España posible en los proyectos constitucionales (1786-1931)*, Madrid, Centro de Estudios Políticos y Constitucionales, 2022, pp. 27-30.

[7] Tra le altre pubblicazioni: J. Varela Suanzes-Carpegna, *Algunas reflexiones metodológicas sobre la Historia Constitucional*, in «Historia Constitucional», núm. 8, 2007, p. 246; Varela Suanzes-Carpegna, Joaquín: *Algunas reflexiones metodológicas sobre la historia constitucional*, Figueruelo Burrieza, Ángela, Enríquez Fuentes, Gastón J., Núñez Torres, Michael, *Derecho, Ciencias y Humanidades*, Comares, Granada, 2010, p. 251; J. Varela Suanzes-Carpegna, *Historia e historiografía constitucionales*, Madrid, Trotta, 2015, p. 13. Va aggiunto che Joaquín Varela ha intervistato quattro importanti figure europee (Ernst Wolfang Böckenförde, Michel Troper, M. J. C. Vile e Maurizio Fioravanti) nella rivista da lui diretta, *Historia Constitucional*, e una delle domande che ha sempre posto loro è stata proprio la loro opinione sul metodo della storia costituzionale.

[8] Nella sua celebre *Historia del levantamiento, guerra y revolución de España*, scritta tra il 1827 e il 1837, Toreno dedica brevi ma sostanziose pagine al processo costituente di Cadice, analizzando sia gli articoli dello Statuto di Bayonne che la Costituzione del 1812. Tuttavia, dedica maggiore attenzione alle vicissitudini politiche delle Cortes de Cádiz in un opuscolo molto meno conosciuto che è la *Noticia de los principales sucesos ocurridos en el gobierno de España, desde el momento de la insurrección en 1808, hasta la disolución de las Cortes ordinarias en 1814, por un español residente en París*. Per un'analisi dettagliata della vita e dell'opera di questo liberale, cfr. J. Varela Suanzes-Carpegna, *El Conde de Toreno. Biografía de un liberal (1786-1843)*, Madrid, Marcial Pons, 2005.

[9] A. Argüelles, *Exámen histórico de la reforma constitucional que hicieron las Córtes generales y estraordinarias desde que se instalaron en la isla de León el día 24 de setiembre de 1810, hasta que cerraron en Cadiz sus sesiones en 14 del propio mes de 1813*, Londres, Imprenta de Carlos Wood e hijo, 1835.

[10] J. Rico y Amat, *Historia política y parlamentaria de España (desde los tiempos primitivos hasta nuestros días: escrita y dedicada a S.M. la Reina Doña Isabel II*, Madrid, Imprenta de las Escuelas Pías, 1860-1861.

[11] J. Rico y Amat, *El libro de los diputados y senadores: juicios críticos de los oradores más notables desde la cortes de Cádiz hasta nuestros días, con la inserción íntegra del mejor discurso que cada uno de ellos ha pronunciado*, Madrid, Establecimiento Tipográfico de Vicente y Lavajos,1862-1866. Alcuni precedenti di tali biografie esistevano già: Anónimo, *Condiciones y semblanzas de los diputados a las Cortes para la Legislatura de 1820 y 1821*, Gibraltar, 1821; Anónimo, *Condiciones y semblanzas de los señores diputados a Cortes para los años de 1822 y 1823*, Madrid, Imprenta del Zurriago, 1822; Charles Le Brun, *Retratos políticos de la Revolución de España*, Impreso en Filadelfia, 1826.

[12] L'opera di Juan Sempere y Guarinos intitolata *Memorias para la historia de las constituciones españolas*, Paris, Imprenta de P.N. Rougeron,1820, era una legittimazione del regime costituzionale instaurato da Rafael del Riego nel Triennio liberale, ma in realtà non si trattava di un'opera di storia costituzionale in senso stretto, nonostante il titolo, bensì di un'esegesi dei precedenti storici del sistema rappresentativo spagnolo durante il Medioevo, tornando così all'idea di "costituzione storica".

[13] V. Du-Hámel, *Historia constitucional de la monarquía española desde la invasión de los bárbaros hasta la muerte de Fernando VII: 411-1833, por el conde Victor Du-Hámel; traducida, anotada y adicionada hasta la mayoría de la reina doña Isabel II … por Baltasar Anduaga y Espinosa*, Madrid, Imprenta de D. Manuel G. Uzal, 1845-1846, 2 vols.

[14] M. Colmeiro, *Elementos de derecho político y administrativo de España*, Imprenta de Gabriel Alhambra Madrid, 1858.

[15] D.E. Aller, *Exposición elemental teórico-histórica del derecho político*, Madrid, Librería de Victoriano Suárez, 1875, dove dedica l'ultima parte a una sintesi storica delle

istituzioni spagnole. La sezione sulla Storia costituzionale occupa appena le pagine 287-303, limitandosi a una brevissima descrizione dei principi di ciascuna Costituzione, dedicando un po' più di spazio alla Costituzione di Cadice, accennando anche allo sviluppo storico.

[16] Nel suo *Curso de Derecho Político*, Santamaría de Paredes divideva la storia del diritto politico spagnolo in cinque periodi, l'ultimo dei quali corrispondeva proprio alla "España Constitucional" (dal 1808 al regno di Alfonso XIII). In totale, si tratta di poco più di una dozzina di pagine che culminano in un'analisi sull'impatto dei partiti politici nel regime costituzionale.

[17] L. Izaga, *Elementos de Derecho Político*, Bilbao, Admón. de El Mensajero del Corazón de Jesús, 1922. Gil Robles, da parte sua, ha dedicato solo il capitolo XIV del secondo volume al "costituzionalismo", con riferimenti alla Gran Bretagna, agli Stati Uniti, alla Francia e alla Germania, ma omettendo qualsiasi cenno alla storia costituzionale spagnola. E. Gil Robles, *Tratado de Derecho Político* (1899-1901 Madrid), Afrodisio Aguado Editores, 1961.

[18] R. Rovira y Rabassa, *Tratado de derecho político: además de las fundamentales teorias en que descansa la ciencia politica; contiene una parte histórica en la que se ocupa del desenvolvimiento de las instituciones políticas de España, y del examen y crítica de las constituciones desde la del año 1812 á la de 1876; con mas el estatuto real de 1834, las cuales se insertan íntegras en el presente "tratado"*, Madrid, Librería de Leocadio López, 1882.

[19] Carlos Sanz Cid ha realizzato il più importante studio sulla Costituzione di Bayonne in Spagna, frutto di un'approfondita indagine negli *Archives Nationales* de París. C. Sanz Cid, *La Constitución de Bayona*, Madrid, Reus,1922.

[20] In questo periodo, uno degli esempi più emblematici del costituzionalismo tra le due guerre, che ha avuto un'influenza notevole sulla Costituzione del '31: *La Constitución alemana de 11 de Agosto de 1919. Texto completo, comentarios, introducción histórica y juicio general por el Dr. Ottmar Bühler. Traducción de la tercera edición alemana por José Rovir*, Barcelona, Taller Gráfico Editorial Labor, 1931. La compilazione di Mirkine è stata pubblicata anche in traduzione da B. Mirkine-Guetzevitch, *Las nuevas constituciones del mundo: Textos integros de las de Alemania, Baviera, Prusia, Austria*, con uno studio preliminare di Boris Sergueevich Mirkine-Guetzevitch, Madrid, Editora España, 1931.

[21] A. Posada, *Tratado de Derecho Político*, Madrid, Librería General de Victoriano Suárez, 1935 (5ª edición), vol. II, pág. 31.

[22] A. Posada, *La nouvelle Constitution espagnole*, Paris, Recueil Sirey, 1932.

[23] A. Posada, *Fragmentos de mis memorias*, Oviedo, Publicaciones de la Universidad de Oviedo, 1983, p. 76.

[24] N. Pérez Serrano, *Estudio acerca del concepto, método, fuentes y programas del Derecho Político español, comparado con el extranjero* (1932), in N. Pérez Serrano, *Escritos de Derecho Político*, Madrid, Instituto de Estudios de Administración Local, 1984, vol. I, p. 57.

[25] E. L. Llorens, *Notas sobre el concepto, método y fuentes y programas del Derecho Político Español comparado con el extranjero* (Madrid, 1933), in S. Martín Martín, *El Derecho Político de la Segunda República*, Madrid, Universidad Carlos III, 2011, p. 162.

[26] G. Fernández de la Mora, *Los teóricos izquierdistas de la democracia orgánica*, Barcelona, Plaza y Janés, 1985; R. Fernández-Carvajal, *La Constitución española*, Madrid, Editora Nacional, 1969.

[27] D. Sevilla Andrés, *Constituciones y otras leyes y proyectos políticos de España*, Madrid, Editora Nacional, 1969, 2 vols. Negli anni Cinquanta e Sessanta cominciarono ad emergere altre compilazioni, anche se in modo isolato: R. Sáinz de Varanda, F. Laguna Aranda, T. Sánchez Casajus, *Colección de Leyes Fundamentales*, Zaragoza, Acribia, 1957; E. Tierno Galván, *Leyes políticas españolas fundamentales (1808-1936)*, Madrid, Tecnos, 1968. Come si può notare, l'uso del termine "costituzioni" nei titoli di queste compilazioni è stato evitato e sostituito dal termine "leggi fondamentali" o "leggi politiche".

[28] L'elenco è abbondante, mi limiterò a citare solo alcuni esempi. Durante il regime franchista, due opere di professori di diritto politico erano ancora in stampa: D. Sevilla Andrés, *Esquema de Historia Constitucional de España (1800-1948)*, Valencia, Gior, 1948; D. Sevilla Andrés: *Historia constitucional de España: 1800-1966*, Valencia, Escuela Social, 1966; R. Fernández-Carvajal: *Síntesis de Historia Constitucional de España: 1808-1936*, Universidad de Murcia, Murcia, 1972. In seguito, sono soprattutto i costituzionalisti a dedicarsi a questo tipo di pubblicazioni anche perché la "Storia costituzionale spagnola" rientrava nei programmi dell'insegnamento di Diritto costituzionale insegnata in tutte le facoltà di giurisprudenza spagnole. Vedi a titolo di esempio: F. Fernández Segado, *Las constituciones históricas españolas: (una introducción jurídica)*, Madrid, ICAI, 1981, J. Solé Tura, E. Aja, *Constituciones y períodos constituyentes en España (1808-1936)*, Madrid, Siglo XXI, 1988; A. Torres del Moral, *Constitucionalismo histórico español*, Átomo ediciones, Madrid, 1988; R. Jiménez Asensio, *Apuntes para una historia del constitucionalismo español*, Zarauz, Editorial Itxaropena Sa, 1992; J. Peña González, *Historia política del constitucionalismo español*, Madrid, Prensa y Ediciones Iberoamericanas, 1995; C. Núñez Rivero, *Historia constitucional de España*, Madrid, Universitas, 1997. Tra i giuristi

impegnati in politica: E. Attard, *El constitucionalismo español, 1808-1978: ensayo histórico-jurídico*, Valencia, Quiles, 1988. Tra gli storici del diritto: B. Clavero, *Evolución histórica del constitucionalismo español*, Madrid, Tecnos, 1984; íd., *Manual de Historia Constitucional de España*, Madrid, Alianza, 1989.

[29] J. Varela Suanzes, *Historia constitucional de España*, Madrid, Marcial Pons, 2020. Purtroppo, io stesso sono stato costretto a rivedere e completare alcuni capitoli, su richiesta di Joaquín Varela (in condizioni di salute precarie) che, con la sua caratteristica gentilezza, mi ha chiesto di apparire come curatore dell'opera. Joaquín Varela morì solo pochi mesi prima che l'opera vedesse finalmente la luce.

[30] M. García Pelayo, *Derecho Constitucional comparado*, Madrid, Revista de Occidente, 1950, con edizioni successive fino al 1967. In Spagna è stato ripubblicato da Alianza nel 1984 e ristampato nel 1991. Nel 1999 la stessa casa editrice ha pubblicato una nuova edizione, con un'introduzione di Manuel Aragón Reyes, inserita nella collana "Manuales".

[31] C. Álvarez Alonso, *Lecciones de historia del constitucionalismo*, Madrid, Marcial Pons, 1999.

[32] N. Mateucci, *Organización del poder y libertad. Historia del constitucionalismo moderno*, Madrid, Trotta, 1998.

[33] M. Fioravanti, *Constitución. De la antigüedad a nuestros días*, Madrid, Trotta, 2001; D. Grimm, *Constitucionalismo y derechos fundamentales*, Madrid, Trotta, 2006 (Il titolo è fuorviante: si tratta infatti di una vera e propria storia costituzionale); M. J. C. Vile, *Constitucionalismo y separación de poderes*, Madrid, Centro de Estudios Políticos y Constitucionales, 2007; H. Dippel, *Constitucionalismo moderno*, Madrid, Marcial Pons, 2009.

[34] C. Álvarez Alonso, *Lecciones de Historia del constitucionalismo*, Madrid, Marcial Pons, 1999; E. González Hernández, *Breve historia del constitucionalismo común (1787-1931)*, Madrid, Editorial Universitaria Ramón Areces, 2006; R. Luis Blanco Valdés, *La construcción de la libertad, Madrid, Alianza, 2010.*

[35] M. Artola, *Constitucionalismo en la historia*, Barcelona, Crítica,2005.

[36] I. Fernández Sarasola, *Miguel Artola: el historiador de la revolución liberal*, in M. Artola, *De la Ilustración al liberalismo. Jovellanos y Argüelles, estudio preliminar y notas de Ignacio Fernández Sarasola*, Pamplona, Urgoiti, 2023, pp. V-LXXII.

[37] Tra le opere di sintesi più significative su questo punto vale senz'altro la pena citare R. Fernández Sirvent, *Las grandes revoluciones: independencia y libertad. Claves para una historia comparada*, Madrid, Paraninfo, 2018.

[38] M. Artola, *Los derechos del hombre*, Madrid, Alianza, 1986. Discorso di insediamento alla Royal Academy of History, pubblicato dall'istituzione stessa: *Declaraciones y derechos del hombre*, Madrid, Real Academia de la Historia, 1982. L'opera di Alianza è stata poi pubblicata anche da Ediciones del Prado (Madrid, 1994) e Círculo de Lectores (Madrid, 1995).

[39] J. Varela Suanzes-Carpegna, *Textos básicos de la historia constitucional comparada*, Madrid, CEPC, 1998.

Duzentos e cinquenta anos de ensino da história constitucional em Portugal (1772-2022)

JOSÉ DOMINGUES

1. *Introdução*

A partir das revoluções constitucionais dos finais do Séc. XVIII e princípios do Séc. XIX – *maxime*, a Revolução Americana (1776-1787), a Revolução Francesa (1789-1791), a Revolução Espanhola (1810-1812) e a Revolução Portuguesa (1820-1822) – iniciou-se uma nova era constitucional (designada como Constituição "moderna", Constituição "escrita", Constituição "codificada", etc.), que, paulatinamente, nos dois séculos seguintes, se espalharia por quase todos os Estados do mundo, salvo o Reino Unido da Grã-Bretanha e a Irlanda do Norte, onde se manteve, até aos dias de hoje, o paradigma constitucional oriundo da Idade Média (por sua vez, designado como Constituição "antiga", Constituição "não escrita", Constituição "histórica", Constituição "consuetudinária", Constituição "esparsa", etc.), formado sobretudo por normas consuetudinárias, mas incluindo também alguns textos escritos, nomeadamente a *Magna Charta Libertatum* de 1215 e os sucessivos diplomas de índole jurídico-fundamental surgidos ao longo dos séculos.

Em Portugal, depois de malograda a tentativa da "Súplica constitucional" de 1808, dirigida a Napoleão Bonaparte, durante a ocupação francesa, foi a Revolução Liberal de 1820 que marcou a entrada do país no constitucionalismo moderno, que viria a ser consumada com a aprovação da primeira Constituição portuguesa, no ano de 1822. Esta profunda rotura com a ordem constitucional do *Antigo Regime* implicou, por efeito da substituição integral da ordem político-constitucional, também uma mudança ao nível do ensino académico do direito constitucional, abrindo sequelas que viriam a condicionar o ensino da história constitucional nos dois séculos seguintes e que se repercutiram até à hodiernidade. É sobre a referida génese setecentista do ensino universitário da Constituição antiga e a disrupção provocada pelo movimento revolucionário *vintista* – que levou a que se criasse uma barreira entre o ensino acadé-

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mico pré-liberal (Constituição antiga) e o ensino pós-liberal (Constituição moderna) –, bem como a sua repercussão até aos dias de hoje, que versa este artigo.

Para além desta introdução e da conclusão, o estudo vai estruturado em três partes, subdivididas em vários itens: a primeira parte versa sobre o ensino académico pré-liberal da história constitucional, desde os *Estatutos Pombalinos* de 1772 até à Revolução Liberal (1820-1822); a segunda parte ocupa-se do ensino académico pós-liberal da história constitucional, desde a primeira Constituição moderna portuguesa (1822) até à atualidade, incluindo um breve panorama das mais recentes publicações académicas; e a finalizar, fica a proposta de se autonomizar o ensino universitário da História Constitucional Portuguesa, reconhecendo-lhe a devida relevância para o entendimento do direito constitucional atual vigente, superando, porém, a tradicional desconsideração da história constitucional pré-liberal.

2. *Ensino pré-liberal da história constitucional (1772-1822)*

2.1 *Constituição antiga: caraterização breve*

A vigência da Constituição antiga portuguesa entre os séculos XII e XIX pode ser subdividida em dois grandes blocos temporais, que nos ajudam a compreender o objeto de estudo aqui proposto[1].

– *1.º período, da monarquia limitada* (Séc. XIII – Séc. XVII): particularmente caracterizado pelos seguintes aspetos: *(i)* instituição e desenvolvimento de uma assembleia representativa da comunidade política (as Cortes gerais portuguesas), onde os representantes dos concelhos passaram a ter assento, a par dos representantes das classes altas do clero e da nobreza[2]; e *(ii)* promulgação das primordiais leis constitucionais do país, que resultaram de pactos assinados entre o rei e os representantes do reino, celebrados em Cortes gerais; *(iii)* o ideal de soberania coletiva e de monarquia moderada, garantidos por mecanismos como o juramento régio, a supremacia e rigidez das Leis Fundamentais, o papel das Cortes na legislação e nos impostos extraordinários, a autonomia municipal e o direito de resistência popular contra o abuso de poder régio[3].

– *2.º período, da monarquia absoluta* (Séc. XVII – Séc. XIX): caracterizado sobretudo pelos seguintes aspetos: *(i)* extinção das Cortes gerais, sendo que a última reunião ocorreu em Lisboa, nos anos de 1697-1698; *(ii)* restrição do alcance da antiga Constituição, limitando as Leis Fundamentais do reino às matérias que versavam somente sobre a sucessão da coroa e a regência do reino, em caso de menoridade ou incapacidade do monarca; *(iii)* adoção do princípio da soberania divina do monarca, que pressupunha a transmissão divina direta e imediata do poder para o rei, negando assim quaisquer manifestações do princípio da soberania popular, inclusive aquela segundo a qual o povo atuava como mero intermediário na transmissão divina do poder para o monarca; *(iv)* redução do poder dos "corpos intermédios" e da autonomia municipal. Em poucas palavras, «mais do que uma *transição* ou uma *mutação constitucional*, o absolutismo traduziu-se numa *verdadeira revogação explicitamente assumida da Constituição tradicional*»[4].

2.2 *Meio século de ensino do Direito Público*

Embora possa parecer controverso, foi no auge deste segundo período de monarquia absoluta que se introduziu nos cursos jurídicos da Universidade de Coimbra (única no país, nessa época) o ensino do Direito Constitucional – incluindo uma vertente de História Constitucional –, através da reforma do ensino efetuada pelo Marquês de Pombal, o todo-poderoso primeiro-ministro do rei D. José I (1750-1777). Assim, subscrevemos a afirmação de Lopes Praça: «devemos ao absolutismo ilustrado de D. José I a criação de uma cadeira onde fosse estudado o direito público»[5].

A reforma determinada pelos *Estatutos Pombalinos* de 1772 instituiu, pela primeira vez na Academia portuguesa, o ensino do *Direito Pátrio Público Interno*[6], cujas lições deveriam ensinar a «Constituição Civil da Monarquia Portuguesa», versando sobre as seguintes matérias:

> A forma da sucessão hereditária dela [da monarquia portuguesa]; o supremo e independente poder e autoridade temporal dos senhores reis destes reinos; o modo da legislação antiga e moderna e da administração da justiça e da fazenda; a natureza das Cortes e das decisões que nelas estabeleciam os senhores reis, enquanto não houve tribunais e magistrados sedentários; os diferentes tribunais que têm sido deputados para o governo político, civil e económico; as diferentes jurisdições que lhes têm sido cometidas; a natureza dos tributos e imposições públicas; o modo de os estabelecer; a suprema jurisdição para estabelecer penas, criar e prover ofícios e dirigir os estudos dos vassalos; e todos os outros artigos que são da inspeção do mesmo Direito Pátrio Público Interno[7].

Trata-se de uma forma extensiva de interpretar a Constituição, muito para além das Leis Fundamentais formais, alargando o seu âmbito à organização política e social do governo *lato sensu*, ou seja, à análise das instituições do poder político (Constituição institucional)[8]. Mas o que efetivamente interessa para este estudo é que a "Constituição Civil" portuguesa da centúria de setecentos correspondia à Constituição histórica, que era formada por momentos esparsos ao longo de vários séculos. Podemos assim concluir que os primeiros passos para o ensino universitário da história constitucional portuguesa foram dados a partir do preceituado nos *Estatutos Pombalinos* de 1772, reiterando aqui as palavras de Lopes Praça:

> Antes do reinado de D. José I embalde se procurará, entre nós, quem prestasse à ciência do direito público serviços assinalados. No quadro da instrução pública não se encontra, antes daquele reinado, cadeira ou estabelecimento onde esta ciência houvesse de ser ensinada e aperfeiçoada[9].

No cumprimento dos referidos *Estatutos*, os autores dos primeiros compêndios jurídicos legaram à posteridade um manancial escrito que serviu de base ao ensino seminal do direito constitucional em Portugal, praticado na Universidade de Coimbra nos cinquenta anos seguintes à outorga dos *Estatutos novos* pelo Marquês de Pombal, ou seja, até ao surgimento da primeira Constituição moderna portuguesa (1772-1822). A título exemplificativo, merecem referência os seguintes manuais académicos do século XVIII: Pascoal José de Melo Freire (regente da cadeira de Direito Pátrio desde 1774 até 1783) dedica ao direito público todo o Livro I das suas *Instituições de Direito Civil Português*[10]; nas *Preleções de Direito Pátrio* de Francisco Coelho de Sousa e Sampaio (nomeado regente da cadeira de Direito Pátrio em 1788/89) consta um título sobre a

"Constituição do império" (Tít. III) e outro sobre "a forma e modo de governo" em Portugal (Tít. IV)[11]; idêntica estrutura, embora mais desenvolvida, foi adotada por Ricardo Raimundo Nogueira (regente da cátedra de Direito Pátrio desde 1795 a 1802) nas *Preleções de Direito Público Interno de Portugal*, com a Parte 1.ª reservada à "Constituição do império" e a Parte 2.ª ao "sistema de governo político e económico do reino"[12].

Acatando o que vinha determinado nos *Estatutos* de 1772, os referidos manuais académicos abordaram matérias inequivocamente constitucionais como, por exemplo: as Leis Fundamentais do reino; o regime político de "monarquia plena" e independente; a sucessão legítimo-hereditária da Coroa; a regência e tutoria da realeza, em caso de menoridade ou incapacidade do legítimo sucessor; a vacatura do trono; as Cortes (que já não eram convocadas desde o final do século anterior), sobretudo quanto à sua autoridade, considerando que tinham apenas uma função consultiva e recusando-lhe autoridade deliberativa; a titularidade exclusiva do poder legislativo no monarca; o sistema judiciário vigente; o direito de punir; o erário régio e o fisco; direitos e deveres dos cidadãos, mas manifestando a ausência total de um catálogo escrito de direitos e liberdades individuais.

2.3 *Críticas emergentes*

Embora de menor importância, a primeira crítica que não podemos deixar de apontar está relacionada com o facto de não existir uma separação entre o ensino do direito constitucional e o ensino da história constitucional. Estando vigente a Constituição histórica, as duas ciências diluíam-se numa só, uma vez que a realidade constitucional em vigor se identificava com os diplomas escritos e as práticas consuetudinárias instituídas e modificadas ao longo de vários séculos. Por isso, o primeiro monumento constitucional a considerar era a Lei Fundamental supostamente acordada entre os procuradores do reino e D. Afonso Henriques, nas míticas Cortes de Lamego (c. 1143). Numa palavra, a Constituição portuguesa começou a ser ensinada na Universidade de Coimbra sob as vestes da história constitucional.

Existem, no entanto, duas críticas relevantes que não podem ser escamoteadas e que derivam do facto de o ensino académico do direito e da história constitucional ter surgido no auge do absolutismo, o qual implicava a negação das duas ideias basilares da Constituição – legitimidade e limitação do poder político. Ou seja, a tese do poder divino e ilimitado do monarca absoluto não era compaginável com a existência de uma Constituição autêntica, que, por isso, não passava de uma "Constituição fictícia". O antagonismo latente entre o absolutismo e a Constituição marcaram profundamente o ensino universitário de então, dando azo a dois estigmas que resistiram aos séculos e se mantiveram até à atualidade: *(i)* a restrição severa do âmbito e alcance da Constituição medieval; e *(ii)* a contenda em torno da autoridade constitucional das Cortes antigas.

Quanto à primeira crítica, desde a sua origem – em França, na década de 70 do Séc. XVI – que a noção de Leis Fundamentais do reino não se identificava propriamente com barreiras ou freios ao poder do monarca, mas antes como pilares de apoio a favor da autoridade régia[13]. Em Portugal

sucedeu exatamente o mesmo, e as Leis Fundamentais foram instrumentalizadas pela literatura política absolutista do Séc. XVIII, que as transformou em mecanismos de legitimação do poder absoluto do rei e de justificação da "monarquia plena" como forma de Estado[14]. Em síntese, as Leis Fundamentais do reino acabaram por ser reduzidas a apenas quatro – a mítica Lei Fundamental de Lamego (c. 1143); a Lei Fundamental da Regência de 1674; a Lei Fundamental de 1679 e a Lei Fundamental de 1698, limitando-se as duas últimas a alterar a Lei das Cortes de Lamego quanto às regras de sucessão régia –, eclipsando assim o alcance e o protagonismo da Constituição medieval, reduzindo o seu âmbito normativo e dispensando o papel preponderante que as antigas Cortes tinham desempenhado no governo do reino e na limitação do poder do rei[15].

Quanto à segunda crítica, relativa ao papel das Cortes, o ensino académico da época, partindo do pressuposto de que o poder do monarca era ilimitado (monarquia pura ou plena), veio reforçar a corrente doutrinária absolutista que, desde há muito tempo, vinha desvalorizando o papel jurídico-constitucional desempenhado pelas Cortes gerais, considerando que, ressalvada a modificação das Leis Fundamentais, se tratava de um órgão meramente consultivo, tanto no plano legislativo como político, que de forma alguma podia limitar o poder do príncipe. O estigma absolutista manteve a questão académica da autoridade constitucional das Cortes em aberto até aos dias de hoje[16].

3. *Ensino pós-liberal da história constitucional (1822-2024)*

3.1 *Constitucionalismo moderno*

O novo regime constitucional emergente da Revolução liberal (1820-1823) veio abalar profundamente os fundamentos do velho direito público absolutista e a Constituição antiga foi abruptamente substituída por um moderno texto constitucional codificado, a Constituição política de 1822. Este rompimento com a ordem constitucional do Antigo Regime, em nome da soberania da nação, da separação de poderes – reduzindo o antigo poder do rei absoluto à chefia do poder executivo, subordinado à Constituição e à lei parlamentar –, do governo representativo e das liberdades individuais, não podia deixar de se refletir no ensino académico do direito público. O modelo dos *Estatutos Pombalinos* de meio século antes, deixava de ter qualquer serventia. Por isso, a necessidade de uma atualização foi de imediato constatada, quer ao nível dos órgãos académicos, quer ao nível do poder político.

O novo reitor da Universidade, Frei Francisco de São Luís[17], aproveitou as congregações das faculdades de Leis e de Cânones para advertir os professores quanto à premência de se adaptar o ensino jurídico à nova realidade constitucional. Na Congregação da Faculdade de Leis, realizada a 18 de dezembro de 1821, alertava para que os discípulos fossem instruídos de acordo com a nova legislação – onde se incluíam, nomeadamente, as *Bases da Constituição* aprovadas em 9 de março de 1821 e a imensa legislação que era aprovada pelas Cortes Constituintes –, «sem cujo conhecimento se não podem habilitar para servirem dignamente o público», acrescentando:

> Achando-se ora adotados em todo o Reino Unido [de Portugal, Brasil e Algarves] os princípios do sistema constitucional; juradas por sua majestade e por todas as ordens do Estado as *Bases da Constituição*; e estabelecidas e promulgadas muitas leis, que são como aplicações e derivações daqueles princípios: parecia de razão e dever que nos cursos jurídicos da Universidade, e principalmente nas cadeiras que têm por objeto a história ou sistema das doutrinas do direito pátrio, tratadas analítica ou sinteticamente, se fizesse a devida aplicação e desenvolvimento daqueles princípios e leis em conformidade dos mesmos *Estatutos* [de 1772], quando a natureza e ordens das matérias, pelo seu paralelismo ou pelas suas íntimas relações, assim o indicasse ou exigisse[18].

Pouco tempo depois, na Congregação da Faculdade de Cânones, realizada a 16 de janeiro de 1822, reiterou a advertência:

> Nesta mesma congregação foi indicado pelo Ex.mo Senhor Reitor que os professores da Faculdade, nas suas preleções e explicações das doutrinas das respetivas cadeiras, se conformassem o mais possível com o presente sistema constitucional, aplicando à doutrina dos compêndios a legislação atual e novíssima das Cortes Gerais e Extraordinárias da Nação Portuguesa e princípios do direito público que mais se conformassem com o atual governo, não só para bem da nação, como para crédito da Universidade[19].

No Magno Congresso constituinte, por seu turno, a poucos dias de se aprovar a nova Constituição (23 de setembro de 1822), também se preparava a substituição do ensino da Constituição material histórica pelo ensino do novo texto constitucional. Em sessão plenária de 11 de setembro de 1822, o deputado Manuel de Serpa Machado apresentou um projeto de lei com a seguinte sugestão:

> Que o professor da cadeira de Direito Público Português, no terceiro ano dos cursos jurídicos, comece as suas lições pela Constituição política da monarquia portuguesa, a qual formará um apêndice ao primeiro volume das obras de Pascoal José de Melo, explicando a doutrina da Constituição pelo método sintético recomendado pelos *Estatutos* para a disciplina daquele ano (Art.º 2º)[20].

De realçar que o projeto mantinha a relevância do manual de Melo Freire sobre o Direito Público Português, acima referido, mantendo assim o ensino da Constituição antiga. Entretanto, para colmatar a falta de um manual sobre a nova ordem constitucional, Diogo Góis Lara de Andrade já tinha avançado com a tradução das *Lições de Direito Constitucional* da autoria de Ramon Salas[21], preparadas com base na Constituição espanhola de 1812 e anteriormente editadas em Espanha. O tradutor remeteu dois exemplares para a Biblioteca das Cortes, os quais foram recebidos com agrado em sessão plenária de 10 de maio de 1822[22].

Todavia, a experiência constitucional vintista foi efémera, terminando poucos meses depois às mãos da contrarrevolução antiliberal da Vila-Francada (27 de maio de 1823), e a projetada mudança universitária no ensino do novo direito constitucional terá ficado resumida às «lições extraordinárias de direito constitucional dadas por Coelho da Rocha, como "opositor" matriculado, lições que lhe valeram ser alvo de perseguição política, depois da restauração do governo absoluto»[23]. Infelizmente, não se conhece o paradeiro dessas lições do professor coimbrão.

Passado o interregno constitucional de 1823-1826, a entrada em vigor da Carta Constitucional veio abrir novamente a questão. Na sessão das Cortes de 16 de março de 1827, quando estava em debate o projeto de lei sobre a reforma do ensino jurídico na Universidade, o deputado José António Guerreiro sugeriu que o *Direito Público Português* fosse separado do *Direito*

Pátrio e passasse para o 2.º ano, que se lhe juntasse o *Direito Público Universal* e se fizesse um novo compêndio, «em que a cada capítulo de direito público universal se ajunte a aplicação ao direito público estabelecido pela nossa Carta Constitucional». Na fundamentação da sua proposta, alegou com a premência de transmitir os novos princípios constitucionais à *mocidade estudantil*:

> Nem se diga que não é para agora a formação de novos compêndios: esta reforma é urgentíssima e, enquanto se não fizer, veremos continuar o escândalo de se ensinar na Universidade por livros que contêm doutrinas contrárias à Lei do Estado. As esperanças de todos os verdadeiros amigos da felicidade nacional devem recair sobre a mocidade estudiosa, que, bebendo, na idade da força e da energia, os princípios constitucionais, fica isenta do mal de antigas preocupações e de inveterados hábitos, que tão poderosamente embaraçam hoje os homens, que foram criados com os princípios, com o exemplo e com a prática do governo despótico[24].

O deputado Joaquim António de Aguiar refutou a proposta, mas não deixou de considerar que a mudança de regime político não era totalmente alheia ao ensino universitário:

> Disse o senhor Guerreiro que era para admirar estar-se ensinando na Universidade o direito público por um compêndio em que se contém princípios opostos à forma atual do governo. Assim é, mas não se segue que estes se ensinem. E eu creio que o lente respetivo há de ter o cuidado de os substituir por aqueles que se acham estabelecidos na Carta, reconhecendo a diferença de uma monarquia que era reputada absoluta a uma representativa, como a nossa atual[25].

A proposta do deputado Guerreiro não foi acolhida pelas Cortes e, no ano seguinte (1828), o regime constitucional caiu novamente, dando lugar a um período de monarquia absolutista (1828-1834). Com a derrota dos absolutistas na guerra civil (1832-1834), seguiu-se o segundo breve período de vigência da Carta (1834-1836), onde foi retomada a questão dos estudos jurídicos na Universidade, mas sem quaisquer progressos de vulto. Foi somente no início do constitucionalismo *setembrista* (1836-1842) que se aprovou a reforma legal sobre a temática que aqui nos ocupa[26].

Na verdade, a reforma dos estudos superiores, regulada por decreto de 5 de dezembro de 1836[27], veio instituir o ensino do direito constitucional (em conjunto com o direito administrativo e o direito público internacional) na cadeira designada «Direito Público Português pela Constituição, Direito Administrativo Pátrio, Princípios de Política e Direito dos Tratados de Portugal com os outros Povos»[28]. A regência desta disciplina foi entregue a Basílio Alberto de Sousa Pinto, cujas lições (manuscritas) foram os primeiros manuais de Direito Constitucional português – *Preleções de Direito Público Constitucional Português*, 1837[29]; *Análise da Constituição Política da Monarchia Portugueza*, 1838-1839[30] –. De referir ainda a obra impressa do lente substituto, João de Sande Magalhães Mexia Salema[31], que o próprio quis retirar do mercado, por considerar que estava imperfeita[32].

Contudo, a Constituição setembrista só vigorou quatro anos (1838-1842), pois em 1842, foi reposta em vigor (pela 3.ª vez) a Carta Constitucional de 1826. Em 1843, a cadeira de Direito Público Português foi anexada à cadeira de Direito Público Universal – indo ao encontro da proposta formulada por J. A. Guerreiro, em 1827 – e, em simultâneo, o Direito Administrativo desmembrou-se do Direito Público[33].

3.2 *Autonomia efémera da história constitucional*

Em síntese, a primeira metade do Séc. XIX pautou-se pela necessidade de adaptar o ensino do direito público à realidade constitucional emergente, o que trouxe novos desafios ao ensino da história constitucional. Sem embargo, manteve-se inicialmente o ensino do constitucionalismo pré-liberal, ou seja, a Universidade preservou o ensino da história constitucional antiga, evidentemente, sem descurar a história constitucional moderna, marcada por três constituições em apenas dezasseis anos. Por exemplo, no programa do «Direito Público Universal, Direito Público Português, Princípios de Política e Ciência da Legislação», para o ano letivo de 1853/54, o professor ainda lecionava uma «breve notícia histórica da Constituição política portuguesa, desde o princípio da monarquia até à época presente»[34].

A 5 de junho de 1865, em resposta à portaria de 21 de janeiro de 1864, o Conselho da Faculdade de Direito enviou ao Governo um projeto em que, pela primeira vez, se reconhecida autonomia pedagógica à História Constitucional. A nova organização dos estudos jurídicos dividiu a cadeira de Direito Público em duas: *1.º ano, 1.ª cadeira*: Filosofia do Direito e História do Direito Constitucional Português; *2.º ano, 4.ª cadeira*: Princípios Gerais de Direito Público, Interno e Externo, e Instituições de Direito Constitucional Português[35]. O parecer do Conselho da Faculdade de Direito, datado de 4 de fevereiro de 1867, mantinha a nomenclatura e distribuição das duas cadeiras[36]. Mas foi sol de pouca dura!

Em 1879, «resolveu-se que a História do Direito Constitucional Português passasse a ser ensinada na 4.ª cadeira, em troca da Doutrina do Direito das Gentes, que viria juntar-se à Filosofia do Direito»[37]. Foi um passo decisivo para que a história constitucional fosse assimilada e voltasse a perder a autonomia a favor do ensino do direito público (constitucional), passando a constituir um mero capítulo deste último[38]. A partir de então, quando o professor entrava na matéria do direito constitucional português, começava «por uma introdução histórica relativamente extensa e passando finalmente à explicitação da Carta Constitucional»[39].

Assim, em 1886, no curso de *Ciência Política e Direito Político* já se ensinava a «evolução histórica» das «constituições e do direito político constitucional português»; a bibliografia recomendada era a obra de Bluntschi (*Teoria geral do Estado*) e o «Livro I de Direito Público»[40]. Tratava-se, muito plausivelmente, da obra de Pascoal José de Melo Freire[41], que, apesar de ter sido eliminada da lista dos livros obrigatórios em 1874[42], ainda era considerado «útil e recomendável para o estudo e compreensão do nosso direito público atual»[43].

O regente substituto desta cadeira, José Joaquim Lopes Praça, publicou uma das mais significativas obras para a história constitucional portuguesa: trata-se de uma coleção de documentos constitucionais, com uma introdução assaz desenvolvida, dividida em dois volumes: no volume I coligiu os documentos pré-liberais (Séc. XII – Séc. XVII) e no volume II as constituições posteriores à Revolução de 1820[44]. Esta obra foi de imediato adotada como texto oficial e mandada distribuir aos estudantes, até que, em 1899, foi substituída por *Cartas e Leis Constitucionais portuguesas*[45]. Ou seja, ao virar do século, a Universidade portuguesa prescindia do ensino dos textos do constitucionalismo antigo.

Oscar Pereira da Silva, Sessão das Cortes De Lisboa *(Fundo Museu Paulista)*

3.3 *Rotura com a Constituição antiga*

Em suma, tudo indica que o ensino da Constituição antiga, já não como norma fundamental vigente, mas como parte do passado constitucional do país, se manteve no ensino universitário depois da Revolução de 1820, durante praticamente todo o Séc. XIX. Todavia, esta vertente de ensino não resistiu à hegemonia crescente do novo direito constitucional, e a história constitucional moderna (baseada nos sucessivos textos constitucionais) acabou por ofuscar completamente o ensino da história constitucional antiga, hoje encoberto pela poeira de mais de um século.

A partir do início do Séc. XX, esta visão restritiva do ensino da história constitucional em Portugal consolidou-se. Tendo subsistido durante várias décadas, o ensino do constitucionalismo antigo foi-se silenciando paulatinamente, dando lugar ao ensino exclusivo do constitucionalismo moderno, gerando a "barreira psicológica" de 1820, como suposta marca de início do constitucionalismo entre nós, o que só recentemente começou a desmoronar-se[46].

As evidências desse paradigma surgem explícitas nos primeiros manuais impressos no início do século, ainda na vigência da Carta Constitucional. Por exemplo, o capítulo II —«Constituições e leis constitucionais»— das *Lições de Ciência Política e Direito Constitucional* de José Alberto dos Reis tratava da Revolução de 1820, dos textos constitucionais de 1822,1826 e 1838 e das leis de revisão (Atos Adicionais) da Carta Constitucional[47]; as mesmas constituições e leis constitucionais foram tratadas por Marnoco e Sousa no capítulo XIII —«Constituições portuguesas»— da Parte I do manual de *Direito Político*[48].

Os manuais que se lhe seguiram, depois da implantação da República e da entrada em vigor da Constituição de 1911, nas duas faculdades de direito (Coimbra e Lisboa, esta criada em 1911) foram atualizando a matéria, acrescentando páginas para as Constituições surgidas posteriormente (Constituições de 1911, 1933 e 1976). Invariavelmente, os hodiernos manuais de Direito Constitucional mantiveram a tradição e reservam um capítulo, mais ou menos extenso, para o ensino da história constitucional portuguesa, desde a *Súplica constitucional* de 1808 e a primeira Constituição política da monarquia (1820-1822), até à atual Constituição (1974-1976), mas sem tratar deliberadamente a antiga Constituição e as Leis Fundamentais da monarquia medieval e do Antigo Regime —*v. g.*, os manuais de Gomes Canotilho[49], Jorge Miranda[50], Bacelar Gouveia[51], Suzana Tavares da Silva[52], Ana Teresa Ribeiro *et al.*[53].

3.4. *Nota para atualização da história constitucional*

Sem embargo de nunca mais ter recuperado o estatuto de disciplina autónoma nos *curricula* das diversas faculdades de Direito do país, o conhecimento sobre a história constitucional portuguesa não estancou, antes pelo contrário; como o de qualquer outro ramo do saber, manteve-se em constante evolução e acumulou teses e resultados científicos, pelo que o seu ensino requer uma atualização persistente e adequada ao mais recente *status quaestionis*. Este não é o momento indicado, nem o espaço disponível o permite, para uma revisão geral, ainda que sucinta, aos contributos de dois séculos

e meio para a história constitucional portuguesa. Fica apenas a seguinte nota sucinta.

Começando pelos trabalhos de síntese de Marcello Caetano[54] e Jorge Miranda[55] sobre as constituições modernas, assim como as entradas no *Dicionário de História de Portugal*, dirigido por Joel Serrão[56], importa sublinhar o ingente trabalho de António Manuel Hespanha, que dedicou imensos estudos à história constitucional portuguesa[57]. Quebrando a "barreira psicológica" de 1820, ainda foram publicados alguns textos sobre o condicionalismo pré-moderno[58]. No âmbito da história em geral, depois da extensa *História de Portugal* de Damião Peres[59], com vários artigos de interesse para a história constitucional, de referir especialmente o trabalho de Gomes Canotilho[60]. Recentemente, também foi publicada entre nós uma reflexão metodológica sobre o ensino académico da história constitucional[61].

Por último, a evocação do bicentenário do triénio liberal, que agora se conclui, foi um momento propício de que resultaram numerosas publicações, que incidiram sobre múltiplos aspetos desse período fundador do constitucionalismo moderno em Portugal (1820-1823). Na impossibilidade de um arrolamento minimamente exaustivo, selecionamos um estudo sobre as Cortes e a problemática legada pelo absolutismo em torno da autoridade das Cortes antigas[62] e dois ambiciosos projetos editoriais: um projeto sobre a história do parlamento português, desde o Séc. XVI até à atualidade[63], editado em quatro volumes, sob a direção de Pedro Tavares de Almeida[64]; e o projeto em oito volumes, de história constitucional de Portugal, desde a fundação do reino até à atualidade (Séc. XII – Séc. XXI), da autoria de Vital Moreira e José Domingues: volume I – *Constitucionalismo antes da Constituição (Sécs. XII-XIX)*; volume II: *Constituição Política da Monarquia Portuguesa de 1822*; volume III: *Carta de Lei Fundamental de 1823*; volume IV: *Carta Constitucional da Monarquia Portuguesa de 1826*; volume V: *Constituição Política da Monarquia Portuguesa de 1838*; volume VI: *Constituição Política da República Portuguesa de 1911*; volume VII: *Constituição Política da República Portuguesa de 1933*; volume VIII: *Constituição da República Portuguesa de 1976*[65].

4. *Que futuro para a história constitucional portuguesa?*

4.1 *Autonomizar o ensino da história constitucional portuguesa*

O ensino da história constitucional portuguesa é um elemento indispensável para o melhor entendimento do direito constitucional vigente, tanto no plano jurídico-normativo, como no plano político. No mesmo sentido deliberou, há mais de século e meio (1865), o Conselho da Faculdade de Direito de Coimbra, quando reconheceu autonomia ao ensino da história constitucional portuguesa, considerando que era na cadeira de *Filosofia do Direito e História do Direito Constitucional Português* (do 1.º ano) que:

> [O] jurista se habilita com todos os dados filosóficos e históricos necessários para o conhecimento do direito público, em todos os seus ramos, e para a inteligência dos outros ramos da jurisprudência, mais ou menos ligados com a ciência do direito público[66].

Para a época atual, embora aplicadas a outra latitude constitucional, são aqui ple-

namente ajustadas as palavras de Gustavo Zagrebelsky:

> La dimensión histórica del derecho constitucional no es entonces un accidente anecdótico, algo que satisfaga solamente nuestro gusto por las antigüedades o la curiosidad por las realizaciones del espíritu humano. Podría ser un elemento constitutivo del derecho constitucional actual, lo que le permitiría dar un sentido a su obra cuando la ciencia del derecho constitucional se decidiera a comprender que no existe un amo que requiera ser servido, al contrario de lo que sucedía alguna vez[67].

Também no mais recente programa académico de História Constitucional da UNLP (Argentina) ficou sinalizada a importância da história constitucional para a compreensão do direito constitucional vigente:

> El estudio de la Historia Constitucional resulta fundamental para el abordaje del estudio del Derecho Constitucional, ya que resulta evidente que no es posible desprender el análisis del articulado de la Constitución, escindiéndolo de la evolución histórica que hizo posible la adopción de esa normativa[68].

Em definitivo, «constitutional history has and can continue to play a role that is both critical and "constructive"»[69]. Nesta perspetiva, deve ponderar-se a sua lecionação autónoma e separada das cadeiras de Direito Constitucional e de História do Direito[70], ainda que a título de disciplina opcional, adaptando as lições ao respetivo ciclo de estudos académicos em que se pretenda inserir o ensino da história constitucional (1.º ciclo estudo, ou licenciatura; 2.º ciclo de estudos, ou mestrado; 3.º ciclo de estudos, ou doutoramento).

A autonomização da disciplina de História Constitucional permitiria aliviar a disciplina de Direito Constitucional de um longo capítulo sobre aquela matéria, libertando mais tempo para o estudo do direito constitucional positivo vigente e permitindo um maior aprofundamento da história constitucional. Solução que está a ser adotada em várias universidades espalhadas pelo mundo.

4.2 *Uma história constitucional desde a origem*

A eventual recuperação da autonomia pedagógica da história constitucional portuguesa terá de incluir o ensino da Constituição antiga, ultrapassando o preconceito de que o início do constitucionalismo se deu com a Constituição moderna. No mesmo sentido se pronunciou recentemente Filipe Arede Nunes:

> Entendemos ser possível realizar um estudo jurídico-histórico dos dois grandes modelos de Constituição (histórica e moderna) e do constitucionalismo onde se incluiu, não apenas o que se tem designado de Constituição formal, mas também do que poderíamos designar de uma Constituição institucional (de que o Reino Unido seria o caso mais paradigmático)[71].

Mas para tal, não basta reativar o ensino da Constituição antiga nos moldes previstos pelos *Estatutos Pombalinos* de 1772. Tal reativação só faz sentido se forem superados os óbices do ensino universitário absolutista, designadamente: *(i)* a origem, organização e autoridade das antigas Cortes gerais (Séc. XIII – Séc. XVII) devem ser analisadas à luz do rigor e isenção científica atuais, sem o espartilho do absolutismo monárquico; *(ii)* o âmbito das Leis Fundamentais do reino deve ser restituído ao seu alcance originário, pré-absolutista.

De igual modo, no ensino da história constitucional moderna, não devem ser

desconsideradas as tentativas de Constituição falhadas, como a *Súplica Constitucional* de 1808, que poderia ter antecipado em vários anos o início da era constitucional moderna em Portugal, e o projeto da *Carta de Lei Fundamental*, ensaiado por D. João VI em 1823, depois de ter revogado a Constituição de 1822.

Em terceiro lugar, sendo a história constitucional portuguesa um sucesso de rupturas e descontinuidades, importa, porém, não desvalorizar a evolução e as mudanças, por vezes substanciais, das constituições mais duradouras – por via de revisão ou de mutação constitucional –, nomeadamente a Carta Constitucional de 1826, a Constituição de 1933 e a Constituição de 1976.

Por último, o ensino da história constitucional não pode evidentemente olvidar as suas estreitas relações dialéticas, de influência recíproca, com a história das ideias políticas, a história política e a história das instituições, desde logo e sobretudo a história do Parlamento.

5. *Conclusão*

Introduzido há mais de dois séculos e meio nos cursos jurídicos da Universidade portuguesa, pelos *Estatutos Pombalinos* de 1772, o ensino da História Constitucional Portuguesa, está hoje, confinado a um mero capítulo das lições de Direito Constitucional.

Nos primeiros cinquenta anos de ensino (1772-1822), existia integração entre a História Constitucional e o Direito Constitucional vigente na altura, ou seja, o ensino da então designada "Constituição Civil Portuguesa" coincidia com a história constitucional do país, sobretudo porque a Constituição em vigor era em si mesma uma Constituição histórica. Esta factualidade viria a ser alterada com a Revolução Liberal de 1820 e a aprovação da primeira Constituição moderna portuguesa, em 1822, que impulsionaram a autonomia do Direito Constitucional vigente e a sua rutura com a história constitucional do país, ou seja, Portugal substituiu a velha Constituição histórica por uma nova Constituição moderna, assente em novas e bem distintas bases.

Apesar dessa cisão, o ensino académico levaria muitos anos a adaptar-se à nova ordem constitucional e, durante praticamente todo o Séc. XIX, o ensino das duas ordens constitucionais ainda conviveu lado a lado, sendo a história constitucional parte do ensino do direito constitucional – salvo durante pouco mais de uma década, como duas disciplinas independentes –. Porém, nos finais do Séc. XIX e princípios do Séc. XX, quando o constitucionalismo moderno já tinha um passado histórico de quase um século, preenchido com a sucessão de várias constituições, aconteceram duas alterações importantes no ensino universitário: *(i)* a História Constitucional perdeu a autonomia e foi convertida num capítulo das lições de Direito Constitucional; *(ii)* o novo capítulo passou a ensinar apenas a história constitucional moderna, abandonando o ensino da história constitucional antiga, anterior à Revolução de 1820.

Hoje, justifica-se plenamente que a História Constitucional Portuguesa recupere a autonomia académica perdida há mais de um século, não só como elemento fundamental para a divulgação do passado constitucional do país, mas sobretudo como um elemento indispensável para o entendimento e interpretação do direito

constitucional vigente e como contributo necessário para a configuração de melhores instituições políticas e para a edificação de uma cidadania mais inclusiva. Importa, porém, eliminar a "barreira psicológica" de 1820 e recuperar o ensino da história constitucional *in totum*, incluindo a Constituição antiga, nos seus diversos avatares, totalmente liberto do enviesamento imposto pelo absolutismo monárquico.

[1] Sobre esta periodização da antiga Constituição portuguesa, ver sobretudo V. Moreira e J. Domingues, *História Constitucional Portuguesa I: Constitucionalismo antes da Constituição (sécs. XII-XVIII)*, Lisboa, Assembleia República: Divisão de Edições, 2020.

[2] As Cortes gerais de Leiria de 1254 têm sido consideradas o momento fundacional do regime representativo no reino de Portugal (*cf.* M. Caetano, *História do Direito Português (Séc. XII-XVI), seguida de Subsídios para a História das Fontes do Direito em Portugal no Séc. XVI*, Lisboa, Verbo Editora, 2000, pp. 314-315).

[3] V. Moreira e J. Domingues, *Para a História da Representação Política em Portugal: O "direito às Cortes" no pensamento político-constitucional de José Liberato | 1819-1821*, Lisboa, Assembleia da República: Divisão de Edições, 2023, pp. 54-55.

[4] Moreira e Domingues, *Para a História da Representação Política em Portugal*, cit., p. 60.

[5] J. J. L. Praça, *Estudos sobre a Carta Constitucional e Acto Adicional de 1852*, Coimbra, Imprensa Literária, 1878, vol. I, p. LXXII.

[6] O ensino do *Direito Pátrio Público Interno* ainda não era feito de forma autónoma, uma vez que se encontrava incluído no âmbito da disciplina de *Direito Pátrio Particular e Público*, sendo a parte do *Direito Público* subdividida em *Público Internacional* e em *Público Interno* (Tít. II, Cap. 3). Por alvará de 16 de janeiro de 1805, a disciplina de *Direito Pátrio* foi dividida em duas cadeiras sintéticas, uma sobre o *Direito Pátrio Particular* [Privado] e outra sobre o *Direito Pátrio Público* (*cf.* A. D. da Silva, *Collecção da Legislação Portugueza de 1802 a 1810*, Lisboa, Tipografia Maigrense, 1826, pp. 296-298).

[7] *Estatutos da Universidade de Coimbra do Anno de MDCCLXXII: Livro II que contém os Cursos Juridicos das Faculdades de Canones e de Leis*, Lisboa, na Regia Officina Typographica, 1773, p. 302.

[8] J. Domingues, V. Moreira, *Genealogy of the notion of constitution in Portugal: the "fundamental laws" and the "civil constitution"*, in «Revista Española de Derecho Constitucional», n. 121, enero/abril 2021, pp. 73-102. DOI: https://doi.org/10.18042/cepc/redc.121.03.

[9] Praça, *Estudos sobre a Carta Constitucional* cit., pp. LXXI-LXXII.

[10] P. J. de M. Freire, *Instituições de Direito Civil Português, tanto Público como Particular*, «Boletim do Ministério da Justiça», Lisboa, 1967, pp. 94-200 e pp. 31-139 (publicado em latim, no ano de 1789). Na nomenclatura da época, a expressão "direito civil" opunha-se a direito eclesiástico, compreendendo tanto o direito privado como o direito público.

[11] F. C. de S. Sampaio, *Prelecções de Direito Patrio Publico e Particular, Offerecidas ao Serenissimo Senhor D. João Principe do Brasil*, Coimbra, Real Imprensa da Universidade, 1793, pp. 25-70 <https://purl.pt/6480> 22 de dezembro de 2023.

[12] R. R. Nogueira, *Prelecções de Direito Público Interno de Portugal (Anno Lectivo de 1795 a 1796)*, in «O Instituto: Jornal Científico e Literário», n. 6-7, 1859, pp. 90-91, 184-186 e 194-197.

[13] J. L. Egío, *La emergencia del concepto de leyes fundamentales en la Francia de las guerras de religion (Beza, Gentillet, Bodino). ¿Frenos o pilares de la autoridad regia?*, in «Conceptos Historicos», n. 3, 2016, pp. 92-131, <http://revistasacademicas.unsam.edu.ar/index.php/conhist/article/view/32> 21 de dezembro de 2023. Em suma, o autor sugere o seguinte: «corrigiendo lecturas anteriores parciales o poco exhaustivas, Innocent Gentillet se presenta, en este sentido, como el padre de *una interesante conceptualización alternativa de las leyes fundamentales*, en la que, como mostramos, las leyes tradicionales que regulaban el acceso al trono, el manejo del patrimonio de la Corona o la interacción de rey y estados *fueron concebidas y explicadas no como instrumentos destinados a refrenar o limitar el ejercicio del poder por parte del soberano, sino como los mismos fundamentos de la autoridad regia*» (p. 122).

[14] A. P. B. Homem, *Lei Fundamental e Lei Constitucional: A Formação do Conceito de Constituição. Contributo para uma História do Direito Público*, in «Estudos em Honra de Ruy de Albuquerque», Coimbra, Coimbra Editora, 2006, vol. I, p. 135.

[15] Domingues e Moreira, *Genealogy*

of the notion of constitution in Portugal cit., p. 84.

[16] Sobre esta controvérsia, *vide* o trabalho recente de Moreira e Domingues, *Para a História da Representação Política em Portugal* cit., pp. 74-80 (bibliografia atinente na nota de rodapé 5).

[17] Antes de ser nomeado reitor da Universidade, Francisco de São Luís tinha participado ativamente na Revolução constitucional de 1820, designadamente, como membro da Junta Provisional do Supremo Governo do Reino e como vogal da Regência do reino, que se manteve até ao regresso do rei D. João VI do Brasil, em 3 de julho de 1821.

[18] P. Merêa, *Estudos de história do ensino jurídico em Portugal (1772-1902)*, Lisboa, Imprensa Nacional-Casa da Moeda, 2005, p. 82.

[19] Merêa, *Estudos de história do ensino jurídico* cit., p. 83. A iniciativa do reitor teve acolhimento na portaria de 25 de janeiro de 1822 (p. 51).

[20] *Diário das Cortes Gerais, Extraordinárias e Constituintes da Nação Portuguesa*, n.º 34 (sessão de 11 de setembro de 1822, p. 412 <https://debates.parlamento.pt> 22 de dezembro de 2023. Em Espanha, por decreto das Cortes de 6 de agosto de 1820, tinha-se substituído o estudo das *Sete Partidas* medievais pelo da Constituição política de 1812 (*Coleccion de los decretos y ordenes que han expedido los Cortes generales y extraordinarias desde su instalacion de 24. de Septiembre de 1810*, Vol. 6, Madrid, 1821, p. 30).

[21] R. Salas, *Lições de Direito Público Constitucional para as escolas de Hespanha*, Lisboa, Tipografia Rolandiana, 1822.

[22] *Diário das Cortes Gerais, Extraordinárias e Constituintes da Nação Portuguesa*, n.º 9 (sessão de 10 de maio de 1822), p. 142.

[23] Merêa, *Estudos de história do ensino jurídico* cit., p. 51.

[24] *Diário da Câmara dos Deputados*, n.º 55 (sessão de 16 de março de 1827), p. 608.

[25] *Diário da Câmara dos Deputados*, n.º 55 (sessão de 16 de março de 1827), p. 608.

[26] Merêa, *Estudos de história do ensino jurídico* cit., pp. 108-109.

[27] Este diploma fundiu as duas Faculdade jurídicas (Leis e Cânones) e fundou uma única Faculdade de Direito na Universidade de Coimbra.

[28] *Collecção de leis de outros documentos officiaes publicados desde 10 de setembro até 31 de dezembro de 1836*, Lisboa, Imprensa Nacional, 1837, p. 193 <https://legislacaoregia.parlamento.pt> 22 de dezembro de 2023.

[29] Manuscrito em poder da família, consultado por Frederico Laranjo (Merêa, *Estudos de história do ensino jurídico* cit., p. 96 e p. 138).

[30] Exemplar manuscrito da Universidade de Coimbra <https://fd.unl.pt/Anexos/Investigacao/7367.pdf> 7 de janeiro de 2024.

[31] J. de S. M. M. Salema, *Princípios de Direito Político Aplicados à Constituição Política da Monarquia Portuguesa de 1838 ou a Teoria Moderada do Governo Monárquico Constitucional representativo*, Coimbra, Imprensa Trovão e Companhia, 1841.

[32] Merêa, *Estudos de história do ensino jurídico* cit., p. 139.

[33] Merêa, *Estudos de história do ensino jurídico* cit., p. 112 e p. 139.

[34] *O Instituto: Jornal Científico e Literário*, Vol. III, n. 18, Coimbra, 1854, p. 227.

[35] Merêa, *Estudos de história do ensino jurídico* cit., pp. 186-187 e p. 313.

[36] Merêa, *Estudos de história do ensino jurídico* cit., p. 277.

[37] Merêa, *Estudos de história do ensino jurídico* cit., pp. 186-187 e p. 230, nota 415.

[38] No parecer de 1883 do Conselho da Faculdade de Direito já não constava qualquer referência à história constitucional portuguesa (*cf.* Merêa, *Estudos de história do ensino jurídico* cit., p. 278).

[39] Merêa, *Estudos de história do ensino jurídico* cit., p. 231.

[40] M. E. Garcia, *Plano desenvolvido do curso de Sciencia Politica e Direito Politico (Programma da 4.ª cadeira para o curso respectivo no anno de 1885 a 1886)*, 3.ª edição, Coimbra, Tipografia de Luiz Cardoso, p. 7.

[41] O aviso régio de 7 de maio de 1805 tinha determinado que as Instituições de Melo Freire fossem «adaptadas para as lições sintéticas do 3.º e 4.º ano do Direito Pátrio».

[42] Merêa, *Estudos de história do ensino jurídico* cit., p. 230.

[43] Praça, *Estudos sobre a Carta Constitucional* cit., p. LXXIV.

[44] J. J. L. Praça, *Collecção de leis e subsidios para o estudo do Direito Constitucional Portuguez*, Coimbra, Imprensa da Universidade, 1893 (vol. I) 1894 (vol. II).

[45] Merêa, *Estudos de história do ensino jurídico* cit., p. 234.

[46] Moreira e Domingues, *História Constitucional Portuguesa I* cit. N. Palma, *As causas do atraso português*, D. Quixote, 2023, p. 45: «Ao contrário do que aprendemos na escola e até nas universidades – tanto mais que gerações de historiadores e juristas o têm repetido desde o século XIX – não é verdade que, antes de 1820, nunca tivessem existido em Portugal instituições parlamentares ou um Estado Constitucional».

[47] J. A. dos Reis, *Lições de Ciência Política e Direito Constitucional*, Coimbra, Imprensa Académica, 1907, pp. 21-41.

[48] A. J. F. Marnoco e Sousa, *Direito politico: poderes do Estado: sua organização segundo a sciencia politica e o direito constitucional português*, Coimbra, França Amado, 1910, pp. 367-387 <https://purl.pt/843> 26 de dezembro de 2023.

[49] J. J. G. Canotilho, *Direito Constitucional e Teoria da Constituição*, 7.ª edição, Coimbra, Almedina, 2003, pp. 125-188.

[50] J. Miranda, *Manual de Direito Constitucional*, Coimbra Editora, 2014, Vol. I, Tomo I-2, pp. 29-276.

[51] J. B. Gouveia, *Manual de Direito Constitucional*, vol. I, Almedina,

2016, pp. 363-450.

52 S. T. da Silva, *Direito Constitucional I*, 2016, Instituto Jurídico / Faculdade de Direito da Universidade de Coimbra, 2016, pp. 69-87.

53 A. T. Ribeiro *et al.*, *Direito Constitucional: O sistema constitucional português*, 3.ª edição, Lisboa, UCP Editora, 2023: «Surgimento e evolução constitucional».

54 M. Caetano, *História breve das Constituições portuguesas*, Lisboa, Editorial Verbo, 1965 (1.ª edição).

55 J. Miranda, *As Constituições portuguesas: 1822, 1826,1838, 1911, 1933, 1976*, Lisboa, Livraria Petrony, 1976 (1.ª edição).

56 J. Serrão, *Dicionário de História de Portugal*, Porto, Figueirinhas, 1985.

57 Sobretudo a sua obra magna: A. M. Hespanha, *Guiando a mão invisível. Direitos, Estado e Lei no Liberalismo monárquico português*, Coimbra, Almedina, 2004.

58 Entre outros, D. F. do Amaral, *As sete constituições informais da Monarquia portuguesa antes do liberalismo*, in *Estudos em Homenagem ao Prof. Doutor Martim de Albuquerque*, Coimbra, Coimbra Editora, 2010, vol. I, pp. 431-448; P. Otero, *D. Afonso II e a edificação do Estado: a raiz do constitucionalismo português*, in *Estudos em Homenagem ao Prof. Doutor Martim de Albuquerque*, Lisboa, edição da Faculdade de Direito da Universidade de Lisboa, 2010, vol. II, pp. 523-538; P. Otero, *O significado constitucional das Cortes de Coimbra de 1385 e das Cortes de Torres Novas de 1438: a génese da primeira Constituição escrita portuguesa*, in *Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho*, V – *História e Política: entre Memórias e Ideias*, Coimbra, Universidade de Coimbra e Coimbra Editora, 2012, pp. 231-244.

59 D. Peres, *História de Portugal*, Barcelos, Portucalense Editora, 1928-1954.

60 J. J. G. Canotilho, *As Constituições*, in J. Mattoso (Dir.), *História de Portugal*, Vol. 5, Lisboa, Círculo de Leitores, 1994, pp. 149-165.

61 F. A. Nunes, *História da Constituição. Objecto e metodologia*, in «Anuário de História do Direito», n. 1, 2020, p. 96.

62 Moreira e Domingues, *Para a História da Representação Política em Portugal* cit.

63 Incompreensivelmente, este projeto excluiu o período áureo das Cortes gerais portuguesas, a Idade Média.

64 P. T. de Almeida (Dir.), *O Parlamento Português*, Lisboa, Assembleia da República: Divisão de Edições, 2023: Vol. I: *Antigo Regime e Monarquia Constitucional*; Vol. II: *República*; Vol. III: *Estado Novo*; Vol. IV: *Democracia*.

65 Estão publicados os dois primeiros volumes: V. Moreira e J. Domingues, *História Constitucional Portuguesa I: Constitucionalismo antes da Constituição (sécs. XII-XVIII)*, Lisboa, Assembleia República: Divisão de Edições, 2020; V. Moreira e J. Domingues, *História Constitucional Portuguesa II: Constituição de 1822*, Lisboa, Assembleia da República: Divisão de Edições, 2023.

66 Merêa, *Estudos de história do ensino jurídico* cit., p. 321.

67 G. Zagrebelsky, *Historia y Constitución*, traducción y prólogo de Miguel Carbonell, Editorial Trotta, 2005, p. 91.

68 Programa de estudios de Historia Constitucional (Cátedra III), Facultad de Ciencias Jurídicas y Sociales, Universidad Nacional de La Plata (UNLP), Argentina <https://www.jursoc.unlp.edu.ar/documentos/alumnos/programas/hist_const_cat_III.pdf> 22 de janeiro de 2024.

69 L. Lacchè, *Introduction: The memory of the constitution and the value of constitutional history*, in «Giornale di Storia Costituzionale», n. 36/II, 2018, p. 23 <http://www.storiacostituzionale.it/doc_full-text/GSC_36_full-text.pdf> 25 de janeiro de 2024.

70 Nunes, *História da Constituição* cit., p. 96.

71 Nunes, *História da Constituição* cit., p. 94.

Constitutional History Teaching in Britain (19th-20th centuries)

ROCCO GIURATO

English constitutional history has been a prominent subject taught in the most respected British universities from late nineteenth century until mid-twentieth century. Within a few decades after its inception, it became increasingly compulsory in humanities university curricula, until the trend rapidly began to reverse in the 1950s. It exerted considerable influence on history teaching in schools as well. In hindsight, it may be surprising to find out how a subject that is now regarded as highly technical among other historical disciplines, thereby chiefly (if not exclusively) relevant to students of law or politics, played a key role in historical studies. As I will show in further detail, constitutional history had initially appeared in the context of political history in connection with legal studies; this feature was particularly highlighted by the contributions of Frederic William Maitland (1850-1906). To understand the reasons why this happened, we should start focusing on the intrinsic transformations of British historiography and «the historian's craft» between the nineteenth and twentieth century in relation with the historical events from which they originated. Consequently, this article is divided in five parts: in the next section, I will trace the origins of English constitutional history back to the nineteenth century, with particular reference to the work of William Stubbs (1825-1901); sections 2 and 3 deal respectively with the early teaching of constitutional history at Oxford and Cambridge, and the later teaching at London; section 4 briefly shows the "external" influences exerted by constitutional history, namely, on the teaching of history in schools and on constitutional law; in the last section, I will give the reader a glimpse on the current perspectives of constitutional historiography.

1. For several generations of students, English constitutional history was an academic subject whose educational purposes went far

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beyond the transmission of purely historical knowledge. Its aim was to make the British public at large (starting with the most educated part, namely, the clerisy, and the highest and most influential social classes, eventually down to the literate public) familiar with the basic whig[1] assumptions concerning the historical experience of England and the supposed pre-eminence of its culture among the most civilised nations in the world. The historical continuity of the English law and institutions since the high Middle Ages, assumed as the foundation of Britain's imperial glory, is the main idea on which English constitutional history firmly rested from the nineteenth to the twentieth century. All this, in turn, constitutes the foundation of the whig interpretation of history[2]. Therefore, constitutional history was a subject that clearly bore the mark of whig ideology right from the beginning. Where the ideas that shaped constitutional history for a long time did come from and how did they spread among the public and academia is the first point that we should consider in this section before proceeding further to discuss more in detail the teaching of constitutional history in Britain through the most important examples.

English constitutional historiography was born with the purpose of celebrating the historical experience from which it drew inspiration and nourishment. Although Britain already boasted a long historiographical tradition, only during the nineteenth century a keen interest on the long-term transformations of political institutions arose. Hereafter, in the rest of this section I will briefly set forth the reasons why this happened, recalling at the same time the most influential nineteenth-century works on English constitutional history.

The first work specifically dedicated to the constitutional history of England (and, as such, so titled) appeared slightly before the beginning of the Victorian age, written by Henry Hallam[3]. Other influential works written by other authors followed Hallam's *Constitutional History*, even though they do not explicitly mention the subject in the title; this is the case of Thomas Babington Macaulay (1800-1859), the most famous Victorian author of historical works, who published a *History of England from the Accession of James the Second*[4]. The adjective 'constitutional' does not appear in the title, but this absence should not be surprising because the main focus of the work is on the impact of the so-called Glorious Revolution on the development of the English constitution: it is a constitutional history in all respects, and like the said work by Hallam, its author had a whig approach to history. The *Constitutional History of England* written by Thomas Erskine May (1815-1886), albeit much less influential than the previously cited works, is also worth mentioning[5].

Among the champions of whig constitutional history, however, a prominent figure is that of William Stubbs (1825-1901). Bishop of Chester (1884-1888) and later of Oxford (1888-1901), he was one of the most authoritative exponents of the whig constitutional historiography. However, to distinguish Stubbs and the authors contemporary to him from those cited in the previous paragraph, it can be said that the former were exponents of a "Romantic" whiggism, while the latter believed they were further ahead «in their superior scholarship»; their attitude symbolises the appearance of the so-called modernism in historiography[6]. Stubbs's reputation as a scholar was recognized with the appointment as Regius

Professor of Modern History at Oxford in 1866[7]. Although politically a tory, he developed a whig vision of history which clearly shines through in his works, especially in the *Constitutional History*, his best known and most celebrated work[8]. This may seem paradoxical, but upon closer inspection it is an unequivocal sign of the fact that the whig cultural substratum had definitively become the foundation of constitutional historiography. That set of values and beliefs rooted in the British mentality found in Stubbs a talented interpreter who was able to effectively coagulate it around an idea of a constitution that found favour with the Anglophone cultural elites for decades. «The study of Constitutional History», according to Stubbs, was «the examination of a distinct growth from a well-defined germ to full maturity» which drew nourishment from «the very nature of the people»[9]. Notwithstanding his teleological vision of the English legal and institutional experience, credit is due to Stubbs for having continued and promoted historiographical research based on archival documents.

Many years of archival research allowed William Stubbs to bring to light a huge quantity of manuscript sources dating back to the Middle Ages[10]. Consequently, it can be said that his *Constitutional History*, among similar contemporary works, is the foremost study of English political-institutional history largely based on first-hand sources[11]. Since the 1870s, when it first appeared, it exerted for decades an exceptionally long and vast influence on nineteenth- and twentieth-century historical-institutional studies as well as on the teaching of history in schools and universities[12]. Although it is a very large and detailed work, it is possible to outline the structure of Stubbs's *magnum opus* by rapidly reporting the general characteristics and the basic assumptions that animate it.

The «continuity of life» and «national purpose», combined with the continuous development of law and institutions, is the idea on which William Stubbs based his interpretation of the English constitutional experience, the alpha and omega that symbolically opens and closes the first volume of the aforesaid work[13]. It is a recurring theme in Stubbs's historiographical reflection, pervasive to the point of imprinting its peculiar characteristics on almost every page. In the background of his narrative, he placed the other element, that is, the national «spirit» which supposedly manifested itself constantly in history and would finally be embodied in nineteenth-century British constitution. Stubbs built the emergence of the English constitution around the historical transformations of the national spirit – a concept, however, which remains poorly defined –, conceived as an evolutionary process which he exposed in essence already in the first pages of the work, with an outcome necessarily predetermined by the interplay of «three forces, […] the national character, the external history, and the institutions of the people»[14].

Two main assumptions support William Stubbs's historical interpretation: the certain origin and the deterministically predictable outcome of the English constitution. A further basic assumption that also serves as the underlying theme of his *Constitutional History* is «the continuous development of representative institutions»[15]. This teleological vision unfolds through some key moments. Overall, they form a neat and essential frame which from

the Germanic origins of the English people continues with the dialectic between the nation on the one hand and the monarchy and aristocracy on the other, the failure of the Lancastrian "constitutionalist" experiment, the Tudor «despotism», the civil war and the so-called "Glorious Revolution" of 1688-'89 which supposedly begot the nineteenth-century constitution. Stubbs believed that the Middle Ages were crucial to the subsequent English constitutional development; in particular, he recognized in the Parliament of 1295, called by Edward I (1272-1307), the place and date of birth of English political representation, whose essential characteristics would then remain almost unchanged up to his days. The centrality of representative institutions in the English constitution was, according to Stubbs, a Germanic legacy. Furthermore, the link with Germany emerges even beyond his historical interpretation, as he was influenced by Leopold von Ranke (1795-1886). For Stubbs, the 'scientific' rather than 'political' historiographical approach was the main reason for admiration towards the authoritative German scholar. Around 1872, Stubbs even suggested to the Clarendon Press that the massive *Englische Geschichte*, published in several volumes over the course of a decade by von Ranke, be translated into English[16].

The ideas of Charles Darwin (1809-1882) also had a strong influence on William Stubbs, who mentioned the «process of natural selection», a concept unequivocally borrowed from the well-known evolutionary theory[17]. It seems that it is no coincidence that Stubbs's *Constitutional History* was published a few years after Darwin's widely read book on the origin of species[18].

Overall, William Stubbs's work does not depart from the whig interpretation of history. It affords an underlying teleologically orientated vision of British history, narrated as a continuum invariably destined for «magnificent and progressive fate» as well as the predominance of the English people over all others. Though, while showing on the one hand the consolidation of the whig creed in English constitutional historiography, on the other hand it marks the beginning of its decline, especially at an academic level. Notwithstanding this – somewhat paradoxically –, since its appearance, Stubbs's main work has traditionally occupied a position of great importance in British historiography, exercising a notable influence until the 1950s, waning about twenty years later. In the twentieth century, British political-institutional historiography often retained a more or less explicit tendency to take the whig interpretation of history into consideration, while hypocritically pretending to criticize it.

2. English constitutional history was first taught at the two universities of Oxford and Cambridge, starting from the second half of the nineteenth century, but afterwards it came to be included in the curricula of other institutions. Predictably enough, the pioneer at Oxford University was William Stubbs, Regius Professor from 1866 to 1884, who also contributed significantly to the establishment of modern history (as opposed to ancient history) as an autonomous academic degree[19]. Stubbs's teaching and research were closely related, as his *Select Charters* «was assigned in bits and pieces. From the date of publication, the

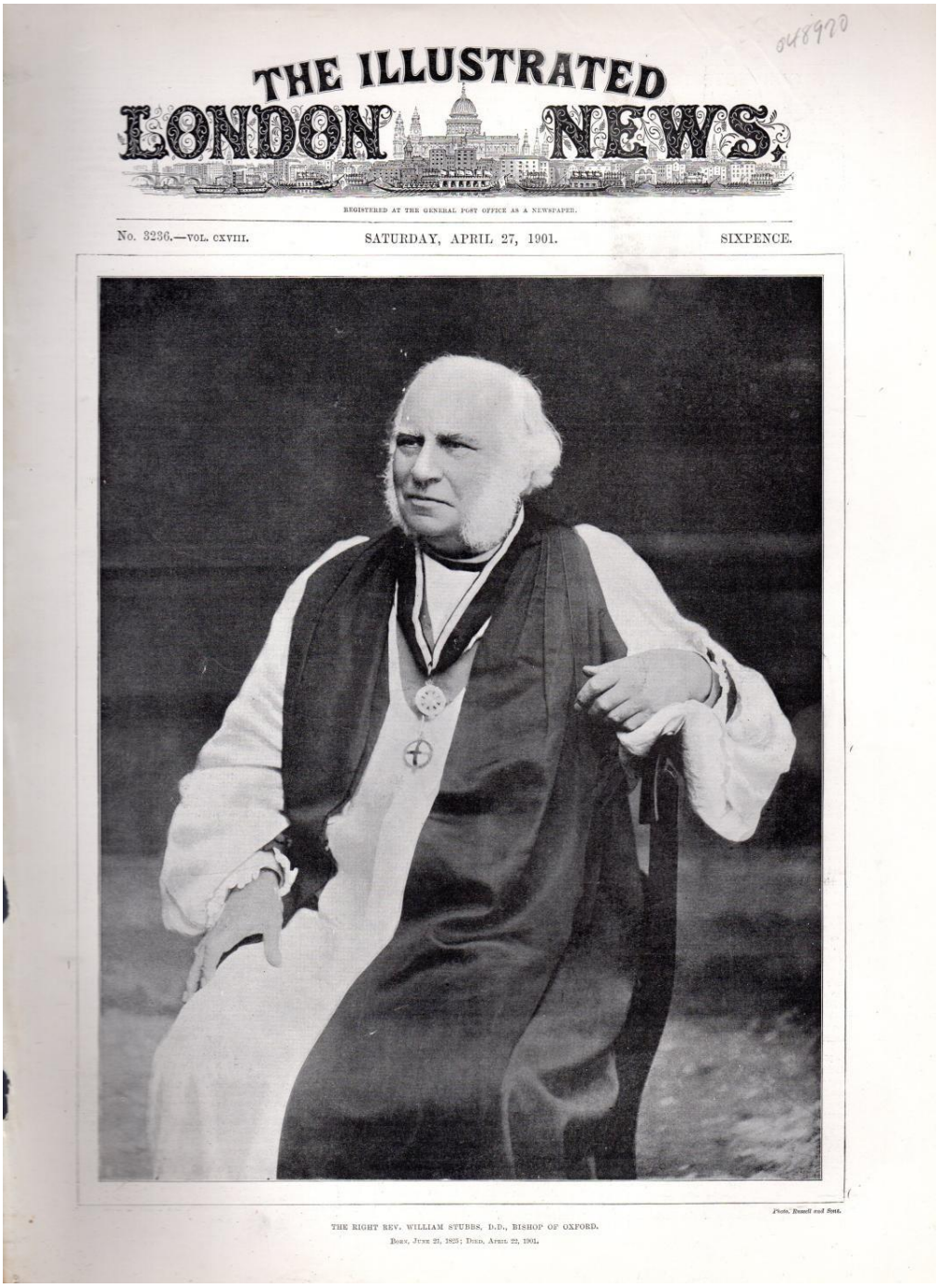
Charters became, as Charles Oman recalled, a "sort of bible, from which a candidate was expected to identify any paragraph without its context being given"»[20]. Afterwards, it even «became a textbook for history students both in Oxford and Cambridge»[21]. Undoubtedly, Stubbs's works in general commanded a wide influence; as we will see later, even such an authoritative scholar like Frederic William Maitland was influenced by them. This was not only due to the originality of Stubbs's works, but also to his captivating narrative style, which was the most remarkable sign of his literary prowess[22]. However, his «lectures in Oxford were not well attended»[23], and college tutors carried out much of the educational tasks, to the point that a group of them published a small collection of essays – with Stubbs's approval – aimed at clarifying many topics which eventually went through two editions[24].

At Oxford, constitutional history was taught for about two decades until 1872 at the School of Law and Modern History. After the separation between the two disciplines, the new School of Modern History aimed to draw and educate men who aspired to a political career or to a position of great responsibility in public administration[25]. By looking at both the examination papers and the syllabi we may gather sufficient information about the structure and the educational goals of the courses of lectures on constitutional history[26].

In 1884, Edward Augustus Freeman (1823-1892) was appointed Regius Professor of Modern History. He was interested in constitutional history, but it seems he did not lecture on this subject, and as in his predecessor's time, there were tutors who did[27]. Pretty much the same can be said about James Anthony Froude (1818-1894) who succeeded Freeman in 1892 and held the post until 1894[28]. The custom of entrusting teaching to tutors continued into the early twentieth century. For tutors lectured on constitutional history and some of them at the same time published professional works which supplied the want of readily available printed documents and authorities (either legislative or judicial) relating to specific historical periods, often re-edited several times to suit teaching needs[29].

At the same time, there was also a change in research interests that went hand in hand with teaching. In some instances, the focus of constitutional history significantly shifted from the Middle Ages to later periods – it is worth remembering that Stubbs's *Constitutional History* stopped at 1485, and the *Select Charters* at the beginning of the fourteenth century –, up to the nineteenth century[30]; while in others it was administrative history that drew more attention. It can be said that the latter was the offspring of constitutional history. I will return to this point in the next paragraph.

Oxford University, at the beginning of the twentieth century, had other prominent historians after William Stubbs, among which at least one of his pupils, Charles Harding Firth (1857-1936) should be mentioned, but none of them matched his remarkably wide influence in the field of historical studies. Between the wars, constitutional history continued to be taught by lecturers and tutors, but after World War II fewer and fewer students took courses. In the late 1960s, the teaching of constitutional history at Oxford had virtually disappeared. In the words of an authoritative British medievalist, it «was no longer a popular course by the time I took it, having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THE RIGHT REV. WILLIAM STUBBS, D.D., BISHOP OF OXFORD.
Born, June 21, 1825; Died, April 22, 1901.

The Right Rev. William Stubbs, D.d., Bishop of Oxford, photoengraving from *The Illustrated London News*, April 27, 1901

been eclipsed by one on the Crusades. As far as I remember, there were only one or two other students in the audience». The teacher was then John Mason (1920-2009), who «said that the lectures were actually those of his old tutor, Sir Goronwy Edwards, who had been taught by T. F. Tout, who in turn had been taught by Stubbs himself»[31]. It is worth mentioning, *en passant*, the figure of Thomas Frederick Tout (1855-1929), Professor of History at Manchester, leader – along with James Tait (1863-1944) – of the "Manchester History School", who dedicated many years to the study of English administrative history[32]. The teaching of history at Manchester School differed from any other British university in that students were encouraged to visit the archives and write undergraduate dissertations based on archival documents[33]. The School was regarded as «higly professional in its approach to research»[34] and therefore much criticised by Oxbridge lecturers, but eventually the model inaugurated at Manchester would prove successful.

Bringing the discussion back to Oxford University in the interwar period, it is inevitable to mention one of its main figures, John Goronwy Edwards (1891-1976), who served as a tutor and lecturer from 1919 to 1948. However, as noted by a contemporary leading scholar in medieval studies, he was one of the last historians of his generation «who find anything called "Constitutional history" sufficient in itself; but they also look through the windows»[35]. Where did this view come from? What changes had historical research in general undergone between the two wars? After the First World War, research interests began to converge increasingly towards economic and social history. The horror and destruction caused by the two world wars, the British constitutional crises of 1911 and 1936, led most British historians to assume that previous approaches were extremely narrow and therefore obsolete. Furthermore, the celebratory tones of nineteenth-century constitutional history could no longer catch the attention of a disillusioned public. As a consequence, historical research focused more on socio-economic phenomena rather than legal and political ones. Obviously, this change affected not only research, but also the teaching of constitutional history in British universities. Whether constitutional history's outlook was really so narrow or not is a question that I am trying to address throughout this article – and so far, I have already showed that this was not the case. Having concluded this part concerning the teaching of constitutional history at Oxford, we can turn our attention to Cambridge.

At Cambridge University the teaching of English constitutional history began a few years later than at Oxford, thanks to John Robert Seeley (1834-1895) who included it in the Historical Tripos[36]. Seeley was appointed Regius Professor of Modern History in 1869 and set out to rearrange the Tripos soon afterwards. In 1870, he firstly reinstated the teaching of history that had been removed from the Moral Sciences Tripos the previous year; so, until 1874, it constituted the Law and History Tripos. The experiment that had already taken place at Oxford was repeated at Cambridge, where it had a much shorter life though. Finally, in 1875, historical studies acquired their autonomy with the birth of the Historical Tripos. Constitutional history had been part of the Law and History Tripos because of its connection with legal subjects, and was also maintained later, when History

was separated from Law, with the classic books by Hallam, Stubbs, and May still being suggested to students[37]. It soon became an important subject; as Joseph Robson Tanner (1860-1931) noted in 1901, «English constitutional history is by tradition the backbone of the Cambridge Historical Tripos»[38]. It was split into two historical periods, with the year 1485 acting as a watershed; Part I of the Tripos covered the earlier era, and Part II covered the later. As a consequence, its teaching took place in different moments of the course and was carried out by different lecturers. This arrangement was symptomatic of a change that occurred in historical research, that is, first of all the specialisation between medievalists and modernists and the consequent appearance of new works, which were in turn the result of a problematic approach to the study of constitutional issues[39]. In this respect, Frederic William Maitland led the way questioning received views and making new historical discoveries through an extensive and (above all) critical study of archival documents.

It was especially thanks to Maitland, then, that constitutional history made important progresses at Cambridge. His «own achievement was to make Cambridge a leading centre of the study of legal history – and among historians to help to embed law (for a time) and the constitution deeply in the History Tripos»[40]. Maitland's famous course of lectures delivered in 1887-1888, but posthumously published, soon became a classic[41]. A genius and a literary talent in his own right, he nevertheless was influenced by the writings of William Stubbs, at least to some extent – an influence that waned in his later works – and most notably from Paul Vinogradoff (1854-1925) – a crucial encounter in his life, occurred in 1884 – who directed him to the study of history. However, Maitland's most valuable contribution to the teaching of constitutional history – as it is evident from his printed course of lectures and his works in general – was his focus on the study of legal and institutional issues to grasp their socio-economic substratum[42]. His writings in general are littered with hints at how much data on society and economy may be gleaned from the legal records of the past.

After Maitland, the teaching of constitutional history at Cambridge continued until the 1960s, although its golden age had already ended nearly three decades before. Among the most distinguished scholars who taught constitutional history at Cambridge during the period between the beginning of the twentieth century and the First World War and then of the interwar period, we should mention Joseph Tanner, Helen Maud Cam (1885-1968), and Gaillard Thomas Lapsley (1871-1949).

Joseph Tanner served as a tutor and lecturer for nearly four decades, from 1883 to 1921. He wrote many valuable historical works, but one of his essays (specifically dedicated to the topic discussed in this article) best suits our purposes here. While addressing several caveats to teachers and students regarding their respective methods, it provides many first-hand insights on the teaching of constitutional history[43]. First, he showed how Stubbs's «three sacred volumes», jokingly equated with the Vedas, despite their immense popularity were already obsolete, and in any case insufficient with respect to the teaching of English constitutional history in a long-term perspective. In line with the evolution of historical science in the late nineteenth century, Tan-

ner also highlighted the dangers of an antiquarian approach to constitutional history. Furthermore, he warned against a preference for legal technicalities (which since Stubbs's time had always found a place in constitutional history books) rather than for the relations between the socio-institutional components, say, between the monarchy and the aristocracy, as well as against the anachronisms in the use of modern words and expressions for rendering ideas from the past. All this was the consequence of changes in historical research that I have already partially mentioned above, which also had repercussions on the teaching of constitutional history.

Moving forward to the 1930s, we note that constitutional history suffered the same fate at Cambridge as it did at Oxford. Moreover, as was observed in those years, «Sir Lewis Namier has put constitutional history out of fashion among the historians»[44]. However, let us briefly return to the two Cantabrigian teachers of the interwar period that I have already mentioned previously. Gaillard Lapsley was tutor, lecturer, and finally reader in constitutional history until 1939. Hailing from New York, educated at Harvard under the guidance of Charles Gross (1857-1909), he was influenced by the ideas of Maitland through his teacher, proving how much they were welcomed overseas. Better known than Lapsley was Helen Cam who taught at Cambridge from 1921 to 1948 and then moved to Harvard, where she was the first woman to gain a tenure. She wrote important contributions to constitutional history and innovated the traditional approach compared to her predecessors by placing emphasis on the history of administration.

After the Second World War, Geoffrey Rudolph Elton (1921-1994), one of the most influential historians in twentieth-century Britain, «was promoted to a personal chair and chose the unfashionable title of 'Professor of English Constitutional History»[45]. Elton held this chair until 1983, when he was appointed Regius Professor of Modern History. More will be said about Elton in the following sections.

Notwithstanding its importance, also proved by the presence of the illustrious scholars I have mentioned so far, «the syndrome of constitutional history» in post-war Cambridge was fading out, until it disappeared in the 1970s[46]. And the same tendency can be found regarding the University of London which I will discuss below.

3. As we have seen in the previous section, the two universities of Oxford and somewhat later Cambridge pioneered the teaching of English constitutional history in the second half of the nineteenth century. Oxonian and Cantabrigian scholars set the standard for the time to come, both in terms of teaching and research. Therefore, at the beginning of the following century, other lecturers at British universities continued to teach the said subject in the manner established at Oxbridge and new books on constitutional history appeared.

In Victorian London, lectures on constitutional history were held as early as in 1861, apparently based on the book by Henry Hallam, however not in the university, but in the Inns of Court as part of a broader educational programme focused on constitutional law and legal history[47].

In 1869, a chair of English constitutional law and history was established at King's College, to which John William Bund Willis-Bund (1843-1928) was appointed[48]. At the same college, a course of twenty lectures on «Jurisprudence, Roman Law, and Constitutional History», in view of the examination for the Bachelor of Law, was held in 1875 by John Cutler (1839-1925), then Professor of Jurisprudence[49]. In the same years, an analogous chair was also established at University College, apparently held by Willis-Bund until 1882. The course «embraced the Crown Prerogative, the Houses of Parliament, the executive and the government, and then constitutional history from the Norman Conquest through to 1688»[50]. Willis-Bund was succeeded by Thomas Pitt Taswell-Langmead (1840-1882), formerly tutor on constitutional law and legal history to the four Inns of Court; however, his professorial experience was a short-lived one, as he died in the same year of his appointment[51]. The following year, Thomas Edward Scrutton (1856-1934) – later one of the most influential judges in the United Kingdom – was appointed to the said chair[52]. As is evident in all the cases that I have cited so far, though, there is a very close relation between constitutional history and law, if not a real dependence of the former on the latter. Moreover, only Willis-Bund and Taswell-Langmead published historical works.

The chair gained its autonomy with the figure of Albert Frederick Pollard (1869-1948) who was Professor of Constitutional History at University College from 1903 to 1907, then of English History (1907-1927), and once again of Constitutional History until 1931. Among the most influential and prolific historians in twentieth-century Britain, Pollard may be counted among the modernists[53]. He gave birth to the London School of History, contributed to the creation of the Historical Association (1906), and most notably in 1921 founded the Institute of Historical Research (IHR, which still exists today), where postgraduates could carry out advanced studies. These few facts would already be sufficient to make it clear that during Pollard's heyday history experienced a significant change and that he was one of the architects of them. The nineteenth-century, now old-fashioned «idea of history as a general education in gentlemanly values», was superseded by «the idea of history as the serious, professional pursuit of greater knowledge through scholarly research»[54]. At Pollard's hands, constitutional history remained of course involved in this process of general transformation. How did this change come about? The emergence of modernism, which brought with it a scientific approach to history – as evidenced among other things by the founding of the IHR –, is primarily responsible for the said transformation. Pollard's heuristic approach put an overarching emphasis on the study of manuscript sources, which combined with his specialisation in Tudor history.

Thenceforth, students of constitutional history increasingly focused their attention on Tudor Parliaments since Pollard had come to see early modern parliamentary institutions as the fulcrum of political and institutional modernity and the sixteenth century as the time when the modern English state was created. Pollard's work on Tudor Parliaments was continued by his pupil John Ernest Neale (1890-1975), in turn mentor of Geoffrey Elton, who was especially critical of traditional constitutional

history with its teleological and evolutionary perspective. Undoubtedly, they were both constitutional historians, but their professorships were in modern history – with the «unfashionable» exception of Elton during the period 1967-1983, which I have already mentioned –, a fact that once again confirms the transformation of the historical profession in twentieth-century Britain.

4. As I stated earlier in this article, constitutional history produced some important "external" influences. For some time, it shaped the teaching of history in schools and of course it influenced constitutional law. Until the 1960s, history in British schools was basically taught on the basis of constitutional history[55]. Methods and contents formed what has been termed the «Great Tradition», that is, dispensing a selection of accepted political facts from antiquity to the First World War, with the purpose of asseverating an evolutionary vision of Great Britain towards democracy[56]. In short, history was about passing on a common cultural heritage that descended from the whig assumptions concerning the historical experience of England.

Given all this, for much of the twentieth century, Governments did not interfere with the historical curricula of schools. They saw history as a means to promote acceptance of the traditional socio-political order through a noncontroversial interpretation of British (actually Anglocentric) history. Moreover, pupils were not expected to develop other skills and/or abilities but to remember a string of significant facts, names, and dates, to be eventually recounted in an examination essay[57].

The early 1970s saw a significant shift in the traditional approach to teaching history due to societal changes that had taken place in Britain during the 1960s. British society was becoming multicultural; therefore, values were changing. Due to migrations brought about by the United Kingdom's employment prospects, cultural homogeneity was undermined by the emergence of new communities. Accordingly, the teaching of history had to change. School curricula were thus adapted to new educational needs. A new approach was used, and history classes were now expected to deal with new topics. Understanding fundamental concepts, such as the use of evidence, causation, and change and continuity, was emphasised.

The other influence, namely, on constitutional law, arose in late nineteenth century, as can be especially seen from the work of Albert Venn Dicey (1835-1922), one of the two leading Victorian constitutional lawyers, the other being William Reynell Anson (1843-1914). As is known, Dicey made extensive use of history, both British and comparative, in his most important book, the *Law of the Constitution*[58]. He did not claim that an historical point of view was the key to understanding constitutional law, though he acknowledged that history was a means to contextualise the law of the constitution[59].

This theoretical premise serves as an explanation for Dicey's interest in constitutional history. He obviously used the books by William Stubbs – he also reviewed the first of the tree volumes in 1875[60] – and Henry Hallam as his primary sources, but how did he use them? In short, how did

whig constitutional history affect Dicey's legal doctrine?

Dicey identified three fundamental principles – the legislative sovereignty of Parliament (*rectius*, of the Crown-in-Parliament), the rule of law, and the role of constitutional conventions – that he believed to be the cornerstone of the British constitution. Out of the three, he drew the second idea directly from Stubbs's account[61]. We may thus see the extent to which constitutional history (or, rather, Stubbs's account) has shaped the law of the United Kingdom's constitution in light of the influence that Dicey's vision in general and the idea of the rule of law in particular exerted on common law constitutional thought in the following decades.

5. As this article draws to a close, one may wonder if constitutional history truly vanished before the turn of the century. In a sense, it did, as after the 1980s there were no more chairs of English or British constitutional history and very rarely new books bearing such title have been published, although history has not entirely disappeared from the constitutional lawyers' scope, as some notable works prove[62]. As we have already seen, history saw a significant shift at the turn of the twentieth century, moving from being a subject primarily directed to the education of gentlemen to becoming a technical-scientific field of studies; at the same time, constitutional history came under growing criticism for being too narrowly focused on law and institutions, thus ignoring social and economical factors. However, a closer look reveals that constitutional history did not really disappear; rather, its main focus shifted and limited to parliamentary history, especially because of Albert Pollard's research and teaching at London throughout the interwar years.

Such scholars as John Ernest Neale, Geoffrey Rudolph Elton, along with those ones who were mentored by them, and many others still working today, undoubtedly are constitutional historians in that laws and institutions of Britain are the main subjects of their research. However, we may say that a parliamentary perspective has long dominated constitutional history. One extremely poignant example of this is the appearance of a very recent collection of essays on the history of Parliament, which on its cover features a portrait of William Stubbs[63].

Notwithstanding this, there are some recent and significant developments to consider. Despite the fact that a more than a century-old tradition vanished about fifty years ago, a new book-length *Constitutional History* – this time a collective work – has been published[64]. The project arose in a legal milieu, spurred by new legal and political theories that followed the British constitution's changes, particularly those occurred in the 1970s[65]. A highly innovative feature is the fact that the work brings together essays written by historians, lawyers, and students of politics; a choice which accounts both for the multidisciplinary approach to the phenomenon and the nature of the constitution itself. A clear pattern that foreshadows a great deal of future research on constitutional history is therefore discernible.

[1] Readers should note the difference between the noun «Whig» which indicates the name of the political party and the adjective «whig». As we will see later, the second has a broad meaning and includes attitudes and ideas that can also refer to people who did not belong to the Whig party.

[2] The expression was coined by H. Butterfield, *The Whig Interpretation of History*, London, G. Bell and Sons, 1931. The first extensive treatment of this subject has been carried out by P.B.M. Blaas, *Continuity and Anachronism: Parliamentary and Constitutional Development in Whig Historiography and in the Anti-Whig Reaction between 1890 and 1930*, The Hague, M. Nijhoff, 1978. See also J.W. Burrow, *A Liberal Descent: Victorian Historians and the English Past*, Cambridge, Cambridge University Press, 1981.

[3] H. Hallam, *The Constitutional History of England from the Accession of Henry VII to the Death of George II*, 2 vols., London, John Murray, 1827.

[4] T.B. Macaulay, *The History of England from the Accession of James the Second*, 5 voll., London, Longman & Co., 1848-1861.

[5] T.E. May, *The Constitutional History of England since the Accession of George the Third: 1760-1860*, 2 vols., London, Longman, Green, Longman, and Roberts, 1861-1863. Clerk of the House of Commons from 1871 until 1886, May is especially remembered for his well-known book on the parliamentary procedure: *A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament*, London, Charles Knight & Co., 1844.

[6] M. Bentley, *Modernizing England's Past: English Historiography in the Age of Modernism, 1870-1970*, Cambridge, Cambridge University Press, 2005, p. 23. This book is the most extensive and up-to-date monographic treatment of modernism in British historiography.

[7] The adjective «modern», eliminated in 2005, indicated all historical periods posterior to antiquity.

[8] W. Stubbs, *The Constitutional History of England in Its Origin and Development*, 3 voll., Oxford, Clarendon Press, 1874-1878. In 1907, Charles Petit-Dutaillis published a French translation of the first volume and thereafter felt the urge to complete and correct it through a series of 12 essays: *Studies and Notes supplementary to Stubbs' Constitutional History Down to the Great Charter*, translated by W.E. Rhodes, Manchester, Manchester University Press, 1908.

[9] Id., *Select Charters and Other Illustrations of English Constitutional History, from the Earliest Times to the Reign of Edward the First*, Oxford, Clarendon Press, 1870, p. v.

[10] Published in the book previously cited. Subsequently, he added English translations of the sources already reproduced in print: Id., *Translation of Such Documents as are Untranslated in Dr. Stubbs' Select Charters from the Earliest Times to the Conclusions of Edward I's Reign*, Oxford, E. B. Gardner *et al.*, 1873.

[11] Contemporary historical works include most notably E.A. Freeman, *The History of the Norman Conquest, its causes and its results*, 6 vols., Oxford, Clarendon Press, 1867-1879; J.R. Green, *A Short History of the English People*, London, Macmillan & Co., 1874; S.R. Gardiner, *History of England from the Accession of James I to the Outbreak of the Civil War, 1603-1642*, 10 vols., London, Longmans & Co., 1883-1884; J.A. Froude, *History of England from the Fall of Wolsey to the Death of Elizabeth*, 10 vols., London, John W. Parker, 1856-1870; J.R. Seeley, *The Growth of British Policy*, 2 vols., Cambridge, Cambridge University Press, 1895.

[12] Cf. H. Cam, *Stubbs Seventy Years after*, in «The Cambridge Historical Journal», IX, n. 2, 1948, pp. 129-147.

[13] Stubbs, *Constitutional History* cit., vol. I, pp. iii, 638.

[14] Ivi, p. 1.

[15] Ivi, p. 544.

[16] L. von Ranke, *A History of England: Principally in the Seventeenth Century*, 6 vols., Oxford, Clarendon Press, 1875 (English translation of *Englische Geschichte, vornehmlich im sechzehnten und siebzehnten Jahrhundert*, 7 vols., Berlin, Verlag von Duncker und Humblot, 1859-1869). Cf. A.D. Boldt, *Leopold Von Ranke: A Biography*, Abingdon, Routledge, 2019, pp. 258-259.

[17] Stubbs, *Constitutional History* cit., vol. I, p. 170.

[18] C. Darwin, *On the Origin of Species by Means of Natural Selection, Or the Preservation of Favoured Races in the Struggle for Life*, London, John Murray, 1859.

[19] On this topic, cf. R.N. Soffer, *Modern History*, in M. Brock, M.C. Curthoys (eds.), *The History of the University of Oxford: Volume VII: Nineteenth-Century Oxford, Part 2*, Oxford, Clarendon Press, 2000, pp. 361-384.

[20] Ivi, p. 366.

[21] A. Briggs, *History and the Social Sciences*, in W. Rüegg (ed.), *A History of the University in Europe: Volume 3, Universities the Nineteenth and Early Twentieth Centuries (1800-1945)*, Cambridge, Cambridge University Press, 2004, pp. 459-491, quotation at p. 473.

[22] Cf. R.J. Brentano, *The Sound of Stubbs*, in «The Journal of British Studies», VI, issue 2, May 1967, pp. 1-14.

[23] Briggs, *History and the Social Sciences* cit., p. 473. Stubbs himself recognised this fact: *Two Lectures on the Present State and Prospects of Historical Study*, Oxford, E.P. Hall & J.H. Stacy, 1876, p. 7.

[24] H.O. Wakeman, A. Hassall (eds.), *Essays Introductory to the Study of English Constitutional History by Resident Members of the University of Oxford*, London, Rivingtons, 1887.

[25] Cf. Soffer, *Modern History* cit., pp. 362-363. However, see also the article by P. Slee, *Professor Soffer's 'History at Oxford'*, in «The His-

torical Journal», XXX, n. 4, 1987, pp. 933-942, who raises doubts about Soffer's statement relating to the careers of Oxford graduates in late nineteenth century.

[26] See, for example, «Oxford University Gazette», Supplement to n. 3, vol. I, Tuesday, Feb. 8, 1870, p. 3; Supplement to n. 21, vol. I, Tuesday, June 21, 1870, p. 3. Reading lists concerning «The Constitutional History» recommended «Stubbs' Select Charters; […] Hallam's Constitutional History; May's Constitutional History»: ivi, p. 383 (5 December 1871); as for «History of Constitutional Law, […] Mr. Stubbs' "Documents Illustrative of English History" (the original documents, with the notes and introductions, should be consulted and referred to on the more important points rather than minutely studied) […]. Reference may also be made to the chapters on the English Constitution in Hallam's Middle Ages, and to Hallam's Constitutional History»: ivi, p. 396 (12 December 1871).

[27] For example, in the academic year 1889-1890, «The Master of University [James Franck Bright] lectured on English Constitutional History from 1688. […] Mr. C.W. Boase gave three Courses of Lectures on English Constitutional History. Mr. A. L. Smith gave two Courses of Lectures on English Constitutional History. Mr. Lodge lectured on English Constitutional History from 1485 to 1688»: «Oxford University Gazette», Supplement (2) to N. 690, 13 November 1890, p. 137.

[28] One of the tutors during those years was Dudley Julius Medley (later Professor of Modern History at the University of Glasgow from 1899 to 1931) who published *A Student's Manual of English Constitutional History*, Oxford, B. H. Blackwell, 1894.

[29] As, for example, in the case of C.G. Robertson, *Select Statutes, Cases and Documents to illustrate English Constitutional History, 1660-1832. With a supplement from 1832-1894*, London, Methuen & Co, 1904, which went through nine editions until 1949.

[30] As the book cited in the previous note shows.

[31] D. Carpenter, *Magna Carta*, London, Penguin Classics, 2015, p. 11.

[32] Cf. Soffer, *Modern History* cit., p. 363.

[33] Cf. P.R.H. Slee, *Learning and a Liberal Education: The Study of Modern History in the Universities of Oxford, Cambridge, and Manchester, 1800-1914*, Manchester, Manchester University Press, 1986.

[34] Briggs, *History and the Social Sciences* cit., p. 475.

[35] Letter from Frederick Maurice Powicke (1879-1963) to Helen Cam, dated 15 July 1951, cited in Bentley, *Modernizing England's Past* cit., p. 21. In the passage quoted above, Powicke mentions together with Edwards the names of Gaillard Lapsley (of whom I will speak shortly) and Bertie Wilkinson, Professor of History in the University of Toronto until 1966.

[36] C.N.L. Brooke, *A History of the University of Cambridge: Volume 4, 1870-1990*, Cambridge, Cambridge University Press, 1993, pp. 227-232.

[37] Cf. B.E. Hammond, *The Historical Tripos*, in *The Student's Guide to the University of Cambridge, Third Edition, Revised and Partly Re-written*, Cambridge, Cambridge University Press, 2009, pp. 421-438 (original edition Cambridge, Deighton, Bell and Co., 1874).

[38] J.R. Tanner, *The Teaching of Constitutional History*, in W.A.J. Archbold (ed.), *Essays on the Teaching of History*, Cambridge, Cambridge University Press, 1901, pp. 51-68, quotation at p. 52.

[39] Cf. ivi, pp. 53-55.

[40] Brooke, *A History of the University of Cambridge* cit., p. 218.

[41] F.W. Maitland, *The Constitutional History of England: A Course of Lectures*, ed. By H.A.L. Fisher, Cambridge, Cambridge University Press, 1908.

[42] Cf. Bentley, *Modernizing England's Past* cit., p. 124.

[43] Tanner, *The Teaching of Constitutional History* cit., *passim*.

[44] I. Jennings, *Cabinet Government*, Cambridge, Cambridge University Press, 1969 (1st edn. 1936), p. IX.

[45] P. Collinson, *Geoffrey Rudolph Elton*, in «Proceedings of the British Academy», XCIV, 1997, pp. 429-455, quotation at p. 447.

[46] Bentley, *Modernizing England's Past* cit., p. 21.

[47] «The Law Times», 29 December 1860, n. 927.

[48] D. Foxton, *The Life of Thomas E. Scrutton*, Cambridge, Cambridge University Press, 2013, p. 36.

[49] J.E. Benham, *The Preliminary Examination Journal and Student's Literary Magazine. Vol. I, February, 1871, to May, 1875*, London, Butterworths, 1875, p. 66.

[50] Foxton, *The Life of Thomas E. Scrutton* cit., p. 36.

[51] He was the author of an *English Constitutional History: A Text-book for Students and Others*, London, Stevens & Haynes, 1875, which went through eleven editions until 1966.

[52] Foxton, *The Life of Thomas E. Scrutton* cit., p. 167.

[53] Cf. P. Cavill, A.F. Pollard, in D. Hayton and L. Clark (eds.), *Historians and Parliament*, Chichester, Wiley for the Parliamentary History Yearbook Trust, 2021, pp. 45-58.

[54] Ivi, p. 46.

[55] Cf. R. Phillips, *Government policies, the State and the teaching of history*, in J. Arthur and R. Phillips (eds.), *Issues in History Teaching*, London, Routledge, 2000, pp. 10-23, quotation at p. 12.

[56] D. Sylvester, *Change and Continuity in History Teaching, 1900-93*, in H. Bourdillon (ed.), *Teaching History*, London, Routledge/Open University Press, 1994. Cf. also R. Harris, S. Harrison, R. McFahn (eds.), *Cross-Curricular Teaching and Learning in the Secondary School: Humanities*, Abingdon, Routledge, 2012, chapter 1.

[57] Cf. J.G. Slater, *The Politics of History Teaching: A Humanity Dehu-*

manised?, London, Institute of Education, University of London, 1989, p. 1.

[58] A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, London, Macmillan and Co., 1885; subsequently republished several times with the title *Introduction to the Study of the Law of the Constitution*.

[59] Cf. M.D. Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind*, Cambridge, Cambridge University Press, 2020, p. 142.

[60] A.V. Dicey, *Stubbs's Constitutional History of England*, «The Nation», 4 March 1875, n. 20, pp. 152-154.

[61] Cf. Walters, *A.V. Dicey and the Common Law Constitutional Tradition* cit., p. 95.

[62] During the above-mentioned period, the only new book bearing this title with reference to Britain has been published by A. Lyon, *Constitutional History of the UK*, London, Cavendish Publishing, 2003. A partial exception is represented by E. Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History*, Oxford, Hart, 2006, being a collection of essays on single topics and not a constitutional history in the classical sense. The most notable work combining constitutional law and history which I was referrring to in the text of the article is the book by J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects*, Cambridge, Cambridge University Press, 2007.

[63] Hayton and Clark (eds.), *Historians and Parliament* cit.

[64] P. Cane, H. Kumarasingham (eds.), *The Cambridge Constitutional History of the United Kingdom*, 2 vols., Cambridge, Cambridge University Press, 2023.

[65] Much debate sparked after the publication of the article by J.A.G. Griffith, *The Political Constitution*, in «The Modern Law Review», XLII, n. 1, January 1979, pp. 1-21.

Constitutional History Teaching in Italy: problems, challenges, opportunities

LUIGI LACCHÈ, GIUSEPPE MECCA[1]

1. *The teaching of constitutional history in Italy through an empirical analysis*

In Italy, the teaching of Constitutional history is often divided up among historians with various different specializations and lawyers. So far, there are only a limited number of chairs, located in just a handful of universities. However, it is difficult to determine exactly how many constitutional history courses are taught in Italian universities. There are several reasons for this, which we will try to explain.

First of all, there is the problem of nomenclature. Indeed, there are different names for the subject, some of which reflect different approaches and methodologies. Thus, alongside the name Constitutional History, there are variously named subjects such as 'History of Modern Constitutions', 'History of Codification and Constitutions', 'Introductions to national and/or comparative public law', 'Parliamentary History', and so on. A cursory survey of Italian university websites reveals that courses on this subject are offered at Naples Federico II, Ferrara, Florence, Bergamo, Turin, Macerata, Rome "La Sapienza", Rome Tor Vergata, Lecce, Milan, and Pisa. For the above reasons, the list should be considered as indicative and not exhaustive since it will change from year to year as demands upon teaching staff vary.

This number is likely to increase if we focus on the content of the courses rather than on their formal titles. Constitutional history has lost its autonomy and has become an adjunct to other subjects. Constitutional history sometimes forms part of the teaching of contemporary history, enabling students to understand major global transformations (political, economic, social). In the field of legal history, constitutional history is relegated to illustrating the regulatory framework added to codification processes or to describing the political-constitutional transformations that have shaped the institutions in each

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historical period. In constitutional law, it serves primarily to provide a context for the current republican constitution, highlighting similarities and differences with the past. In courses on the history of political institutions, constitutional history is an indispensable component, where the political-constitutional framework is the starting point.

Thus, constitutional history tends to be included in courses with a broader title, which generally correspond to the academic disciplines (SSD), recently termed 'academy-disciplinary groups' (GSD), that the Ministry of University and Research (Mur) has formally recognized.

While constitutional history struggles at the teaching level, it thrives in research, with significant increases in publications, conferences, research projects, and doctoral theses. This is also a negative reflection of the low esteem in which teaching is held in terms of career advancement (National Scientific Qualification (ASN) ex art.16 of the law 30 December 2010, n. 240). University professors are also subject to a cyclical evaluation system for scientific production (VQR-ANVUR), but there is no system that measures and evaluates the teaching performance of individual professors.

2. *Constitutional history as a 'bridge' between different academic subjects*

Constitutional history represents an interweaving of various disciplinary paths and must relate not only to the various historiographical families that approach constitutional issues head-on or at a tangent, but also to the methodologies of other social sciences, such as public law, economics, political science and sociology, which also analyse and study constitutional phenomena. It is therefore necessary to answer the following questions: What are the relationships between disciplines and academic boundaries? What are the 'outer boundaries' of constitutional history?

Roberto Bin, a Constitutional law professor who was teaching in Macerata, presenting the founding of the *Laboratorio "Antoine Barnave"* and its Constitutional library, which contained about 2000 volumes, expressed his appreciation of the initiative, which strengthened the study of constitutional law through historical experience[2]. He argued for investment in these «areas of convergence» to prevent researchers from becoming isolated within their specialized fields[3].

In 1993, the *Centro studio per la storia del pensiero giuridico moderno*, founded in Florence in 1971 by Paolo Grossi, published the proceedings of a conference dedicated to the teaching of Legal History. During this conference, a historian and a lawyer explored their respective disciplinary boundaries and sought a dialogue that is very often lacking between subjects taught on the same course.

For Pierangelo Schiera, constitutional history has thus become a «bridge» between different types of knowledge, between theory and practice, between the past and the present[4]. This author sees constitutional history not only as a narrative of normative and legal developments, but as a field of study that seeks to integrate a global vision into the study and interpretation of human political phenomena. Schiera maintains that this branch of history positions

law and its essential constitutive function at the core of diverse historical structures which, at different moments in history, form the basis of an organised political reality. Thus, constitutional history does not study law alone, but includes and analyses all the constituent elements that define different historical realities. Law occupies a central position not only for linguistic reasons – since political language is permeated by dogmas, concepts and specific terms – but also for substantive reasons, since decision-making and organisational processes often have a strong legal imprint that has influenced European political solutions to the various problems of coexistence.

On the other hand, Gustavo Zagrebelsky reflected on the greater integration between historical and constitutional law, suggesting that a deeper understanding of the historical context can significantly enrich current legal practice[5]. He stressed that without an effective historical sensitivity, constitutional law risks being reduced to a purely theoretical exercise, disconnected from contemporary realities and challenges. Constitutional history might not only strengthen the study of constitutional norms, but could also foster a reflection on society that recognises and incorporates the lessons of the past in the formulation of its future laws and policies.

This approach, which sees constitutional history as a meeting point between different disciplines, its interdisciplinarity and interconnectedness, is certainly a strength in terms of teaching, providing students with a holistic view of constitutional principles and their impact on modern society.

3. *From the pitch to the players*

Livio Paladin (1933-2000), professor and constitutional judge, died before he could complete his book on Constitutional History. His numerous historical essays have been collected in two volumes: *Per una storia costituzionale dell'Italia Repubblicana*[6] and *Saggi di storia costituzionale*[7]. The author explicitly posed the question: Who teaches Constitutional history? To which category of scholars should constitutional history be entrusted? To historians or to lawyers?[8]

He takes a clear position in favour of the jurists. Although history itself does not lend itself to the study of a legal method, he considers it indispensable to have a specific sensitivity and in-depth knowledge of the objects and subjects to be treated, which only those with legal expertise can master. Paladin criticizes general historians who have previously addressed the Republican period for their significant and systematic neglect of key institutional aspects, such as the drafting of the Constitutional Charter, its implementation, and the Constitutional Court's activities.

The question raised by Paladin deserves careful consideration, given the complexity and importance of the issue. While this author rightly points to the gaps that historians may have in addressing legal and institutional issues, one cannot ignore the fundamental contribution that historians can make to understanding the social, political, biographical, and cultural contexts and dynamics that influence the evolution of institutions. Historians, with their broad understanding of historical processes and causality leading to institutional changes, provide a perspective that significantly enriches the strictly legal narrative.

Only an integrated methodology could provide a richer and more multidimensional analysis of constitutional history. Such an interdisciplinary approach would promote a more comprehensive understanding, allowing for the elucidation of historical forces and legal interpretations, both of which are crucial to the understanding of republican institutions and their evolution.

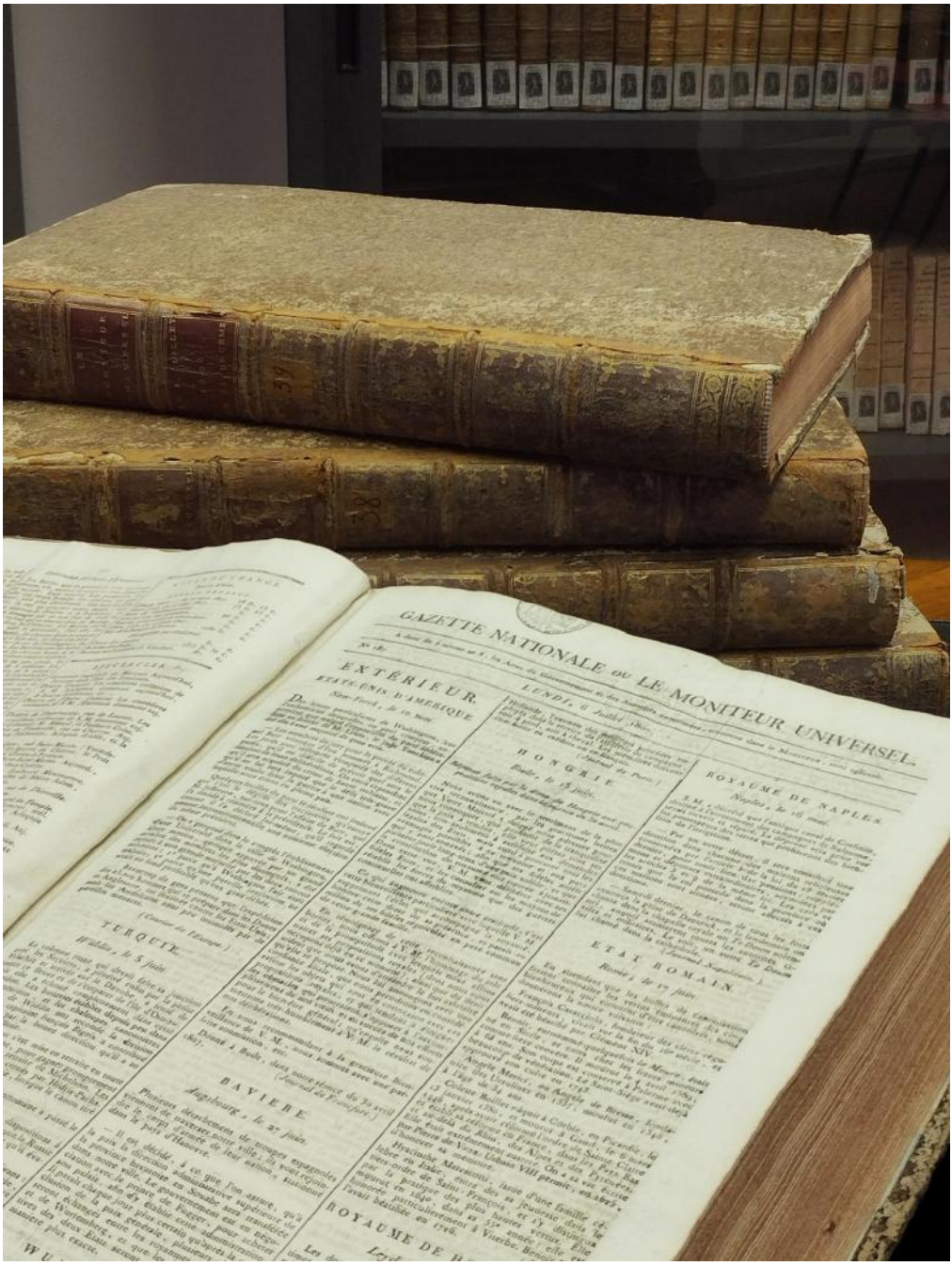
In conclusion, although Paladin raises pertinent questions about the guardianship of constitutional history, the solution may perhaps not be to choose one professional group over another. Instead, fostering synergy between historians and legal experts could lead to a more comprehensive and nuanced narrative of Italian constitutional history.

4. *Crossroads of teaching and research: textbooks*

The current literature on constitutional history is very rich. Among the most influential works are constitutional history books that go from the founding of the Italian state to the most recent reforms, offering reconstructions of constitutional aspects and institutions, in-depth studies of the legal thought of important constitutionalists, and contributions that, from a historical perspective, offer further insights and contemporary debates that are essential for scholars and legal practitioners. Compared to the French or English experience, however, the general reconstructions of Italian constitutional history are few.

The first Italian constitutional history, written fifty years after the entry into force of the *Statuto Albertino*, was written by the jurist Gaetano Arangio Ruiz, who explained that constitutional history should be understood neither as parliamentary history nor as the history of legislative texts[9]. The former would be confined to the internal vicissitudes of Parliament, diluted in the news that had little to do with the actual development of the State and the government, and nothing to do with social movements. The latter would come under the heading of political science, aimed at making judgements about the current constitutional system on the basis of historical facts. Constitutional history, on the other hand, is civil and political in the broadest sense. It must therefore deal with the formation of the State; political facts, even those indirectly related to the parliamentary regime; the main laws, constitutional in the broad sense; constitutional issues, political parties, social conditions.

Before the method promoted by Vittorio Emanuele Orlando in *I criteri tecnici per la ricostruzione giuridica del diritto pubblico* (Technical Criteria for the Legal Reconstruction of Public Law) became established, many other jurists tried their hand at historical reconstructions and recognised a privileged role for history in their treatment of constitutional law. For a particularly telling illustration, we need only think of the reflections of Giorgio Arcoleo, who based his entire analysis on the relationship between constitutional law and other sciences[10]. The Constitution – this scholar declared – is «both system and history». Constitutional law is linked not only to the legal and political sciences, but also to the social sciences. But the discourse did not stop there. In fact, to quote Luigi Palma, Constitutional law is «determined by its history»[11].



Biblioteca Antoine Barnave, Università di Macerata

After Arangio Ruiz's volume, there was a long silence in Italian historiography. We had to wait until the 1970s for another general work, this time by Carlo Ghisalberti. The notion of writing a history of such vast proportions did itself reflect the author's didactic preoccupations. Ghisalberti noted that both legal scholars and historians had remained insensitive to the study of constitutional history and, more generally, to the whole question of the organisation of the modern state and the evolution of political institutions. In a review, Isabella Zanni Rosiello reproached Ghisalberti for «tracing schemes and periodisations of political history», for failing to overcome the old formalistic methodological approach and for not achieving the goal of writing a synthesis of Italian constitutional history[12].

Other general reconstructions followed Carlo Ghisalberti's volume: from *Profilo di storia costituzionale italiana* by Umberto Allegretti[13] to *Storia della Costituzione italiana* by Silvano Labriola[14] and Giuseppe Volpe's *Storia costituzionale degli Italiani*[15]. To date, in addition to Francesco Bonini's book[16], there are other volumes dedicated to the period of the republican constitution, in particular Pombeni's volume[17] and the recent work by Raffaele Romanelli[18].

Constitutional history studies both constitutionalism (a philosophical-political movement aimed at limiting public power) and its normative product: the constitution. This reconstruction completely overlooks the vast literature that has approached the subject from the perspective of political thought and the history of concepts. I will limit myself to mentioning, by way of example, Nicola Matteucci's *Breve storia del costituzionalismo*[19] and the Italian translation of Heinz Mohnhaupt and Dieter Grimm's work[20].

Before concluding this brief overview, it is necessary to mention two other works which, like Ghisalberti's, were written for specific didactic reasons, that is, as a result of the authors' teaching activities. The first text is Maurizio Fioravanti's *Appunti di storia delle costituzioni moderne*[21], published in 1991 and now one of the three parts of the larger *Lezioni di Storia costituzionale*[22], divided into Fundamental Freedoms, Forms of Government and Constitutions of the 20th Century. Fioravanti stated that constitutional history «is never the history of a single constitution, formally understood, and of its strength, but rather the history of a country or territory from the point of view of doctrines and institutions, that is, of the codified elements, both theoretical and practical, that give life and identity to that country or territory».

The other volume is Martucci's textbook[23]. In comparison with the other histories, the author points out that, by leafing through the pages of the book, students can see the reduced space devoted to doctrinal reflection between the 19th and 20th centuries. Excessive recourse to the jurists' reflections is defined by the author as «hermeneutic *maquillage*» in that, while it restores the system of conceptual coordinates of the Italian constitutional nineteenth century, it inevitably leads away from an understanding of the constitutional dynamics of the Italian state.

5. *Research experience and teaching at the University of Macerata*

In this general context we think that the teaching experience at the Law Faculty of the University of Macerata may well repre-

sent an interesting case. Luigi Lacchè began teaching "History of Modern Constitutions" (Storia delle costituzioni moderne) in the 1995-96 academic year. Before, this "discipline" had never been taught autonomously. "History of Modern Constitutions" was (and is still) the main label used in the law Faculties. This academic framework is based on the idea that "Constitutional History" was the label to be used in the Political Sciences Faculties, and "History of Modern Constitutions" the appropriate name for Legal studies curricula. The idea, influenced by legal positivism and bolstered by other doctrinal and pragmatic concerns, was dominant that Legal Studies had to focus on the formal dimension of constitutional phenomena, the Constitutional texts and first and foremost the modern Constitutions, thus also identifying the chronological axis. In this sense, History of Modern Constitutions would be a branch of Legal History. Constitutional History for its part would be primarily concerned with the "material" constitutional structures, social and political developments, conflicts and compromises.

This *actio finium regundorum* appeared as a way to emphasize a field of study that actually allows for a range of points of view. In any case the establishment in 1995 of the chair at the Law Faculty was the "effect" and the achievement of a specific path opened up in 1992 when the "Laboratorio di storia costituzionale A. Barnave" was founded by Roberto Martucci. This Centre organised many conferences, seminars, editorial series, a PhD Programme, a highly specialised library[24]. In continuity with this experience, in 2001 the *Journal of Constitutional History* (*Giornale di storia costituzionale*)[25], was founded, becoming over time a reference point for research into constitutional history and the methodological issues involved. A journal known for its international perspective, its multilingual approach, its pronounced interdisciplinary orientation, and its interest in comparison.

Teaching constitutional history became part and parcel of the same "strategy". The inaugural course was devoted to "Constitutions and constitutionalism in France and Switzerland in the 19th century". Every two years the course changed topic, according to the teacher's interests, so in 1998 it dealt with the Italian constitutional history from the liberal period to the transformations under the fascist regime; then with developments within the British Constitution; the form of government in Italian history; the Weimar political regime and its Constitution; the origins and features of the republican Constitution of 1948. Teaching and research proceeded together, creating a positive osmosis between courses and scientific publications[26]. The methodology used has been based above all on active teaching, encouraging those students attending to take their first steps in research activity, reading texts and presenting their papers to each other. Non-attending students studied Maurizio Fioravanti's *Appunti di storia delle costituzioni moderne. Le libertà fondamentali*[27], complemented by other texts variously added from year to year.

6. *Teaching comparative constitutional history. Some problems, challenges, opportunities*

Two years ago the chair was renamed, being known henceforth as the Chair of "Constitutional history". This lexical change was

intended to record the substance of teaching activity, even if labels – certainly for our field of study – no longer seem to be decisive. We can say that a comparative constitutional history approach has been privileged in Macerata since the beginning and that it remains central. Today comparative constitutional history seems useful also for the demystifying the excessively simplified use of "general" typologies, models and clichés. We need to transcend the disciplinary divide between comparative constitutional history and other disciplines in social sciences studying the same set of phenomena[28]. This vision may prove to be helpful also in dealing with the notions of "constitutional heritage" and "common constitutional traditions".

In this direction, comparative constitutional history[29] can help us to show and valorize the complexity of the constitutional phenomenon. What comparative constitutional history offers us is precisely the possibility of subjecting already established positions and perspectives to critical review. This approach can serve to shed new light on familiar themes, and to help us to jettison stereotypes and unduly schematic interpretations. We need to be aware of the fact that myths and traditions are part and parcel of constitutional history building. Demystification and critique of the excessive and ahistorical use of "constitutional" models are important elements in the fashioning of a renewed history. In this way constitutional history can enhance other research outlooks, for example comparative constitutional law and political science. One of the issues addressed by constitutional history concerns the "making" of constitutional texts. Not infrequently this history has been reduced to a sort of history of mere genealogies. The use of "models" as prescriptive frameworks suggests that there are "original" and "derivative" constitutions.

Thanks to this perspective students can understand better that a constitution is at one and the same time a factor of sharing and of separation, of identity and of difference. A constitution is always a *patchwork* composed of different elements. A constitution is not a fixed design because it always lives through discourses, languages, the transnational exchange of ideas and the interplay of constitutional stakeholders. A constitution has long been a means of communication between State and society, institutions and social classes. For this reason constitutional history needs different and integrated research approaches able to combine or at least to take account of the history of public law, legal scholarship about the State, political doctrines and institutions, the science of administration, political and social conditions[30]. This approach can serve to avert the ever-present risk of anachronism.

Among the problems related to teaching constitutional law we have to consider the existing gap between research practice and teaching activity. In recent years constitutional history has lost academic space, "autonomy" (specific chairs) and interlocutors. The wide range of approaches and methodological viewpoints is a richness but does also risk rendering the common elements less recognizable.

At the same time constitutional history can be useful for the training of students and the transmission of a culture of citizenship, offering the possibility of understanding better the past in order to build a more solid future. Moreover, various pub-

lic actors (judges, members of representative assemblies and civil servants) could find it a useful tool. By adopting a historical perspective, those who are called to govern public institutions can benefit from it in order to better fulfil their role and interpret the constitutional transformations of their time.

Teaching constitutional history provides a unique opportunity to reflect on the historical and legal developments that have shaped modern Italian society. By addressing the problems and challenges in this field, educators can seize the opportunity to foster informed citizens who understand their constitutional heritage. Constitutional history in Italy confronts several challenges in the modern academic landscape, especially as the social sciences grapple with educational systems that prioritize practical and applicable skills. Despite these challenges, a renewed interest in democratic governance and civil rights has rejuvenated the in-depth study of the Constitution and its historical evolution.

Finally, the comparative constitutional history approach can be, in the global perspective, a tool helping students and future professionals to better decipher two very important issues in our times: first of all assessing the identity and the constitutional substance of a European living common core of constitutional traditions; then considering constitutional history as a way to address different levels of global constitutionalism and new trends of governance.

[1] The ideas expressed in this article are shared by both authors. Materially, the first part (paragraphs 1, 2, 3 and 4) was written by Giuseppe Mecca, while Luigi Lacchè wrote paragraphs 5 and 6.

[2] R. Bin, *Il laboratorio «Antoine Barnave» e la Biblioteca di storia costituzionale*, in «Storia Amministrazione Costituzione. Annale dell'Istituto per la Scienza dell'Amministrazione Pubblica», 1/1993, pp. 281-284.

[3] On the notion of field, see also *Costituzionalismo e storia del pensiero giuridico. Intervista al professor Maurizio Fioravanti, del professor Joaquín Varela Suanzes-Carpegna/ Constitutionalism and history of legal thought. Interview to professor Maurizio fioravanti, by professor joaquin Varela Suanzes-Carpegna*, in «Historia Constitucional», n. 14, 2013 pp. 583-610, https://www.historiaconstitucional.com/index.php/historiaconstitucional/article/view/384/347.

[4] In P. Grossi (ed.), *L'insegnamento della storia del diritto medievale e moderno. Strumenti, destinatari, prospettive. Atti dell'Incontro di studio - Firenze, 6-7 novembre 1992*, Milan, Giuffrè, 1993, pp. 253-265. See also P. Schiera, *Per la storia costituzionale*, in «Giornale di Storia Costituzionale / Journal of Constitutional History», 19, I, 2010, pp. 17-27.

[5] Ivi, pp. 177-227.

[6] Bologna, il Mulino, 2004.

[7] Bologna, il Mulino, 2008.

[8] In particular, see Paladin, *La questione di metodo nella storia costituzionale*, in *Saggi di storia costituzionale*, cit.

[9] G. Arangio-Ruiz, *Storia costituzionale del Regno d'Italia,* Florence, G. Civelli editore, 1898.

[10] G. Arcoleo, *Diritto costituzionale. Dottrina e storia*, Naples, Jovene, 1907, pp. 1, pp. 168-178.

[11] L. Palma, *Corso di diritto costituzionale*, Florence, Pellas, 1877, vol. 1, p. 53ff.

[12] I. Zanni Rosiello, *Una storia costituzionale d'Italia*, in «Italia contemporanea», 1975, pp. 132-134, for the replay see C. Ghisalberti, *Postilla ad una recensione*, in «Rivista di storia del Risorgimento», 1975, pp. 484 ff.

[13] Bologna, il Mulino, 1989. Later, by the same author: *Storia costituzionale italiana (Popolo e istituzioni)*, Bologna, il Mulino, 2014.

[14] Naples, Esi, 1995.

[15] Turin, Giappichelli, Vol. 1: *L'italianetta (1861-1915)* and Turin, Giappichelli, 2015, Vol. 2: *Il popolo delle scimmie (1915-1945)*.

[16] F. Bonini, *Storia costituzionale della Repubblica: un profilo dal 1945 ad oggi*, Bari, Carocci, 2007.

[17] P. Pombeni, *La questione costituzionale in Italia*, Bologna, il Muli-

no, 2016.

[18] R. Romanelli, *L'Italia e la sua Costituzione*, Rome-Bari, Laterza, 2023.

[19] Brescia, Morcelliana, 2010.

[20] *Costituzione. Storia di un concetto dall'antichità a oggi*, Bari, Carocci, 2008.

[21] Turin, Giappichelli, 1991.

[22] Turin, Giappichelli, 2021.

[23] R. Martucci, *Storia costituzionale italiana. Dallo Statuto albertino alla Repubblica (1848-2001)*, Bari, Carocci, 2001.

[24] See R. Martucci, *Laboratorio di storia costituzionale "Antoine Barnave" dell'Università di Macerata, 1992-2001*, in «Historia Constitucional» (revista electrónica), 2, 2001, http://hc.rediris.es/02/index.html.

[25] See L. Lacchè, *Un nuova rivista italiana ed europea: il "Giornale di storia costituzionale"*, in «Historia Constitucional» (revista electrónica), 3, 2002, http://hc.rediris.es/03/index.html; Lacchè, Martucci, Scuccimarra, *For constitutional history, ten years later*, in «Giornale di Storia costituzionale / Journal of Constitutional History», 19, I, 2010, pp. 9-14; L. Lacchè, *Il "Giornale" e la sua storia costituzionale*, in «Giornale di Storia Costituzionale / Journal of Constitutional History», 41, I, 2021, pp. 11-17.

[26] I would venture to recall in particular two collections containing in all 31 articles: L. Lacchè, *History & Constitution. Developments in European Constitutionalism: the comparative experience of Italy, France, Switzerland and Belgium (19th-20th centuries)*, Frankfurt am Main, Vittorio Klostermann, 2016; Id., *La Costituzione nel Novecento. Percorsi storici e vicissitudini dello Stato di diritto*, Turin, Giappichelli, 2023

[27] See L. Lacchè, *Il costituzionalismo liberale e la legge fondamentale*, in *Lo Stato costituzionale. Radici e prospettive*, Atti della Giornata di Studi in memoria di Maurizio Fioravanti, 10 marzo 2023, ed. by M. Gregorio and B. Sordi, Milan, Giuffrè Francis Lefebvre, 2023, pp. 135-155.

[28] See A. von Bogdandy, *National Legal Scholarship in the European Legal Area— A Manifesto*, in «International Journal of Constitutional Law», 10, 2012, p. 624; Ran Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law*, Oxford, Oxford University Press, 2014, pp. 191-192.

[29] See L. Lacchè, *Crossing boundaries. Comparative constitutional history as a space of communication*, in «Glossae. European Journal of Legal History», 15, 2018, pp. 126-139, http://www.glossae.eu.

[30] J. Varela Suanzes Carpegna, *L'histoire constitutionnelle: quelques réflexions de méthode*, in «Revue française de droit constitutionnel», 68, 2006, p. 676.

Teaching Constitutional History in the Benelux Countries

ALAIN WIJFFELS

1. *A personal introduction*

In the early months of 2005, I was preparing a new course on History of European Public Law which had just been introduced at the Law Faculty in Leiden. I was at the time also teaching in Belgium and a research fellow in France, and during term, my weekly routine would involve commuting between the three countries. It was a propitious time for working on European constitutional law in a historical and comparative perspective, as the member countries of the European Union were all faced, according to their own constitutional arrangements, with the endorsement of the draft European constitution. The procedures for ratification differed from one member state to the other: for example, whereas Belgium followed the standard procedure of a parliamentary debate and vote, in France and in The Netherlands, the authorities had opted for a referendum. A majority of French and Dutch voters rejected the draft constitution. The project was then abandoned as a formal constitutional instrument – paving the way for the Treaty of Lisbon and its further developments, but also to different policies: in France, for example, no government, whatever its political colour, has ever since risked a new referendum on issues of European integration, a cautious approach which, however, has fuelled further criticism on the democratic legitimacy of the Union. At the time of the 2005 debates, perhaps one of the most striking features of the discussions both among scholars and among wider public audiences, was how the approaches and emphasis on different issues varied from one country to another, although the debate was supposed to focus on the same text. Clearly, in different member states, both the population at large and even the narrower circle of scholars did not share identical views on the very concept of a constitution, or its legal and political significance. Therefore, in each country, whatever one's position towards the European integration process, citizens and scholars

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(including legal academics) tended to view the draft constitution along the perception of the constitutional tradition in their own country. Such perceptions, needless to say, are strongly influenced by the political and constitutional history – if only during the citizens' own lifetime – of each country, and the general narratives on that history in school textbooks and in the media. Although the draft European constitution was supposed to be a common instrument of the Union and its member states, the citizens of each member state had a different idea of a constitution's nature and purpose, and held therefore different expectations of the constitution's impact on their political, social, economic and cultural life. A course on the history of European public law was therefore an invitation to consider from a comparative historical perspective to what extent the national constitutional traditions differed, and to what extent, beyond those differences, some common ground existed with regard to a shared constitutional culture.

2. *Teaching European constitutional history in the Low Countries*

In order to write a brief survey of the teaching on the history of public law today in the Benelux countries, some important restrictions have been necessary. Academic traditions, too, vary, not only from one country to the other, or, more generally today, as universities have been given more leeway to establish their own curricula, from one university to the other. In Belgium, until the end of the twentieth century, a system of national curriculum prevailed, which entailed that all law faculties had to provide the same core curriculum imposed by law; devolution has transferred powers in matters of higher education to the Communities, with diverging policies in the Dutch-speaking and French-speaking universities as a result. Since the 1960s, legal culture has also profoundly changed in the law faculties, but with significant differences in individual faculties[1]. These changes have affected the place of legal history. In the Netherlands, until the 1970s, law faculties had two main chairs in legal history, one in Roman law, the other in Dutch legal history. Since the 1970s, the trend was to size down the role of legal history and to have only one chair covering the subjects of both former chairs. Further cuts and reforms have reduced even more the place of legal history in most faculties. In Belgium, the old system of chairs has all but been abandoned: lecturers are appointed to teach a combination of subjects. In comparison to the Netherlands, legal history in Belgium, both in Flanders, in Wallonia and in Brussels, has better withstood the drift to marginalise it in the curriculum. Everywhere, of course, in spite of guidelines (usually defined at faculty level) for each taught subject, the specific contents depend largely on the interests and expertise of the individual lecturer. As everywhere else, legal education has witnessed during the last decennia of the twentieth century a decline of the share of private law (especially of the subjects governed by the country's civil code), which since the nineteenth century had often provided a 'general grammar' or even theory of legal methods. The overall result has been an accelerated atomisation of law as an academic discipline.

In general, legal history has maintained a propaedeutic role at the level of undergraduate studies (i.e., towards a bachelor's degree in law). In the Netherlands, when the subject is still part of the compulsory core curriculum, its contents depend largely on the lecturer's scholarly profile, which will determine to what extent ancient and perhaps later Roman law is taught, whether the course will focus more on private or public law[2], whether other more specific areas (e.g. commercial, economic, social, international… law) will be dealt with, how much attention will be given to 'external' legal history… In Belgium, the undergraduate curriculum still comprises in many cases substantial courses on (largely, ancient) Roman law, or a course on the history of private law (where the share on Roman law depends on the lecturer's inclination), and, separately, a course on legal history, which may focus in general on post-Antiquity or modern legal history, or more specifically on public law[3]. In addition, an (undergraduate) curriculum in law also sometimes includes (in Belgium, in particular) a (usually, compulsory) subject on the history of (public) institutions, or on modern political and parliamentary history. Both in the Netherlands and in Belgium, comparative legal history has made inroads in scholarship and teaching, but in variable degrees.

The present survey is limited to subjects which qualify formally in the law faculties' curricula as courses on legal history[4]. Roman law teaching is in most faculties where the subject is still taught mainly approached with an emphasis on private law[5] (in some French-speaking faculties, its official title is – translated – "Roman law foundations of private law")[6]. Whereas legal history courses are usually taught by lecturers with a legal education (in some cases combined with a separate degree in history), courses on political history and history of public institutions are often taught by historians, members of a history department outside the law faculty. For practical reasons, the latter are not included in this survey, although they may occasionally refer to issues of constitutional history. Similarly, constitutional history may appear as a feature of the courses on public or constitutional law[7], or in a variety of jurisprudential courses[8], but such features (which may vary from year to year) have also been disregarded in the present survey, except for the occasional example which may serve as a reminder that this overview could be expanded so as to mirror the degree of historical interest among lecturers who teach contemporary positive law[9].

Master's degrees offered by the law faculties vary even much more than the undergraduate curricula. The general trend has been to offer a range of more or less specialised master's degrees (sometimes as a stepping stone to a post-master master's degree). In general, legal history is either absent from such degrees, or occupies a somewhat marginal position. Provided academic staff is available and willing, legal history may be in some faculties the topic of a master's thesis, in competition with all other subjects of legal studies.

Increasing constraints have in recent years been imposed on all students who wish to register for a doctor's degree in a law faculty (requiring them to attend a number of taught courses on research methodology, conferences, formal presentations of interim results, etc.), but there is no specific teaching organised by the law faculties at post-master level on legal history. Despite

the lack of any legal-historical 'doctoral school' or similar arrangement, students at Belgian and Dutch universities still produce every year several doctoral dissertations of high scholarly quality on various topics of legal history. That research falls outside the ambit of the present survey[10].

The relatively marginal position of legal-historical subjects in the curricula of most universities is so far not echoed in a proportional decline of research and legal-historical fora (journals, conferences…) in the Low Countries, although, at present, the infrastructure for legal-historical scholarship is perhaps stronger in Belgium than in the Netherlands. The sharp decline of legal-historical departments within a generation in Dutch law faculties, together with the changes in programmes, shows that a relatively solid position today does not entail any guarantee for the near future.

The survey is based on information available on Benelux law faculties' websites (which, depending on the institutions, reflected the programmes for either 2022-3 or 2023-4)[11]. That information, a caveat for future university historians, often does not consistently give reliable details and its material support as a source is more than often unstable. I have therefore contacted, whenever the information was readily available, the colleagues who are in charge of the teaching as defined above and submitted a questionnaire. Predictably, the quality of the responses varied a great deal.

In addition to my original brief, I included the University of Luxembourg in the survey[12]. Somewhat in disregard of the criteria I have set out, I have included the College of Bruges[13].

3. *Constitutional history: not a specific subject?*

Roman law courses, where they survive, are as already noted mostly focused on private law[14]. This seems largely also the case where late Medieval and early modern civil law is discussed in courses on either Roman law or legal history[15]. General legal history courses may include aspects of constitutional history. The most promising framework for constitutional history are offered in a few universities where there is a course of History of public law on the curriculum. However, these courses (as most legal history courses everywhere) are all undergraduate courses. In the case of History of public law, the course mostly addresses freshers, sometimes during their first term: under the present circumstances, that implies that the vast majority of law students have very few historical bearings, and no legal background yet. The potential for addressing fundamental issues of constitutional history is therefore limited, at least if one admits that constitutional history cannot be properly understood without a contextual background consisting of several layers of political, economic, social and cultural history.

If the programmes of taught master's degrees in law faculties are anything to go by, history does not appear to be viewed as part of a lawyer's intellectual toolkit. Even the relative progress of comparative law in legal culture does not extend to any in-depth interest in the historical background of other legal systems, beyond a few stale clichés. Similarly, the tradition which called for a brief historical outlook as a set piece in the introduction of a doctoral thesis or a seminar paper appears to die out – probably for the best, as it typically rested

on bygone secondary literature and rarely informed the ensuing research on current issues of positive law.

The following (no doubt, not comprehensive) survey considers first to what extent constitutional legal history appears in the context of general courses on legal history. Subsequently, it provides examples from several curricula where constitutional history is dealt with from the vantage-point of other specific legal history courses.

3.1 *Constitutional history in the context of general legal history teaching*

By far most of the legal history courses are included in an undergraduate programme and do not require any prior knowledge of either law nor history. Belgian law faculties have maintained more often separate undergraduate courses on the history of private law and public law (in addition, sometimes, to compulsory courses on public institutions and on political history)[16]; Roman law courses are no longer compulsory (if available) in most programmes, but have sometimes been subsumed in the courses on the history of private law[17].

3.1.1 *External legal history*

The distinction between external and internal legal history is nowadays rarely referred to, though in some programmes, the course description does mention that it will discuss the "sources" of the law and their developments[18]. In so far as there has been a general shift from an abstract notion of "sources" to a more sustained attention for the political and social actors who produce norms acknowledged as authorities within the legal system[19], the issue is relevant for drawing the students' attention to the diversity of legal norms and their interaction, and thus to the limits of a codified constitution in defining or even hierarchising the law-making process. An introductory legal history course may create an awareness that the agents of that law-making process are variable over time and that non-legal factors determine the respective weight of the various agents.

3.1.2 *Modern and pre-modern legal history*

The period covered by general legal history courses varies greatly. Where specific Roman law courses survive, the assumption is that they will cover Antiquity, even though they mostly deal exclusively with private law topics[20]. Even when late Medieval and early modern Roman law (in the guise of *ius commune*) is part of the course description, the emphasis will tend to privilege private law developments[21].

Most general introductory courses on legal history omit Antiquity, or refer only briefly to ancient (almost always: Roman) law[22]. The Middle Ages also receive much less attention than a generation ago, but still hold some ground in a few Belgian programmes[23]. The early-modern period, in the areas of public law, retain more attention, not only in legal history subjects: some lecturers on jurisprudence, on state theory, and even constitutional law include chapters on major early-modern authors

who remain part of the canon of the history of political thought. Works by the same authors are also included in some legal history courses, but pre-modern constitutional practices appear to be more difficult to integrate into an undergraduate's introduction – unless perhaps for major monuments of constitutional history, such as the Joyous Entry of Brabant (1356) in Belgium, the Act of Abjuration (1581) in The Netherlands, and in a comparative perspective the English Bill of Rights (1689) and, at the hinge of early-modern and modern times, the Declaration of Independence and the early constitutions of the American Revolution. The courses on the history of public institutions, partly because they are often taught by historians, may on the other hand discuss more in detail aspects of the institutions' practice[24].

3.1.3 *Modern history*

Modern legal history, until a generation ago mostly confined to (the "long") nineteenth-century history, in the light of increasingly deep structural changes in all areas of the law since the Second World War, has caught up with the twentieth century, also because a growing number of legal historians have written their doctoral dissertation on contemporary history. For constitutional history, Belgian lawyers cannot ignore the changes which took place since the early 1970s, when devolution gradually transformed the country from an originally French-inspired early-nineteenth centralised unitary state into a complex federal state, a process which in the early decades of the twenty-first century is far from finished. Within a couple of two generations, this has contributed to provide Belgian lawyers with a sophisticated experience in the workings of complex polities. In comparison, the Dutch state (except for its construction of a small Commonwealth forming the Kingdom of the Netherlands, which associates The Netherlands with Caribbean countries)[25] has retained (in spite of its quasi-confederal structure under the Republic of the United Provinces) far more the features of the nineteenth-century state architecture, in spite of a formal overhaul of the constitution (in 1983[26]) and several other specific amendments since. Recent constitutional history has therefore become more of a shared ground between legal historians and constitutional lawyers in Belgium than in The Netherlands.

Courses on Parliamentary and Political History, which appear on the curriculum in several law faculties at undergraduate or graduate level, are more likely to inform students on some forms of constitutional practices (and hence possibly constitutional conventions) in modern times.

3.2 *Constitutional history in the context of specialised orientations or specific legal history courses*

Whereas, apart from minors and majors, and a more or less extensive choice of optional courses, the curriculum of the standard bachelor's degree in law in most faculties does not provide much room for specialisation, the programmes for a (first) master's degree in law tend to emphasise far more a specialisation, in Dutch faculties perhaps more than in Belgian univer-

sities. In many cases, the master's degree obtained after the bachelor's diploma will even specify the area of specialisation, avoiding the generic title of "master in law", although the introduction of English-spoken programmes is sometimes emphasised by granting the title LL.M., whether or not with the addition of some specialisation. The title is usually understood as an English abbreviation for Master of Laws, without any reference to Latin.

Many, if not most, of the specialised master's degrees have a strong insistence on vocational training, the exposure to legal practice and the acquisition of "skills". It is at this level that the absence or, at best, very peripheral availability, of legal-historical courses illustrates an academic legal culture where history is not deemed to play any part in legal methods and reasoning, whatever the area where law graduates will be working as legal professionals.

But for a few exceptions, the many specialisations of master's degrees linked to business law and economic law (despite a strong expertise in the history of business law built by new generations of legal historians in The Netherlands and Belgium) ignore legal history almost completely. In other areas of specialisation, the appearance of a legal history course on the master's curriculum, usually as an optional subject, often reflects a niche expertise of the lecturer who has succeeded in convincing the faculty authorities to take it on board. Remarkably, even when a faculty's curriculum includes for the master's degree a public law specialisation, such a specialisation only rarely offers a course approaching the subject of constitutional history.

Some orientations nevertheless have intersectional features which facilitate a dialogue with constitutional history[27]. This is obviously the case of public international law, all the more since both in The Netherlands and in Belgium, several scholars have established strong scholarly credentials in that field. In several universities, the history of international law is a course on the syllabus of international law specialisations, and in most cases taught by expert legal historians[28]. Constitutional history may only appear only tangentially in this context, but many of the issues which have been raised in international law over the centuries (Who qualifies as a subject in the law of nations? Is there a hierarchy between domestic law and international law? What jurisdiction can a polity claim over – and under – the high seas? …) also raise issues of constitutional law, and show that such notions as sovereignty, territory, legitimate rule… are not only key-notions in both international and constitutional law, but also linked as their meaning has varied in the *longue durée*[29].

European law, understood as the law of the European Union, is the specialisation of several master's degrees, but the history of EU law has not yet become part of mainstream legal-historical research in the Low Countries: it is still mostly regarded as part of the current foundations of EU law and therefore integrated in the narrative of current EU law developments[30]. A more sustained effort to consider the EU's constitutional issues in the EU's historical perspective (which requires to include the national constitutional developments in the member states) is offered at the College of Europe in Bruges[31].

Comparative constitutional law has become a successfully established ramification of comparative law approaches[32]. It

appears as a subject with its own course in some master's degree orientations in public law, but, it seems, chiefly without any major historical component, partly because the technicality or the diversity of issues and systems such courses take into account do not leave much leeway for historical digressions[33]. Nevertheless, it is obvious that comparative constitutional law and (modern) constitutional history share substantial common interests[34]. Whereas aspects of comparative constitutional law appear recurrently in undergraduate course descriptions, they may also occasionally be addressed as a particular theme in master's courses[35].

Fundamental rights have undergone important developments over the past half-century. Until approximately the 1970s, they were still mainly viewed within the framework of constitutional rights and liberties, with an incremental interest for social and economic rights. Human rights, however, were at best a backroom niche of constitutional law or a minor optional course. Only from the late 1970 onwards was the full potential of human rights, particularly those enshrined in the European Convention and expounded by the European Court of Human Rights, more systematically acknowledged in legal literature and legal education. Human rights now pervade practically all legal courses taught in the universities. The importance of human rights has inspired specialised master's orientations[36] and degrees. It has also fostered research on fundamental rights in the more distant past, but the ongoing, contemporary development of human rights (as a characteristic feature of our own *Zeitgeschichte*), including the populist backlash against some of its progress, has ensured that human rights have now become a specific theme in legal-historical teaching[37].

4. *Central themes and issues*

In the course descriptions of the law faculties, some central issues and themes are recurrent. Perhaps the most obvious theme, not only for the pre-modern period, but also for the history from the American and French revolutions onwards, is that of state formation. A runner-up would be the *rechtsstaat/état de droit*[38]. State formation is often closely linked in the syllabus with the advent of the separation of power doctrine, its different implementations, and the variable architecture of the *trias politica.* Several descriptions also refer to the need to contextualise constitutional developments through political, economic and social history[39]. (I have not come across explicit references to constitutional history from the viewpoint of cultural history, apart from the occasional reference to historical iconography or literature, but that may simply be due to the fact that such a link is not explicitly stated in the published descriptions, or that they may be subsumed under a different approach).

Most legal historians would agree that the formula "The past is a foreign country" is an understatement of their students' acquaintance with history, whether national, European, or "global". Yet, few lecturers consider that the lack of historical awareness among their addressees is an insuperable obstacle for discussing complex historical developments. One suspects therefore that although some students may

grasp the caveats with regard to the historical context of the events, developments and concepts under discussion, the communication between lecturers and their students inevitably entails a compression of the understanding of change and continuity. Despite repeated and highlighted warnings and disclaimers teachers may incorporate in their presentations, some notions are to some degree flattened in order to appear intelligible (and applicable) throughout successive periods. The result of this process is that in courses which deal effectively with constitutional history, one is never far away from constitutional theory, whereby notions and principles are given a minimal historical construction so as to avoid giving the impression of a-temporal abstractions. Hence various devices used for enhancing the historicity of different stages of development, such as including a broader political context of the period, or confronting the students with primary sources, which may be texts, images, or any artefacts which may help to call up the "spirit" of an age. Indeed, following a successful trend in other historical works, one could consider an ancillary textbook along the format of, say, "Constitutional History in 100 Objects". These objects could be useful props, but they will not entirely bridge the gap with the intellectual history which has woven many essential threads throughout Western – and worldwide – constitutional history.

5. *A personal conclusion*

Every legal historian experiences a personal itinerancy over the course of their career. When I started on my first doctoral dissertation, on the use of civil and canon law authorities in the practice of the higher courts during the transition from the Middle Ages to early modern times, I was expected to contribute to the historiography of the "reception" of Roman law, which was deemed to be primarily a development having affected private law. The source material quickly proved that a substantial proportion of the litigation and related arguments was concerned with the relations between public authorities at different levels of government, or with the relations between individuals or groups and a public authority. Later on, when I started teaching, due to the vagaries of faculty policies, my lectures on legal history gradually required a stronger emphasis on public law developments. I ended up teaching mostly the history of public law. During those years, my understanding of what was called either "learned law" (*gelehrtes Recht*) or *ius commune* when I was a student and a young lecturer, moved to a different approach. The very essence and purpose of legal studies, when universities with law faculties developed from the twelfth century onwards, was to elaborate a science of the art of good governance. That governance was primarily implemented through the action of political actors, and should therefore be understood as public governance. Roman law texts were studied, beyond the necessary understanding of the technical terms, notions and rules, in order to acquire a matrix of reasoning that could underpin the justification of a fair outcome for conflicts of interests, and thus the legitimacy of government. A ruler – whether a city, a territorial ruler, a clerical administrator or any other public authority – was legitimate if their rule appeared to be based on justice, perhaps the most central fea-

ture of good governance. Lawyers graduated from law faculties were expected to have acquired the expertise to formulate what a just policy or decision was in any specific circumstances, and became the indispensable auxiliaries of any political actor who wanted to ensure (or advertise) the legitimacy of their rule.

While academic lawyers did not have a monopoly in advising rulers how to achieve good governance, it is clear that fundamental constitutional principles – and even the essence of what is now referred to as constitutionalism – were developed by late-Medieval civil law based jurisprudence[40]. Since the later centuries of the *Ancien Régime*, jurisprudence has to a large extent lost its grip on the science and theory of government, and since the late eighteenth century, with renewed strength after 1945, the advent of democracy as the exclusively legitimate form of government has greatly undermined and destabilised the very foundation of the jurists' expertise in defining the principles of good governance. The marginalisation of the jurists' role in the upstream political decision-making process has been further sharpened by the insufficient capacity of legal science to integrate appropriately the normativities set out by modern social sciences[41].

Legal history is ebbing away from modern lawyers' legal culture. The presence of legal history courses in most of the law faculties' programmes, mostly as an elementary introductory subject, is misleading, because in general, apart from a niche course or paper in the master's curriculum, it is hardly taken up in the majority of courses in any area of positive law. At this stage, a priority ought to be to ensure that, towards the next generation, a sufficient number of young researchers are trained to work with the necessary historical expertise on primary sources from different periods. Once the thread of research founded on the historical sources of legal developments is broken, a point of no-return will be reached, and legal studies will effectively have operated a *tabula rasa* of any informed historical awareness. At present, however, the numbers and the academic level of young scholars who have undertaken a legal-historical doctoral research suggest that, unless dramatic cuts in the law curricula occur, the future of the discipline, and therefore the prerequisites for ongoing research and teaching on constitutional history, are secured for the next generation.

[1] These are some of the reasons why, unfortunately, I cannot offer a neat scheme of development of constitutional thinking as, for France, O. Beaud, s.v., *Constitution et droit constitutionnel*, in D. Alland, S. Rials (eds.), *Dictionnaire de la culture juridique*, Paris, Lamy PUF, 2003, pp. 257-266.

[2] Although there is (no longer) any strong ideological divide (as until recently in France) between public and private law either in The Netherlands or in Belgium, many law curricula, especially at the level of master's degrees, maintain a taxonomy which includes the distinction. More importantly, specialisation, at the latest from the master's programmes onwards, and the departmental organisation of law faculties enhances the self-identification of academic jurists as "private lawyers" (Fr. *privatistes*), "constitutional lawyers" (*constitutionnalistes*) etc. Most Belgian and Dutch legal historians tend to work in areas of both private and public legal history; in the law faculties where two courses are on the programme, they would usually view it as a convenient way of maintaining a stronger position for legal history in the curriculum overall.

[3] The only case of a course explicitly titled "constitutional law" I have come across (*viz.* "Histoire constitutionnelle et régimes politiques") is in Namur, where the course description suggests an overview of constitutional developments in England, the United States and France (the curriculum includes a separate course on the history of institutions in Belgium, which covers Belgian institutional history from the end of the Ancien Régime until the present day). The phrasing of titles in a syllabus should not be understood too literally: titles such as "history of public law" usually cover mostly constitutional history. In theory, "public law" covers both constitutional law and administrative law, but the history of administrative law (in contrast to, e.g., the situation in France) has so far not been widely developed in Belgian or Dutch legal-historical research, and is largely absent in teaching. Other areas related to public law, such as tax law, economic law, social law…, because they are closely linked to public policies, have intermittently received some attention, but without being permanently integrated in the syllabus. One notable exception is the course (at master's level) on History of social and economic law in Ghent, for which the lecturer has written a specific text-book (D. Heirbaut, *Het sociaal, economisch en fiscaal recht in België. Een beknopte geschiedenis*, Ghent, Academia Press, 2019). In Liège, the graduate course "Legal History, Special Questions" discusses the instrumentalization of history in the ideological underpinning of discourses touching on economic and social law.

[4] Only one faculty of canon law survives today in the Benelux countries, at the KULeuven. Long gone are the days when the late Mgr. W. Onclin would lecture *ex tempore* on the *Lex fundamentalis* draft when prompted by a curious student. However, the master's programme offered by that faculty offers two legal-historical courses governed by that faculty: "History of canon law – Sources and Institutions", which offers an opportunity to deal with quasi-constitutional aspects of ecclesiology from Antiquity until modern times; and a course "History of canon law – Thematic aspects", which offer some leeway to discuss quasi-constitutional issues in the context of the religious law of the Roman-Catholic Church.

[5] In Leiden, only the first week of the Roman law course deals with public law (information kindly provided by the course's main lecturer, E. Koops).

[6] The second-year course on Roman Law in Groningen is also an example of approaching Roman law from the perspective of present-day Dutch private law.

[7] A good example are the undergraduate courses on public law taught and constitutional in Liège, partly based on J. Stengers, *L'action du Roi en Belgique depuis 1831. Pouvoir et influence*, Brussels, Racine, 2008; the introductory course on public law requires freshers to read primary sources on political thought from Bodin onwards. Similarly, the master-course taught by the same lecturer (who also teaches at the KULeuven) on "Critical Analysis of major texts and speeches on public law" discusses textual sources from modern (mainly twentieth century) history. (I am grateful to J.-L. Gerkens for drawing my attention to these courses). In Tilburg, one vantage-point of the introductory course on Constitutional Law is the historical development of the democratic rule of law (*democratische rechtsstaat*), referring to M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen, R.J.G.M. Widdershoven, *Beginselen van de democratische rechtsstaat. Inleiding tot de grondslagen van het Nederlandse staats- en bestuursrecht*, Deventer, Kluwer, 2022, 9th edn. The course "Constitutional Law" in Utrecht takes the "historical roots of Dutch public law" as its starting point and refers to the "historical context and jurisprudential themes in order to explain constitutional doctrines (textbook: C.A.J.H. Kortmann, *Constitutioneel recht*, Deventer, Wolters Kluwer, 2021, 8th edn.).

[8] For example, the undergraduate course at UCLouvain "Legal Theory and Contemporary Legal Thinking" which addresses *inter alia* the issue of the relation between democracy and constitutionalism, and uses as its framework the period from the "liberal state" to the "welfare state". Saint-Louis (Brussels) is one of the few universities where

the once ubiquitous course on "Natural Law" has survived; the course also covers the historical evolution of natural law theories. In Leiden, the course "Practicum: History of Legal Philosophy and Ethics" invites the students to read extracts from work ranging from Antiquity to modern times, including reference works on constitutional history (e.g. Dicey). In Luxembourg, the course of Philosophy of Law on "Historical [Introduction] to the Theory of Liberal Democratic Law" is based on nineteenth- and twentieth-century political theories (using as its textbook: J. Van der Walt, *The concept of liberal democratic law*, London, Routledge, 2019); the general course "Introduction au droit luxembourgeois" includes an historical preamble.

[9] For an unpromising start, see the brief course description "History of law and institutions" at Mons for the academic year 2023-4, an uncommon pile of insignificant commonplaces. Entirely different is the approach in Luxembourg for the three parts of the course "Constitutional Law", *viz.* General Theory of the State and the Constitution, General Theory of the Constitutional Powers, and General Theory of Fundamental Rights, taught by a legal historian, which, in addition to the historical course on constitutionalism, adopt a strong historical approach.

[10] The most comprehensive announcements of public defences of doctoral dissertation in legal history at Belgian and Dutch universities since 2006 is to be found on the website http://www.rechtsgeschiedenis.be/ under "Rechtshistorische courant".

[11] For Belgium, in the Dutch-speaking Community, I have taken into account the law faculties in the universities of Brussels (VUB), Antwerp, Ghent, Hasselt, and Leuven (KULeuven). Leuven has campuses with (for our purpose, mostly undergraduate) courses in Kortrijk (KULAK) and Brussels (Campus Brussel), where legal history is taught along more or less the same lines as on the Leuven Campus, often by the same lecturers (and, with regard to the course "History of public law", using the same textbook). Hasselt, a relatively new university, has developed its autonomy over the years, but maintains some links with both Leuven and Maastricht. For the French-speaking Community, I have tried to cover the ground for the law faculties in Brussels, both the ULB and Saint-Louis (the latter recently part of a broader association within the UCLouvain), Liège, Mons (for law studies, so far operating as an outside campus of the ULB), Namur and Louvain-la-Neuve (UCLouvain). For the Netherlands, I have endeavoured to include the law faculties (or "schools") in Amsterdam, both the University of Amsterdam (UA) and the Free University (VU), Groningen, Leiden (and its outside campus in The Hague), Maastricht (which combines a Dutch-speaking curriculum with a distinct curriculum of its European Law School), Nijmegen, Rotterdam, Utrecht, and Tilburg. See also further on my references to the University of Luxembourg and to the College of Europe in Bruges. I have translated the titles of courses from Dutch or French into English, except when the original version was necessary; I mention if a course's original title in the syllabus is in English.

[12] References to the Luxembourg curriculum are all based on information provided by L. Heuschling, to whom I am most indebted for his extensive report on the background and the current state of constitutional history teaching at Luxembourg.

[13] For which I am indebted to S. Garben's information.

[14] In Luxembourg, a first-year course on Roman law has a conventional private law outlook. However, the second-year course on "Constitutionnalisme ancien et moderne en Europe/Ancient and Modern Constitutionalism in Europe" includes a substantial chapter on ancient Greek and Roman developments, with extensive reading suggestions to a.o. the works by Michel Humbert.

[15] The course European Legal History (in English) at Leiden focuses on public law developments in the section on early-modern history (my indebtedness to E. Koops for the information).

[16] The history of criminal law, a generation ago a popular subject with a distinctive (graduate) course in Dutch law faculties, is nowadays only sporadically taught. One exception is the legal-historical teaching in Tilburg, where the graduate course on "Legal History" draws on E.J.M.F.C. Broers, *Straf en schadevergoeding. Drie historische hoofdstukken*, Antwerp-Apeldoorn, Maklu, 2018 (3rd. edn.), E.J.M.F.C. Broers, *Van plakkaat tot praktijk. Strafrecht in Staats-Brabant in de zeventiende en achttiende eeuw*, Nijmegen, Ars Aequi Libri, 2006) and on Medieval literature (*Reynard the Fox, Karel ende Elegast)*.

[17] The description of the undergraduate course "Historical-comparative developments of private law" at Nijmegen, and of the first-year course "Legal History' at Groningen suggest that the teaching aims at confronting private Roman law with present-day Dutch civil law; the parallel undergraduate course "Historical-comparative developments of public law" in Nijmegen uses the vantage-point of codification as a vantage-point for discussing some themes of constitutional relevance, a feature also mentioned in the Legal History course at Groningen (connecting codification with such concepts as sovereignry, legality, separation of power). A similar approach is expressed in the description of the first part of the undergraduate

course "Legal History" in Liège: «Dans cette première partie, la dimension constitutionnelle du développement historique du droit privé sera mise en lumière, par exemple à travers le passage du droit privé de l'ancien régime aux codifications du dix-neuvième siècle, souvent inspirées par les nouvelles idées politico-philosophiques de la Révolution française». Codification is also mentioned as the "thread" for an historical contextualization of law in the description of the first-year course "Introduction to Jurisprudence" in Rotterdam.

[18] For example, the description of the course on History of Law and institutions at the ULB, and the History of law and institutions in the Middle Ages and Ancien Régime at Saint-Louis (Brussels). The course description for "European Legal History" in Tilburg refers with some emphasis to "external legal history" ("uitwendige rechtsgeschiedenis"); external legal history is also part of the package in the description of the first-year course at the VU Amsterdam.

[19] A unique example I came across in surveying the programmes is the course "Comparative Legal History of the Meuse-Rhine Euregion" in Maastricht, which approaches comparatively the law-making process and its underlying policies in the early-modern territories of the area including Gelderland, Cologne, Liège *et al.* Another legal-historical course focusing on pre-modern regional law is Introduction to Roman-Frisian Law" at the VU Amsterdam, which discusses private law topics.

[20] A course on "Roman Law and Society" taught in the history department at Nijmegen focuses on private law topics, and in the Law Faculty, I did not find any public law equivalent to the graduate course "History of European Private Law".

[21] But here again, one should quote Sportin'Life's motto "It ain't necessarily so": in Liège, the course "Legal History" refers to late-Medieval and early modern law developments as "private law's constitutional matrix".

[22] With notable exceptions, see the English title of the Maastricht undergraduate course: "Law in Europe, from Gaius until the EU"; the Dutch-speaking undergraduate programme no longer includes a distinct course on legal history, but historical features, including constitutional issues, are discussed in a general third-year course on "Foundations of the law" (I am indebted to B. van Hofstraeten for information not available on the university website); the textbook used in the first year's course in Ghent, although mainly focused on developments in the Belgian territories since the Middle Ages (including foreign influences from France and the United States), includes a substantial part on the political and external legal history of Roman Antiquity: G. Martyn (i.s.m. R. Opsommer), *Geschiedenis van het publiekrecht en van de politiek*, Bruges, Die Keure, 2022. In Hasselt, the legal history course starts in the Antiquity, but without discussing specifically constitutional history (again, my indebtedness to B. van Hofstraeten).

[23] Undergraduates at Saint-Louis (Brussels) have separate compulsory courses on the history of institutions and public law for (a) the Middle Ages and the *Ancien Régime* ; (b) modern times.

[24] Various forms of legal practice, though not necessarily constitutional practice, may be discussed in (graduate) courses which deal with the theme of "Justice", which is in particular understood as the administration of justice by the courts (and sometimes by executive bodies), see e.g. the course on "Advanced Questions of Legal History at the ULB (from the long-term vantage-point of the literature published in a Belgian legal journal), and the course "History of Justice" at Saint-Louis (focusing on various judicial and extra-judicial sources, including iconographic sources, relevant for understanding the court's practice since the Middle Ages).

[25] Which is the subject of a specific graduate course at Groningen: "Constitutional Kingdom Law" (referring in its reading materials to C. Borman, *Het statuut voor het Koninkrijk*, Deventer, Kluwer, 2012). In spite of a growing interest for (post-)colonial studies, I have not noticed specific courses on colonial legal history in the law faculties, though very occasionally, I have been informed that an historical outlook on the relations with a former colony is included in a course (e.g. in Tilburg – for which I am indebted to M. in't Veld).

[26] K. van Leeuwen, M. van Faassen, M. Scherer, *Over de Grondwet gesproken. Een selectie uit documenten van staatscommissies voor grondwetsherziening 1883-1983*, Hilversum, Verloren, 2020.

[27] Conversely, a general introductory (first-year) course on the History of Public Law may be informed by historical developments of international law, as in the course taught in Leuven (by R. Lesaffer, whose optional course on the History of International law for graduate students currently focuses on the law of war). In some law faculties (e.g. UCLouvain, UA), a course is offered on "History and Theory of International Law", but not necessarily taught by a legal historian; this also seems the case in Leiden (course "International Law in Context: Historical, Sociological and Theoretical Perspectives".

[28] The VU Amsterdam inherited a special chair on the history of international law. Its current manifestation is the course "Beyond Grotius. History of International Law and Diplomacy: Europeanisation and Globalisation". In

Ghent, the graduate course on "Historical Public Law" focuses on nineteenth-century and twentieth-century treaties and their impact on state formation and domestic constitutional arrangements (I express my indebtedness to G. Martyn for sending me abundant information and documentation about his courses in Ghent).

[29] The textbook used at the Flemish University of Brussels (VUB) incorporates the double vantage-point: the first part deals with international relations from the Middle Ages onwards, the second part gives an outline of the internal (national) developments in France, Germany, the United Kingdom, the United States, Russia and China: F. Dhondt, *Gestolde macht. Historische en vergelijkende inleiding tot het publiekrecht*, Brussels, VUB Press, 2021 (2nd ed.); I am much indebted to F. Dhondt, who provided me with detailed information and documentation about his teaching on constitutional history related topics.

[30] See, however, the course "History of European Integration" (in English) at Brussels, Saint-Louis (highlighting in its reading list D. Dinan (ed.), *Origins and Evolution of the European Union*, Oxford, OUP, 2006, and A. Moravscik, *The Choice for Europe. Social Purpose & State Power from Messina to Maastricht*; Ithaca, Cornell University Press, 1998). In Groningen, the first-year course on "Legal History" includes a discussion of the historical developments of the EU law and institutions, and of the European Convention of Human Rights.

[31] Of particular interest in the present context is the course "The Constitution(alization) of EU law" taught by S. Garben, with an emphasis on the democratic legitimacy a constitutional order may acquire over time through its constant implementation and development – the "constitutional moment" not being per se a codified constitution's formal adoption by a constitutional lawmaker or through a referendum at a given time in history –, an approach which ought to be followed also with regard to national constitutions, whether fully codified or not; see S. Garben, *The constitutionalization of European integration as a single, protracted 'constitutional moment' towards the establishment of EU final authority*, in M. Dani, M. Goldoni, A.J. Menéndez (eds.), *The Legitimacy of European Constitutional Orders. A Comparative Inquiry*, Cheltenham, Elgar, 2023, 259-281. However, the author also discusses features of the EU's normative process which betray a lack of democratic legitimacy: S. Garben, *The European Union and its Three Constitutional Problems*, in M. Avbelj (ed.), *The Future of EU Constitutiona*lism Oxford, Bloomsbury/Hart, 2023.

[32] In several curricula, a general introductory course on legal history for undergraduates is styled as "European Legal History" (or similar titles), indicating a departure from purely national legal history and comprising a legal-historical approach. I have noticed only one course formally encompassing in its title "Global Legal History" (in English), at Tilburg, a course considering moreover all periods from Antiquity until the present day (and drawing, according to the course description, on J. Klabber, *International Law*, now Cambridge, Cambridge University Press, 2021, 3rd edn.); the same global perspective (and transcending a Western perspective) also inspires the Tilburg course on the "History of International Law" (supplemented by other courses, such as "International Security in Historical Perspective", focusing mainly on post-World War II developments, but also partly based on current research by R. Lesaffer). I am indebted to M. in't Veld for informing me on the legal history courses in the English and Dutch curricula at Tilburg.

[33] The approach may depend on broader policy considerations. In Luxembourg, the law faculty (which had inherited a solid theoretical background from the Belgian input during the early years of Luxembourg's *Centre universitaire*) decided from 2014 onwards to engage into an approach styled as "transnationalization" (to some degree inspired by McGill comparative legal studies). For constitutional history, this means that even when national Luxembourg constitutional history is taught, such history avoids any national narrative, even when constitutional doctrines are often presented under the guise of a dubious, at times quasi-official historical narrative supposed to underpin constitutional doctrines. A broad comparative view offers the possibility to avoid the national narrative; see for a specific example: L. Heuschling, *Le discours sur la valeur consultative du référendum (art. 51 § 7 Const. Lux.). Une déconstruction historique*, in «Pasicrisie luxembourgeoise», n. 1, 2015, pp. 1-49, esp. pp. 3-4 : «Sur la question de la valeur du référendum s'est cristallisé au cours de l'histoire, plus précisément de 1948 jusqu'à ce moment crucial que fut le début du XXIe siècle, un discours dominant qui, par certains aspects, a pris la forme d'un lieu commun et d'une doxa. C'est le discours sur la nature (consultative) du référendum de l'art. 51 § 7 Const. […] Un premier trait caractéristique de ce discours concerne sa façon de mobiliser l'histoire, tout en se situant hors de l'histoire. Ce discours proclame qu'il est, à l'heure actuelle et depuis toujours, le seul discours à exister (la thèse de son exclusivité historique). Il n'y a pas, et il n'y a jamais eu d'autre interprétation alternative, soit radicalement soit sensiblement différente, à propos de l'article 51 § 7 Const. […]. L'histoire est ainsi mobilisée de

manière forte pour suggérer, à propos d'une construction intellectuelle, l'existence d'une sorte de bloc monolithique qui aurait traversé les âges, sans évolution, ni fracture. De là, il n'est qu'un pas à penser qu'aucune autre lecture n'est, en soi, possible. Or, ce discours qui se veut historique, en ce qu'il s'appuie sur l'histoire pour faire avancer un argument en dogmatique juridique – il s'agit de savoir, à l'heure actuelle, quel est le sens exact de cet article de la Constitution – est, profondément, *an*historique et même *anti*historique. Quant au fond du discours: à l'instar de nombre de doxas, il tend à essentialiser, naturaliser ou à déraciner de l'histoire une construction intellectuelle qui, pourtant, y est ancrée. Quant à la méthodologie employée : ce discours dominant mobilise l'histoire alors qu'en vérité, il ne s'appuie sur aucune étude sérieuse, scientifique, du passé» (I am grateful to the author for providing the reference and its background).

[34] Nevertheless, several curricula include a course on political history which focuses more specifically on the national developments, e.g. in Antwerp, the course description of "Political and Institutional History of Belgium and the Low Countries", at UCLouvain (first-year course "History of institutions", but in a broader context of Belgium's political, social and economic history); at Brussels, Saint-Louis, the course description for "History of Institutions and Law, Modern Times" is focused on Belgium, with some references to the original Belgian constitution's immediate Dutch and French predecessors; in Liège, the course "Belgian political history" starts in ancient times and refers to various political regimes which have ruled over present-day Belgian territories, an approach that offers an opportunity to address various theories on the formation of a political system (G. Grandjean, *Histoire politique belge*, Liège, Presses universitaires de Liège, 2024; idem, *Le principe d'égalité dans l'organisation de la société. Émile de Laveleye. Un intellectuel au service de la Cité*, Bruxelles, Larcier, 2020; C. Régnier, *La constitution au fil de ses versions*, Bruxelles, CRISP, 2022 2nd ed.). In Namur, the course "History of Belgian Institutions", from the end of the Ancien Régime to the present day, offers an opportunity to address issues of democratization and federalism. In Groningen, the graduate course "Parliamentary History and Political Constitutional Law" (in the Dutch law master's curriculum, specialisation Constitutional and Administrative Law) considers mainly modern Dutch political history (based on *inter alia* R.A.M. Aerts, *Land van kleine gebaren. Een politieke geschiedenis van Nederland 1780-2012*, The Hague, Boom, 2013, 8th edn., and P.P.T. Bovend'Eert and H.R.B.M. Kummeling, *Het Nederlandse Parlement*, Deventer, Wolters Kluwer, 2017, 12th edn.). The course "Political and Parliamentary History" at the VU Amsterdam also deals with modern Dutch history.

[35] For example, half of the graduate course "Legal History of History of Justice" at UCLouvain has dealt with modern, i.e. pre- and post-Brexit, constitutional developments in the United Kingdom – developments which have often provided an occasion for the courts and scholars to refer to more distant historical constitutional developments in the British Isles.

[36] Occasionally also a specialization of an undergraduate's degree : thus in Amsterdam (UA), the minor "Human Rights in Modern Society", which has a legal-historical course on "Human Rights and Democracy", partly based on M. Freeman, *Human Rights*, Cambridge, Polity Press, 2022 (4th ed.) and T. Akkerman, *Democratie. De Europese grondslagen van het moderne idee*, Apeldoorn, Het Spinhuis, 2010 (I am indebted to G. van Nifterik for his information on this course). Three French-speaking universities (Namur, Saint-Louis and UCLouvain) offer jointly a specialised master's curriculum in Human Rights.

[37] Human rights, with a more or less sustained historical interest, is of course also taught in specialized courses, and more general jurisprudential courses (e.g. in Amsterdam UA, where the course on the "History of Legal Theory" is partly based on L. Hunt, *Inventing Human Rights*, New York and Londen, Norton, 2008).

[38] For Leuven, see R. Lesaffer, *De rechtsstaat. Een constitutionele geschiedenis van het Westen*, Ghent, Owl Press, 2024 (forthcoming at the time when this article was written; the book will be based on the printed manual the lecturer used previously – information kindly provided by R. Lesaffer) a central theme in the book is the changing nature of the "rechtsstaat", which may contribute to understand the current tensions around the notion as a symptom of yet another transitional stage of its development.

[39] A special case is the course "Recent history of law, economy and politics" at the KULeuven, tailor-made for allowing K. Geens to pursue some teaching after his retirement, an acknowledgement of his achievements as Belgium's federal Minister of Finance, and subsequently a reformist Minister of Justice while he was a member of the Leuven law faculty (teaching company law). The course aims at establishing connections in modern Belgian, European and international history between the three terms mentioned in the course's title.

[40] In a recent paper, I have argued that Ernst Kantorowicz's rehabilitation of the phrase "Political Theology" (in *The King's Two Bodies*) might even more aptly

have been expressed by using the phrase "Political Jurisprudence" (*Médiévistique et "déméditerranéisation" du monde occidental dans l'œuvre d'Ernst Kantorowicz*, in : *Ernst Kantorowicz, un historien pour les juristes ? Actes du colloque organisé par l'Institut Michel Villey, Droit et Philosophie, Hors-Série*, n. 3, 2023, pp. 68-79).

[41] A slightly more elaborate argument on this theme in my paper : *Une très brève histoire du droit dans la civilisation occidentale (1000-2000)*, in «Annales de Droit de Louvain», n. 77/3, 2017 (= 2019), pp. 397-411.

Teaching Nordic Constitutionalism? How to understand the histories of the Nordic constitutions

DAG MICHALSEN

1. *Introduction: The history of Nordic states in the 19th and 20th Century*

Given the obvious constitutional stability of the Nordic countries since the 19th century, one should have expected a massive interest in the teaching of constitutional history at Nordic universities and legal faculties. That seems however not to be the case[1]. Paradoxically, that may in fact exactly be the result of the constitutional and political stability itself, as the academic class does not quite find it necessary to explore constitutional law historically for the benefit of the political present. This picture is however again too simplistic – and for at least two reasons. Firstly, even though one may attempt to think of the Nordic region of Europe as one block, it is no surprise that there are many differences between the (now) five major countries: Denmark, Finland, Sweden, Norway and Iceland, comprising just under 30 million inhabitants. Behind the label of Norden (the Nordic catchword for the Nordic region and which I will use here), there are different histories stretching back to the High Middle Ages when the three kingdoms of Norway, Sweden and Denmark were formed, chiefly during the 12th and 13th Century[2]. Secondly, the constitutions of the Nordic countries have had different political, social and cultural functions and significances during the last two centuries making it more interesting for one country to study its constitutional history than that of another country. The best example in this respect is the rather stark differences between Norway and Sweden as Norway is a typical patriotic-constitutional society, whereas Sweden has had a much more distanced, almost a non-constitutional, interest it its constitutional past.

In this article, I will focus on modern constitutional history, meaning the histories arising from the constitutions that came about during the 19th and 20th century. It is a matter of definition where to start a constitutional history. The three medieval kingdoms of Denmark, Norway and Sweden

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had all legal codes comprising administrative law that functionally had constitutional character and lasted far into the early modern era. As Sweden and Denmark emerged as the two dominate powers of Norden after the Reformation, especially Denmark developed a constitutional political order reflected in one legal text (*King's Law* 1665) defining the absolutist rule in a systematic and exhausting fashion not common at the time[3]. Until around 1800, Norden was not at all a 'natural' entity as the region was divided, and controlled by, the two semi-empires Sweden and Denmark.

Norden as a plausible historical entity was the outcome of the Napoleonic wars. From 1815, Norden that had been dominated by Sweden and Denmark was transformed into four more or less nation state-defined entities: Denmark, Finland, Sweden and Norway. After the loss of Finland to Russia in 1808, Sweden reorganized its way of ruling and enacted a modern rather liberal constitution of 1809. Denmark, an ally of Napoleon, having lost Norway to the king of Sweden on that account, a loss that was confirmed at the Vienna settlement, continued as an un-constitutional absolutist state until 1849. Then Denmark enacted a modern liberal constitution that entailed the complicated issue of the Dukedoms of Schleswig and Holstein. Norway enacted its liberal constitution in May 1814, but the Great Powers demanded that Norway had to enter a personal union with the king of Sweden who then in November 1814 became king of Norway as well. The union-king then ruled constitutionally according to the Norwegian Constitution as Norwegian king and as king of Sweden according to the Swedish constitution. Thus, a typical 19th century version of 'united kingdoms' emerged in Norden[4]. The Vienna Congress indirectly sanctioned this constitutional order in 1815. As Russia took the eastern part of Sweden through warfare in 1808 and then created the archdukedom of Finland in a personal union with Russian Tsar, Finland as a new political entity so to speak emerged. Finland had limited autonomy during the 19th Century within the Tsar Russia. The Russian Revolution led Finland to declare itself an independent republic, with the ensuing civil war (1918), before the enacting of the new constitution in 1919[5]. Iceland remained part of the Kingdom of Denmark also after the Vienna settlement, eventually as late as 1944 Iceland declared its independence through a republican constitution in the middle of the Second World War. To sum up then, the first decades of the 19th Century saw the establishment of many of the essential features of modern Norden, including the region's outer borders and new internal constitutional arrangements. Out of this comes a fundamental observation, namely that the constitutions of the Nordic nation states were all closely connected to the modern geopolitical transformations of Norden.

As much research tells us, during the 19th century, the 'constitution' was a generic normative phenomenon based on what is often called the modern concept of a constitution coming about from around 1800[6]. The typical features were one written standardized document; the idea was that this constitutional text constituted and regulated the state and its fundamental organs in exhaustive ways; the constitution brought about normative political visions, in particular through insertions of the civil rights, and 'globally' the new constitutional concept conveyed universal principles to

ever-new societies. Eventually, any constitution belonged historically and structurally to a network of many hundreds of other constitutional texts[7]. These common features point to something central: Even though the many hundreds of constitutions were used in different states and cultures, and even though their political and historical conditions were different, the actors were very conscious about this standardization of the constitutions. This can be studied in the works of the three constitutions of 19th century, Sweden (1809), Norway (1814) and Denmark (1849). This dimension points to a central theme on the Nordic scene: The tensions between the internationalism of any modern constitution and the national embeddedness of the individual Nordic constitutions, reinforced by many layers of nationalism/internationalism through two hundred years. This theme is a recurring topic of contemporary constitutional history in the Nordic countries.

Thus, we are addressing the complicated role of the constitution as part of the forming of nation states in the Norden[8]. The new states of the first part of the 19th century also became the nation states of Norden in a modern sense. The transformation from the two semi-empires Sweden and Denmark into five nation states occurred with different speed, Norway having a very early national revival, due to the combination of a less stable statehood and a more democratic constitution than Sweden and Denmark. Overall, however, during the 19th century the result was a continuous nationalization of the Nordic states, involving language, processes of national identities of peoples and their pasts, all of which were typical patterns of nationalism in the modern age[9].

However, intertwined with the dimension of nationalism was the dimension of a new Scandinavism and eventually Nordism[10]. From the 1830s, there emerged a strong sense of cultural and political common understanding of being 'Scandinavian', and later during the 20th century, transformed into 'Nordic' (then including Finland): This double geography of 'Nation' and 'Norden' thus enlarged the limited defined nation state and set in motion imaginations of a more unified Nordic region, also in legal-constitutional terms. As is well known, this did not result in any concrete constitutional arrangements, but certainly, a vivid Nordic cooperation came about. This again resulted in an understanding of the Nordic nation states as historically and politically more complex than they otherwise would have been, just as states of a nation. This certainly spilled over to the understanding of the constitutional identities of the different Nordic constitutions to which we will return.

This dynamic between 'nation' and 'Norden' brings us to an important point in the history of constitutions in Norden, namely that of nation and union. From 1800, between Nordic states there were many internal legal interrelationships defined by international law[11]. Constitutions were at the same time both constitutional law, internal union law between two Nordic union states and in that respect functionally external international law. One example was the above-mentioned united kingdom of Sweden and Norway that from 1815 to 1905 had their own constitution, but at the same time, parts of these constitutions were prerequisites for the interstate-relationship between the two states defined as Swedish-Norwegian union based ulti-

KONGERIGET NORGES

GRUNDLOV

gjeven i Rigsforsamlingen paa Eidsvold den 17de Mai 1814.

og nu i Anledning af

Norges og Sverriges Rigers Forening

fastsat i Norges ovenbemeldte Storthing i Christiania, og antagen den 4de November 1814.

1814 Constitution of the Kingdom of Norway

mately on the central union-treaty of 1815. The legal construct of this unified kingdom then were two separate constitutions (1809, 1814) and the treaty of 1815 binding the two nation states together in a specific union: This inherit tension between nation and union certainly is a pedagogical challenge for a modern audience, and certainly this is case in Norway not being member of the European Union.

To conceptualize the close interactions between domestic constitutional-legal regimes and external international legal regimes the term 'international legal act', may be apt for any constitution having this double legal function of nation state and union law. The term seeks to grasp the normative legal acts connecting international treaties at the same time being constitutions. As there were so many blurring borders of constitutions existing both in national and union-related sense in the Nordic region, this dimension influenced the very understanding of these constitutions. In addition, it influenced how constitutional history was taught in different Nordic countries. As mentioned, from 1814-1815 until 1905 Norway and Sweden were tied to a personal union through a common king, resulting in rather aggressive Norwegian and Swedish nationalism, forming the way constitutional history was taught, then in highly nationalistic terms. During the 19th century, Denmark was structured by the difficult Schleswig/Holstein conflicts, especially from 1848 to 1864, that included two wars with Prussia. Then the political-pedagogical issue was 'what was Denmark'? In the north of the Nordic area there were the Sami issues resulting in a rather antagonistic Norwegian nationalism directed at the Sami autonomy, connected to ongoing prolonged border disputes with Sweden and Russia/Finland through a long periode (1751-1826-1852-1905). Between 1843 and 1944, Iceland and Denmark struggled over independence for Iceland. The emergence of Finnish identity came about during the first half of the 19th century. This was a difficult issue under the Tsar regime until the sudden enactment of the modern republican constitution for the new independent Finland became possible in 1919. In addition, all these issues resulted in many regional conflicts involving at the same time constitutional law and international law, as for example the Åland-question 1918-1921 [regarding sovereignty on that island between Sweden and Finland] and the Greenland conflict between Norway and Denmark in 1930-1932[12].

A central dimension of understanding the past constitutional law is to identify its actors, such as the professors of constitutional law. Their role in Nordic constitutional law have always been very prominent and some have almost personified the constitution itself at a certain time. These constitutional law professors were professor-politicians that related both to the ideals of the university and that of the interests of the state. This double approach shaped their accounts of the history of the constitutional law of different Nordic countries – *being the voice of the state* so to speak. Being a constitutional law professor then involved having the political tasks either as an active politician as members of Parliaments or as having elite bureaucratic functions. To understand this activity as a kind of operational legal research signifies the interconnections between legal expertise and the expertise related to political institutional activities. The operational character shaped

these professor-politicians in their plural public activities, being in Parliament, state administration, the close connections to executive power, often doing much judiciary work, and being expert in administrative reform processes. Their simultaneous account of constitutional history reflected these kinds of activities – it was the account of a 'statesmen', that contemporary political order quite not allows any more.

During the second part of the 20th century, the Nordic countries took different paths, first due to the different experiences of Second World War. The Nordic countries took a neutral stand during the First World War, and they all became active members of the League of Nation[13]. Then: Nazi-Germany occupied Denmark and Norway from 1940 to 1945, Sweden declared itself neutral during the whole war; the British-American occupation of Iceland enabled that country to declare independence of Denmark; Finland was attacked by Soviet and later during the war, Finland realign itself with Germany until very late. From 1945 to 1949, the international status of Norden changed dramatically. Norway, Iceland and Denmark became founding members of NATO, Sweden decided to remain formally neutral in the upcoming Cold War and Finland entered the Finno-Soviet Treaty of 1948 giving Soviet some authority to interfere in Finish politics, a treaty that lasted until 1992. The new international status of the Nordic states occurred formally within their respective constitutions, but with tensions. In Norway and Denmark there were pressures arising from the conflicts between traditional ideas of national sovereignty and the supra-national organization of NATO and later EU.

This also led to a new division in Norden that came about with the enlargement of the European Community/Union from the 1970s. In 1960, the Nordic countries (Finland from 1985) joined the British led European Free Trade Association (EFTA); in 1973, only Denmark became member of the EU as Norway rejected call for membership in a referendum. In 1995, Sweden and Finland joined EU whereas the non-members Norway and Iceland were tied to EU through the complicated and far-reaching treaty European Economic Area (EEA 1994). Legally defining has been the increased importance of European Convention on Human Rights (ECHR) on Nordic constitutions although with somewhat different impacts. Yet another war, the Russian attack on Ukraine in 2022, led to the inconceivable result of Finland and Sweden (2023-2024) becoming members of NATO. These historical particulars are important as to how constitutional law is historically interpreted now in Norden, with the different international dimensions structuring diverse constitutional historical self-understandings and narratives.

2. *The constitutions/constitutionalism of the Nordic countries' anno 2024*

Teaching constitutional history is a contextual activity. The point of departure is often the present-day constitution and out of that come constitutional histories that are more or less legal-dogmatic and doctrinal or more or less historical, political and cultural. Lawyers, legal historians, historians or political scientists may teach constitutional histories as part of their disciplines

and thus their professional quality will influence the outcome, their version or even vision of the constitutional past. Therefore, it is important to be aware of the contemporary premises for any mapping of the teaching of constitutional histories around at Nordic universities.

A central dimension of Nordic contemporary constitutional situation is that of continuity. Any teaching would have to deal with long lines of constitutional histories. Even during the volatile 20th century there were no devastating state of emergencies (except the Finnish civil war in 1918) or introduction of dictatorships. The three Scandinavian kingdoms remained unrestrained democratic and that is even the case for the more fragile Finland in that respect. As we have seen, the oldest still existing constitution in Norden is the Norwegian one. Enacted in 1814, it is in principle the same today even though there have been some substantial amendments, mostly in 1905 and in 2014. It goes without saying that a written constitution with such age leads to constitutional and political practices of different kind. At the same time the Norwegian constitution has become an integral part of the nation's DNA, thus it signalizes both the stability of the Norwegian statehood since 1814 and its shifting character, in particular the increased role of democracy. Since 1884, Norway has been a parliamentary monarchy and then through the 20th century it has acquired the identity of modern democracy (with the introduction of full women's voting right in 1913) and rule of law. Of particular importance is that the Supreme Court of Norway has practiced judicial review since the 1820s which strengthen the importance of the Constitution of 1814 considerably. Although this doctrine has had its ebbs and flows, it has remained a fundamental part of the Norwegian constitutional life[14]. Unavoidably, this narrative of increased democracy and rule of law has had its effects upon the writing of constitutional history that tends to celebrate liberal values and visions exposing itself to the dangers of self-congratulations. The problematic constitutional status of the Sami people are consequently often neglected in these histories[15].

To some extend Sweden has had the longest living constitutional story in Norden. During the so-called 'Age of Liberty' between 1719 and 1772 the Parliament was the centre of political power, not unlike the parallel in Britain. The extremely important *Freedom of the Press Act* from 1766 made Sweden to the least repressive state in Norden[16]. The 1809-Constitution mirrored the estate structure of the Swedish society with a strong aristocracy. This was liberalised in 1866 and later after 1919 with a functioning Parliamentarism; this constitutional tradition was then replaced with *The Instrument of Government* of 1974. To say that Sweden at times took its Constitution somewhat lightly is not wrong, and famously, large part of the 20th Century has been called 'the half century of non-constitution' in the sense that the constitution had little significance for the actual governing[17]. To Sweden the Constitution has not played the same significant role has to Norway and to some extend to Denmark. There is no surprise that there is only modest interest in a classical constitutional history in Sweden; rather then, a constitutional history seen from the point of view of political science.

The central constitutional year for Denmark was 1849 which both in form and much substance signalised the transition

from absolutism to liberal constitutionalism. Still, after 1866 a more conservative element again were introduced into the Constitution now favouring the King over the Parliament, again changed in the revised constitution of 1915 signalling the democratisation of the Danish politics and society. This continued with the Constitution of 1953, the current constitution, in many parts still building upon the 1849-constitution. In that sense we are dealing with a high degree of constitutional continuity in Denmark as well.

Finland's current constitution of 1999 (effective from 2000) has enshrined the earlier constitutional documents from 1919 and onwards into one single code and at the same time the 1999-constitution sums up the process of democratisation of Finnish constitutional life from the 1980s. The increased internationalisation of Finish constitutional life is also reflected in this very modern enviably constitution, e.g. through the enhanced role of civil rights.

Iceland's current constitution is of 1944, in connection with and as reaction to the Nazi-occupation of Denmark[18]. The Constitution was somewhat hastily written down and thus formed by the Danish model. The most exciting constitutional experiment in modern time in Norden is undoubtedly the Icelandic constitutional reform that was inaugurated in 2009, after the total collapse of the Icelandic banking system in October 2008, threating the very existence of the Icelandic state and society. The first phase of the reform process was carried out in an extremely innovative and democratic manner and lasted until 2017. Then a cross-party process will conclude with a new constitution, foreseeable in 2025[19]. Especially the broad societal involvement during the first phase should be viewed as a remarkable democratic all-embracing constitutional moment in Norden, and not least as a national pedagogical lesson in constitution-making involving historical reflections on the nature of Iceland's constitutional tradition.

During the last years, there has been a surge of research and literature on what is called 'Nordic model', welfare state, legal ideology and constitutionalism[20]. However, to presume a too coherent political and cultural Nordic identity would be wrong, as there are marked differences in these respects between the countries, in particular the last decades. On the other hand, there are numerous webs of interactions, based on shared history and common contemporary aims. To teach constitutional law in Norden is at the same time to reflect upon these many layers of Nordic history and the multitude of Nordic interactions. A last issue here is whether one could imagine a teaching of a historic Nordic constitutionalism as a separate discipline from that of the five individual countries. This is a difficult question, but so far, we may conclude that this has not yet happened. At the height of legal Scandinavism, at the end of the 19th Century, a famous book on the Nordic constitutions were published, also with pedagogical aims[21]. However, it is hard to imagine that this can become anything else but a comparative exercise, of great interest to the students. As I have shown the differences between the Nordic constitutions are considerable and as such the Nordism is one of several dimensions of the constitutional history.

3. *Teaching constitutional history: Competing fields of law, politics, and history*

To teach constitutional history is at the same time to reflect upon these historical given structures of law, institutions, culture and society. To what extend these reflections should be part of the actual teaching is another matter, but any teaching must be informed by this basic infrastructure, that includes the actual and current constitutional order of the given country. Now, this sentence may be too narrow and naturally presupposes a too specific legal outlook. Thus, it may be rephrased as any constitutional history targeting a legal audience, in particular law students, ought to be informed by current constitutional law. However, already this claim makes clear the problematic relationship between constitutional history as legal doctrinal history versus what I here would call contextual constitutional history, having other aims than contributing to the interpretation of constitutional law. Contextual constitutional history then acknowledges current constitutional law but moves on by defining 'constitution' as a diverse normative phenomenon in history without relevant legal-dogmatic purposes of interpretation. This enables a liberated constitutional historical research freed from the pressure of the actuality of current legal system.

The crucial methodological tool for distinguishing between constitutional law and constitutional history is historicization i.e. to understand sources to a past constitutional order as a constitutional historical phenomenon and thereby to distance oneself from constitutional law as a contemporary legal phenomenon. These reflections seem to deal with research, but without doubt has much to do with formulating a sufficiently complex and interesting form of public dissemination. In my view, any constitutional history must stress the dimension of historization in the sense that constitutional history is an historical scholarship based upon expertise in constitutional law and life. Historization is a comprehensive word, but it does imply a necessary methodological approach insofar as constitutional historical research possess historical epistemological purposes, not just legal dogmatic-doctrinal ones. Even where constitutional history is to be used with doctrinal purposes, as in the interpretation of specific constitutional provisions, the normative significance of historical data will be most obvious precisely where there is quality-assured historical knowledge that forms the basis for interpreting the current sources of law. As such, there will be both different purposes between constitutional history and constitutional law, but also much interdependence.

Given the fact that the Nordic countries, and especially the Scandinavian monarchies, have had long history of constitutional and constitutional lives, several professions have been interested in the constitutional history, although with some differences. As historical scholarship until quite recently was rather national and political in outlook, professing a methodological nationalism, constitutional history was taught as political history of the nation, often with conspicuous absence of international dimensions and with emphasis on the activities of the political class of the past. The rise of political science in Norden during the 20th century underlined this ap-

proach. A particular Swedish intellectual tradition during most of 20th Century was the political science specific focus on the history of Swedish constitutional and political life, a tradition that weakened a more precise legal constitutional historical discipline. Only lately this has changed[22].

If we turn to the current law faculties in Norden, the picture is full of varieties. The traditional law faculties in Norden have been Uppsala, Copenhagen, Lund, Oslo, Stockholm, Helsinki, Turku, Aarhus, Bergen, Tromsø and Reykjavik. Since 2000, there has been a massive increase in academic institutions for teaching law, now well counting over 50 locations in Norden. Even in more business-oriented law-institutions, there are courses in constitutional law, but not at all in legal history. The question is whether teaching in constitutional history is located within the discipline of constitutional law or within that of legal history. In general, out of this disciplinary difference comes two separate approaches, connected to what I just defined as the difference between doctrinal versus contextual constitutional history. Looking through the textbooks of constitutional law of the Nordic law faculties reveals a rather teleological and legal-narrow account of that history, often connecting the story close to the current task of interpreting particular articles of the constitutions. How could it be otherwise one may ask of course. In many instances, there is no historical narrative at all, or even specific arguments directed against the need for historical account of the constitutional history all together. In the discipline of legal history, the role of constitutional history is presented very varied, but the accounts are being placed as part of the general legal history of the nation, often with international background. The only contemporary textbook dealing solely with constitutional history is not surprisingly a Norwegian one that specifically aims to combine national and international constitutional history since 1750[23].

It is not always easy to draw the boundaries between the current constitutional law and the constitution understood as a constitutional-historical normative phenomenon. This is the issue of defining constitutional history with legal or historical purposes. Is it possible to give constitutional history an identity through special empirical resources and methodological characteristics? Researching the constitution as a constitutional historical phenomenon would then mean distancing oneself from the constitution as a contemporary legal document through historicization. In Norden, this is most obvious for Norway, as the 1814-constitution is still applicable law in Norway. Hence, there is a double historical argumentation going on here: Legally, the constitution as a contemporary legal text requires historical data of many kinds in order to be interpreted according to acceptable methods. One could ask if this kind of doctrinal constitutional history is the constitutional history we ought to teach as constitutional historians. Thus, when there should be model of some kind, we should acknowledge the difference between constitutional history as part of contemporary interpretation of the constitution and constitutional history as interpretive history, as part of political and social history. At the same time, it ought to be an aim for the teaching of constitutional history to make these two forms interpretations analytically and transparent. Experiences show that a constitutional history too bent on the de-

velopment of law and doctrines are more prone to teleological forms of interpretation[24].

So, teaching constitutional history must, in my view, be contextual. Constitutional history, whether as research or teaching, must view itself as historical scholarship[25]. This normative stance therefore has as its premise that teaching constitutional history cannot be cut from this research, rather the opposite. Only a research-informed constitutional history will be interesting to a contemporary audience, whatever that may be. The last decades there have been new forms of epistemological pressures on historical sciences, and to some extend law as well- This has been rewarding in the sense that it has produced pluralistic methodological programs, with the effect of historicizing the conceptions of the constitutional past. Also, in teaching one should not avoid confronting the audience with the complicated relationship between the represented past and the present historical representation. Often, for any student, there is almost a revelation that there is no one-to-one relationship between an historical legal source (text) and a past constitutional 'reality'. Thus, as part of teaching we must discuss pragmatically how we ought to organize our legal-historical representations, and not least to reflect upon the often value-burdened vocabulary that are ingrained in the historical and legal methods for reading historical sources[26].

This brings us to the methodological resources of any work on constitutional history that at the same time ought to be conveyed in teaching[27]. To teach constitutional history is to convey the fundamental fact that any constitution is at the same time both national *and* an expression of the historical given constitutional model and international practice that stretches back to the late 18th Century. To absolutize uniqueness is to succumb to the politics of identity of a nation and constitution which is historically more than questionable. So, I would stress the close connection between the modern concept of constitution as a foundation of modern constitutional history and that of historical understanding of the particular constitution as part of the history of a nation. This insight of modern scholarship brings us to the status of source criticism and general methods. To teach constitutional history is simultaneously to openly reflect upon the source-basis of the historical narrative, namely the historian's craft that include source criticism, hermeneutical historical interpretations and not least identifying the ideological terrain surrounding any constitutional history. Thus, an introduction to the historical sources, categories of historical and legal sources, the importance of archival methods and much more of this kind will bring about an enhanced historical awareness of that of teaching constitutional history. So, to teach constitutional history is to teach the contingency of the making of constitutions and the integrated geopolitics of any process of enactment. Equally it should bring about the manifold functions that any constitution manages to perform historically in a given society, dealing with territory, power sharing, citizens, and the fundamental task of enabling the predictability of politics.

4. *Targeting the Nation: Constitutional history and the Bicentennial jubilee of the Norwegian constitution 1814-2014*

A particular kind of 'teaching constitutional history' is the public forms of national memories, national anniversaries of the constitution, including 'sites of memory', parades and much more. Involving the public and involving somehow the connections of law, politics and emotions, are here at stake[28]. In Norway, this was very much the case in 2014, as a massive state-funded celebration of the bicentennial of the Norwegian constitution (1814-2014) took place. Historically, in 2014, the 1814-constitution was the eldest still current written constitution in Europe, and even though amended several times, the 1814-constitution was in principle the 'same' as the one enacted on May 17 in 1814. The following paragraph deals with some reflections about what came out of this national celebration[29]. In order to understand the bicentennial celebration a premise is that Norway is a 'constitutional country': The constitution constituted and constitutes Norway almost literally, thus connecting nation and constitution in a very direct manner. How then to proceed to grasp this as a constitutional historian and communicating this to the audience? Any celebration of a nation or constitution reflects the celebrating society and in addition the celebration itself is a cultural-political act directed towards some aims.

In Norway the prime site of memory where the residence of the national assembly in May 1814 took place, Eidsvoll manor house, some 70 kilometers north of Oslo. This has been a 'site of memory' since early 19th century. In order to involve the nation in 2014 in a direct and almost physical way, this manor house was renovated extensively and by ways of political-historical rituals this house attained almost sacred qualities as it expressed the corporal modality of the Constitution of 1814 itself. Now, there were also more conventional legal changes going on in 2014 as part of the celebration[30]. Through a complex procedure the Parliament (in its capacity as Constitutional assembly) revised the part of the constitution dealing with human rights that had hardly been changed since 1814. Thus, these articles were brought in harmony with the European Convention of Human Rights. The debate whether to include more welfare rights as constitutional rights led to a debate, also historical, about what kind of Constitution the Norwegian had been and ought to be. The result was that the Parliament retained the model of 19th Century, not including new welfare rights in the Constitution. In addition, the Constitution that had maintained its rather archaic Danish-Norwegian language of 1814 until then, also its modern amendments, was now so to speak translated into modern Norwegian. This was indeed an obvious act of enlightenment for a contemporary society. Paradoxally this modernization of the language also highlighted the historicity of the constitution itself.

The celebration in 2014 became a mass education. Surveys made in 2015 showed that almost 50 % of the whole population stated that they now knew much more about the Norwegian constitution than they had before. Almost the same amount had personally participated in some activity concerning the constitution. This is perhaps not surprising as the National Day in Norway, May 17, celebrated since the 1820s, is the day of the constitution, not of the nation

nor of the state or anything else, but the constitution: Thus, the dynamics of mass celebration and mass participation reminds us of Nussbaum's idea of how political emotions are being set loose: The question is of course what is being taught, what is set loose? This depends on where you look: The state financed a lot of new research. But most of the budget was allocated to public activities, restoration of buildings connected with constitutional narratives or engaging the schools to numerous activities. The dominant words of that celebration were 'democracy', 'nation' and 'human rights'. It goes without saying that there had to be much asymmetry between the language of the research and that of the public celebration. This difference was however not that stark as one would have expected partly due to the fact that there are competing interpretations of constitutional history that became part of the public debates. There can be no doubt that the celebration indeed was a mass education.

One backdrop of teaching constitutional history is to emphasize other stories than the dominant one, usually the national narrative. One such counter story is the role of Sami in the Nordic history – that was hardly part of the 2014-celebrations. In 1978, the Norwegian Parliament decided to develop an immense area for hydropower which included an artificial lake that would cover Sámi villages in Finmark in north of Norway. This led to a popular movement that fought against the Norwegian state with legal, non-legal and even violent means. The protesters were removed with force, the case went to the Supreme Court that ruled in favour of the government, and eventually the power plant was built, albeit on a smaller scale than originally planned. During the 1970s many European countries had more severe problems of civil disobedience and terror action than this story shows. But to Norway it was significant, and it was an interesting blow to liberal image of Norwegian nationalism that actually had been strengthened during the debate on membership in European Union in 1972, a membership that was rejected by a majority. As Norway had been a stabile state since 1814 without any coup d'état and characterized by a distinct liberal nationalism since the latter part of the 19th century, this sudden eruption of ethnic violence and a new kind of nationalism, namely the Sami one, came as a shock. However, the events stimulated an interesting and politically loaded legal historical research that eventually contributed to a certain de-nationalization of the constitutional history. The legal-political movement was structured in favour of making the Sámi legal world more constitutionally autonomous and this resulted in a specific article in the Constitution and the establishment of a Sámi Parliament in 1987. Norway that had looked upon itself as morally quite impeccable without the burden of a colonial past suddenly discovered itself in that very role.

5. *Conclusion*

It is hard to differ between the activity of research and that of teaching the constitutional history. At the same time, knowing your target groups and understanding the audience enables one to be flexible both as to research and teaching. As we have seen, for the Nordic countries generally, there are no specific legal-constitution-

al tradition of constitutional history, with the possible exception of Norway. As I suggested in the introduction, the stability of the Nordic democracies and their tendencies to take their constitutions for granted, does not stimulate research or encourages the writing of specific historical narratives. Even though there is much to say in favor of constitutional history as an integrated part of the current constitutional law, as e.g. doctrinal history, contextual constitutional history seems to be the dominant model we ought to pursue. That history then connects to constitutional law, legal history, political science and historical scholarship. To produce a distinct constitutional history requires a contextual understanding of what constitution is in society and history. And what we learnt from Norwegian 2014-celebration is that targeting the nation with a history of the Norwegian constitution unleashed a broad conception of constitutional history enabling the audience to understand the significance of the constitution itself. To teach constitutional history for the law students in particular means not just to focus on the constitution, but equally on what this constitution has made possible in history and what it did not made possible. This may be generalized as constitutions must be viewed as a certain kind of autonomous normative phenomena in history that several disciplines may address for the benefit of both the public and politics.

[1] For this article I have carried out an informal survey addressed to a number of academic institutions for legal education in all Nordic countries.

[2] See here Jørn Øyrehagen Sunde (edited by), *Constitutionalism before 1789*, Oslo, Pax, 2014 for Nordic and European comparisons. For background, Anders Winroth, *The Conversion of Scandinavia*, New Haven & London, Yale University Press, 2012, esp. ch. 9-12.

[3] See in general H. Pihlajamäki, *Scandinavian Law in Early Modern Period*, in H. Pihlajamäki, M.D. Godfery, M. Dubber (edited by), *Oxford Handbook in European Legal History*, Oxford, Oxford University Press, 2018, pp. 806-829.

[4] A. Jackson, *United Kingdoms. Multinational Unions States in Europe and Beyond, 1800-1925*, Oxford, Oxford University Press, 2023, in particular pp. 102-121.

[5] See comparative analysis P. Ihalainen, *The Springs of Democracy: National and Transnational Debates on Constitutional Reform in the British, German, Swedish and Finnish Parliaments, 1917-1919*, Helsinki, Finnish Literature Society, 2017.

[6] The most in-depth general study is D. Grimm, H. Mohnhaupt, *Verfassung: Zur Geschichte des Begriff von der Antike bis zur Gegenwart*, Berlin, Duncker & Humblot, 2. Auflage 2002. For the Nordic, see further in E. Holmøyvik, *The Changing Meaning of 'Constitution' in Norwegian Constitutional History*, in K. Gammelgaard, E. Holmøyvik (edited by), *Writing Democracy: The Norwegian Constitution 1814-2014*, New York, Berghahn, 2014 pp. 43-59.

[7] H. Dippel, *Constitutions of the World from the late 18th Century to the Middle of the 19th Century*, München, K.G. Saur Verlag, 2005. See in the same series, T. Riis, S. Loebert, D. Michalsen, M. Isberg (edited by), *Constitutional Documents of Denmark, Norway and Sweden 1809-1849*, München, K.G. Saur Verlag, 2008 for which I rely.

[8] See for a general observation Z. Elkins, T. Ginsburg, *The Endurance of National Constitutions*, Cambridge, Cambridge University Press, 2009.

[9] See historical-analytically still A.D. Smith, *National Identity*, Harmondsworth, Penguin Books, 1991, ch 2-3 and as to law in Norway Michalsen, *Law, Legal Science and the Norwegian Society*, Oslo, IOR-skriftserie, 1998 pp. 117-144.

[10] See now N. Græger, R. Hemstad, P. Nedergaard, P. Stadius (edited by), *Handbook on Nordic Cooperation*, London, Edward Elgar Publishing, 2024.

[11] For the next two paragraphs, see Michalsen, *From Union Law to International Law? Reflections on the*

relationships between constitutions, international law, and legal internationalism, in K. Brathagen, H. Ikonomou, M. Rasmussen (edited by), *Nordic jurists and International law and politics 1880s-1970s*, London, Routledge, 2024.

[12] M. Jonas, *Scandinavia and the Great Powers in the First World War*, London, Bloomsbury Academic 2019, pp. 111-129.

[13] P. Salmon, *Scandinavia and the Great Powers 1890-1940*, Cambridge, Cambridge University Press, 1997, pp. 169-205.

[14] A. Kierulf, *Judicial Review in Norway. A Bicentennial Debate*, Cambridge, Cambridge University Press, 2018.

[15] Norwegian and Nordic perspectives, J. B. Henriksen, *The continuous process of recognition and implementation of the Sami people's right to self-determination*, in «Cambridge Review of International Affairs», 1, 2008, pp. 27-40.

[16] J- Nordin, *The Monarchy in the Swedish Age of Liberty, (1719-1772)*, in P. Ihalainen, M. Bregnsbo, K. Sennefelt, P. Winton (edited by), *Scandinavia in the Age of Revolution*, Farnham, Ashgate, 2011 pp. 29-40.

[17] M. Sunnqvist, *Konstitutionellt kritiskt dömande*, Stockholm, Institutet för rättshistorisk forskning, 2014, vol. II, p. 722.

[18] See in particular Ragnhildur Helgadóttir, *Iceland: Lawyers, Politics, and Liberalism*, in M. Feeley, M. Langford (edited by), *The Limits of the Legal Complex*, Oxford, Oxford University Press, 2021, pp. 235-261.

[19] See the most interesting book Ágúst þór Árnason/ Catherine Dupré (edited by), *Icelandic constitutional reform. People, processes, politics*, London, Routledge, 2020.

[20] H. Krunke, B. Thorarensen (edited by), *Nordic Constitutions. A Comparative and Contextual Study*, London, Bloomsbury Publishing, 2018, and in particular Feeley, Langford, *The Limits of the Legal Complex*, cit., 2021.

[21] T.H. Aschehoug, *Den nordiske Statsret*, Kjøbenhavn, Gyldendal, 1885.

[22] See Martin Sunnqvist, *Konstitutionellt kritiskt dömande*, cit.

[23] E. Holmøyvik, D. Michalsen, *Lærebok i forfatningshistorie* [Textbook on constitutional history], Oslo, Pax, 2015.

[24] On these and other aspects of 19th century histories of constitutions in several countries, see, K.L. Grotke, M.J. Prutsch (edited by), *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences*, Oxford, Oxford University Press, 2014, esp. Part IV.

[25] See M. Stolleis, *Verfassungs- und Verwaltungsgeschichte. Materialien, Methodik, Fragestellungen*, Berlin, de Gruyter GmbH, 2017, pp. 4-15.

[26] Martti Koskenniemi, *To the Uttermost Parts of the Earth. Legal Imagination and the International Power 1300-1870*, Cambridge, Cambridge University Press, 2021, ch 1, esp. pp. 4-12.

[27] For the next paragraph, see more extensive E. Holmøyvik/D. Michalsen, *Constitutional History*, in D. Law, M. Langford (edited by), *Research Methods in Constitutional Law: A Handbook*, London, Edward Elgar, 2024.

[28] For the following theme, se for the general approach, P. Boyer, J. V. Wertsch (edited by), *Memory in Mind and Culture*, Cambridge, Cambridge University Press, 2009; G. Elgenius, *Symbols of Nations and Nationalism. Celebrating nationhood*, London, Palgrave, 2011 and M. Nussbaum, *Political Emotions. Why Love Matters for Justice*, Cambridge MA, Harvard, 2013.

[29] It was sponsored by the Parliament ('Storting') with considerable funding. I must add that the present author took active part in this celebration, as researcher, communicator and organizer. One legal constitutional historical outcome, somewhat bending to doctrinal history, was O. Mestad, D. Michalsen (edited by). *Grunnloven. Historisk kommentarutgave 1814-2020* [A Historical Commentary to the Norwegian Constitution], Oslo, Universitetsforlaget, 2021. Research on the celebrations themselves, see O. Aagedal, P.K. Botvar, A. Brottveit (edited by), *Kunsten å jubilere. Grunnlovsfeiring og minnepolitikk* [The Art of Commemorating. Constitutional Celebration and Politics of Memory], Oslo, Pax, 2017.

[30] For what follows, see O. Mestad, "Noreg som grunnlovsland" [Norway as a country of constitution], in *Kunsten å jubilere*, cit., ch 12.

Teaching Constitutional History in Contemporary Romania

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Teaching Constitutional History in contemporary Romania seems to be a redundant and unwitting academic endeavour rather than a meaningful and purposive one. This is neither an accident nor a striking exception. Like the research and teaching of Legal History, the research and, especially, the teaching of Constitutional History are highly peripheral to the Romanian legal academic community. After the fall of communism, Legal History had a very small space in the Romanian legal scholarship dominated by legal practitioners. A strong academic pragmatism made of Legal History a Cinderella exiled in a dark and unhealthy back room. Unlike Legal History, there is no Romanian tradition of teaching Constitutional History as an autonomous academic discipline in Romanian universities (see *infra*). Nevertheless, the little interest in Legal History has inevitable negative consequences on Constitutional History's chances of growing as an academic subject of its own.

Unfortunately, in contemporary Romania there are no serious debates about the uses, misuses and purposes of Constitutional History, generally, and its teaching, particularly. This is why the theoretical-methodological inquiry proposed by the *Journal of Constitutional History* has not only a broader, comparative relevance but also it could be a starting point to a fruitful dialogue between Romanian legal scholars. Considering 'the silence' of the Romanian legal scholars about the pedagogical-methodological background of Romanian Constitutional History, I have tried to obtain some relevant answers in the frame of a survey I have conducted amongst the Romanian scholars/professors of Constitutional Law. Its qualitative (not quantitative) results are enshrined in the sections of this article.

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Who Teaches Constitutional History?

Constitutional history is not an autonomous academic discipline in contemporary Romania. Setting aside the courses of Romanian modern and contemporary political history taught in the Romanian faculties of history using particular methodological tools and aiming at specific educational purposes, Romanian constitutional history is regularly taught in the law faculties by professors of Legal History and Constitutional Law in the frame of their courses of Romanian Legal History and Constitutional Law. Nevertheless, a couple of courses specialized in [Romanian] constitutional history may be exceptionally discovered in the curricula of some political sciences and public administration departments[1], taught by historians of constitutional law.

Is There A Romanian Tradition of Teaching Constitutional History?

Unfortunately, there is no Romanian tradition of teaching constitutional history as an autonomous discipline, and there are small chances to see one developed in the next future. Instead, since the establishment of the modern Romanian universities in the mid-19th century, elements of foreign and Romanian constitutional history were taught by Romanian professors of Legal History[2] and Constitutional Law[3]. Strongly influenced by the French legal culture, they approached constitutional history like their French counterparts did. The Romanian Legal History professors during the communist period (1948-1989) naturally kept their interest in the Romanian modern constitutional history[4], while the textbooks of Constitutional Law approached only sporadically the Romanian pre-communist constitutional past when they did not wholly overlook it[5]. Instead, the latter were highly interested in the beginning and development of the socialist constitutions abroad and at home. After the fall of communism, the courses of Constitutional Law resumed the pre-communist interest in teaching constitutional history. Nevertheless, after 41 years of the communist regime, the French influence on Romanian legal scholarship diminished, and the Romanian interest in constitutional history is far from being as strong as the French one was in the last decades.

The Textbooks of Constitutional History

In the absence of any tradition of teaching constitutional history as an autonomous discipline, the textbooks of constitutional history are missing from contemporary Romanian legal-historical literature[6]. This gap is partially filled by the textbooks of Legal History and Constitutional Law. The former naturally integrate the Romanian constitutional evolution into the Romanian general legal history using typical periodisation. Following the French tradition, most of the latter reserve at least one chapter for the Romanian constitutional evolution[7]. Few others, interested in constitutional-institutional history, are making a short historical introduction to relevant institutions like the citizenship, the president (chief of state), the parliament, and the constitutional review[8]. The great majority of the authors of the Constitutional Law

textbooks in my survey emphasized that not only do they have no intention of eliminating the chapter reserved for constitutional history, but are planning to extend it in the next future. The textbooks of Constitutional Law manifesting no interest in constitutional history are pretty rare[9].

The Students of Constitutional History

Having said this, the students of Constitutional History in Romania are mainly undergraduate law students attending the courses of Legal History and Constitutional Law. Unfortunately, Legal History is merely optional in the curricula of many Romanian law faculties, so the number of its atendees is not very high. There are no courses in Constitutional History at the Master's and PhD levels in the law faculties.

Besides, much more intriguing is the silence of both Legal History and Constitutional Law textbooks about the purpose of teaching elements of Romanian constitutional history to law students. It is not clear why the latter should apprehend constitutional history. The Legal History textbooks usually make general references to the relevance of the discipline for understanding the dynamic of law in space and time[10], for discovering the roots of contemporary Romanian law and their continuity in time, for profiling the Romanian legal identity against its natural historical dimension[11] or they are simply emphasizing its educational, formative, role for the future legal professionals[12]. Exceptionally, some textbooks of Romanian Legal History expressly link the study of modern Romanian constitutional history to particular challenges of contemporaneity, i.e. the meeting of the Romanian constitutional traditions / identity with global constitutionalism; the management of the constitutional integration in the European Union[13].

Most Romanian Constitutional Law textbooks lack any clarification regarding the purposes of their historical chapter. It is not intelligible why undergraduate law students should learn about the succession of the legal acts that have constitutional value and constitutions in the Romanian past, about the evolution of some constitutional institutions or about different forms of government present in modern Romanian history. Rarely is only the informative purpose mentioned[14]. Even so, the lack of any substantial connection between the historical chapter and the other chapters analysing the general theory of constitutional law and the provisions of the constitution in force is obvious in almost all Constitutional Law textbooks. Strikingly, some textbooks interested in an institutional historical approach are not critically analysing the contemporary constitutional institution from a historical perspective. However, important counter-examples exist[15], even if the purpose of the historical analyses is not clearly stated.

The insulation of the historical chapters is even more puzzling in the Romanian Constitutional Law textbooks published after the amendment of the Romanian post-communist constitution. In 2003, Article 1, paragraph 3, of the 1991 Constitution was completed with several words that considerably changed its meaning. The old Article 1, paragraph 3 stating that

> Romania is a democratic and social state governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free devel-

opment of human personality, justice and political pluralism represent supreme values and shall be guaranteed

was amended as follows:

Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizen's rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values *in the spirit of the democratic traditions of the Romanian people* and the ideals of the Revolution of December 1989, and shall be guaranteed. [my emphasis]

It seems that the new provision reflected rather the irrational national pride of the Romanian legislators in the context of European integration than the sincere desire to make the Romanian constitution clearer[16]. However, some constitutional law scholars saw in the new provision a compulsory historical interpretation of the most important constitutional values enshrined in the Romanian constitution[17]. Remarkably, the great majority of the Romanian Constitutional Law textbooks not only ignore entirely any historical insight into the Romanian constitutional text but also do not mention at all the syntagm 'democratic traditions'. The Constitutional Law scholars are not interested in giving normative value to the new constitutional provision or in addressing the Romanian democratic traditions as a didactical exercise. Thus, teaching constitutional history becomes even more purposeless and the gap between the historical chapter and the rest of the Constitutional Law textbook is even more noticeable[18].

When questioned, the Romanian authors of Constitutional Law textbooks do not have a different and much more complex perspective. Understanding the influence of the past upon the present seems to be the major reason for teaching constitutional history, either to discover the Romanian constitutional evolution or traditions or to pinpoint the remnants of the past Romanian constitutions and possibly explain the reasons they are present in the post-communist one.

Chronology

Chronology is not a matter of particular debate and, even less, of dispute among the Romanian constitutional historians as long the Romanian constitutional timeline seems self-evident. The post-communist Romanian scholarship of Constitutional Law and Legal History inherited from the communist period the interest in establishing which legal act should bear the title of 'first Romanian constitution', i.e. the *Organic Regulations* imposed by the Russians in 1831-1832, the *Paris Convention of 1858* imposed by the European powers, the *Statute developing the Paris Convention* accorded by the Romanian authoritarian prince Al. I. Cuza at 1859 or the *Constitution of 1866*, the first one discussed and voted by a Romanian constituent assembly. A slide from the communist patriotic-nationalistic approach towards a 'scientific' critical one may be noticed right after the fall of communism. Still, this issue seems to be somewhat forgotten nowadays.

The birth of the Romanian written constitution and constitutionalism is considered a modern socio-politica and legal phenomenon with a certain impact upon contemporaneity. Most Romanian legal historians and Constitutional Law scholars

start their historical inquiry at the end of the 18th century and finish it with 'the constitutional moment' of 1989. 'Condemned' to periodisation, legal historians are more interested in positioning the major constitutional events in their specific social, political and economic contexts. Focused on the birth and consolidation of the Romanian national unitary state, they are placing the crucial external and internal political developments and their constitutional outcomes at the very core of the Romanian significant steps of legal development. Naturally, this periodisation is not unconditionally interested in making the succession of the forms of governments the core of Romanian legal history.

Regarding Constitutional Law courses, the chronological approach is much more diverse. To many professors of Constitutional Law, the historical chapter is only a positivist chronological accounting of the constitutional projects, constitutional acts and constitutions from the beginning of the 19th century until the fall of communism (1989). Few others are rather interested in focusing on the particular succession of the forms of government: i.e. the parliamentary democracy (1857-1938), the authoritarian regimes (1938-1944), and the communist totalitarian regime (1947-1989)[19].

Some Constitutional Law scholars are interested in discussing periodisation, but not without some degree of sophistication. The concept of 'constitutional cycle' was advanced[20] to overcome the simplistic positivistic accounting of the Romanian past constitutional projects and constitutions and crearly distinguish between the great historical cycles of Romanian history and constitutional history per se. This approach has the advantage of extracting the constitutional evolution from Romanian legal history, which is too inclined to confound itself with the periods/cycles of the Romanian general history. At the same time, it offers the Romanian constitutional history the attention and complexity it deserves. 'The constitutional cycles' are strongly related to the birth/making and death/abrogation of the constitutional customs and/or the constitutions, but they are much more. Besides the constitutional customs and texts, a constitutional cycle contains a specific ideology and constitutional institutions, specific constitutional values and principles, specific regulation/limitation of political power, a particular relationship between the state and its citizens, the whole bunch of social, economic and political relationships governed by the constitution, the subsequent legislation and case-law, the populace's attitudes and feeling towards the constitution. One may say a constitutional cycle has its 'spirit' of its own identity. The constitutional cycles are succeeding one after another in close relation to internal and external factors.

Several Romanian constitutional cycles have been established according to this approach: a multi-secular cycle based on the Romanian old constitutional customs, which lasted between the 14th and the end of the 18th century; next one, between 1831 and 1858, related to the Organic Regulations imposed by the Russian empire during the occupation of the Romanian Principalities of Moldova and Wallachia (1828-1834); the cycle of the Paris Convention (1858) followed until 1866; the Constitution of 1866, considered by many the first Romanian constitution stricto sensu, opened a long constitutional cycle replaced only at 1938 by a short one, linked to the Constitution

of 1938 and authoritarian ruling of the King Carol II (1938-1940); after a constitutional intermezzo (1944-1947), the Constitution of 1948 was the beginning point of the socialist/communist constitutional cycle (1948-1989)[21]. This kind of periodization does not simply equate the constitutional cycles with only one constitutional act or constitution; it makes a chronological arch over two or more constitutions sharing the same constitutional spirit, like in the case of the 1866 and 1923 liberal-democratic constitutions or the case of the communist constitutions of 1948, 1952 and 1965. Despite its epistemological advantages, this chronological approach lacks a clear reference point. By covering the medieval ages also, the term 'constitutional' becomes too fuzzy and it would need more clarification to not undermine the whole analytical background.

What does Constitutional History Teach and How?

The Romanian textbooks of Romanian Legal History and Constitutional Law mainly focus on constitutional texts, norms and institutions. Sometimes, constitutional values and principles are also considered. Basically, the professors of Legal History and Constitutional Law inform the law students about the succession in time of the constitutional projects and constitutions elaborated, respectively made and applied, in the Romanian state(s) either by external actors, like the European powers or by internal ones, i.e. the Romanian political elites.

In these circumstances, the methodological approach lacks any complexity. With scarce exceptions[22], it is a descriptive exercise. The structure of the constitutions, the human and citizen rights, the organization of political power (the separation of powers), the state organs, their composition, powers and relationships, constitutional principles like national sovereignty, representative government, the rule of law, governmental responsibility or judicial independence, sometimes the amendment procedure are usually described to the students. In too many cases, all these are not addressed against ideas like evolution, involution, modernization, and modernity. In other words, a properly speaking historical approach is missing. Some authors reference the previous constitutions while describing a particular one, but an overall analysis of the Romanian legal history's traits is regularly absent. Against this backdrop, there is no wonder a feeble interest exists in addressing the concept of 'democratic traditions' or constitutional traditions'.

The most obvious consequence of this very positivistic approach is the lack of interest in constitutional ideology, on the one hand, and constitutional practice, on the other hand. With few exceptions, the concept of constitution is not historically analysed against its ideological-theoretical background, either Romanian or foreign. Puzzling enough, the concepts of 'constitutionalism', 'liberal constitutionalism' and 'democratic-liberal' constitutionalism are not historically situated and explained to the students in the majority of the Constitutional Law textbooks, although the birth and evolution of the Romanian modern constitutionalism were situated at the crossroad of

many political-legal ideas. Modern Romanian constitutionalism began as a mixture of conservative-feudal, illuminist-rational and liberal influences. Political liberalism made its particular way through the Romanian political elites during the 19th century, but it was far from being the only ideological-theoretical approach. The ideas of French Caesarism were also present, influencing the authoritarian ruling of the Romanian princes. Besides, Herder strongly inspired the proponents of the Romanian conservatives and the birth of the strong Romanian ethnocentric constitutionalism. The interwar period also knew a variety of ideological currents, from liberalism to Legionarism, Orthodoxism and Fascism, all of which strongly impacted constitutional development. In turn, constitutional history during the communist-socialist period was not only a succession of constitutional texts but also a very important ideological swift that determined a specific architecture of constitutional institutions and principles. Only a few Legal History and Constitutional Law textbooks consider all these mainly superficially. Unfortunately, even Romanian scholars interested in constitutional cycles or the evolution of forms of government disregard the ideological background of Romanian constitutional history.

The other side of the positivistic approach to constitutional history is the lack of interest in constitutional practice. Many Romanian scholars consider describing the constitutional texts of the past sufficient for a general historical survey. Some professors of Constitutional Law blame the vast amount of information that must be processed and the lack of proper space in Constitutional Law textbooks for the past constitutional-political Romanian life. Regularly, the links between the constitutional ideology / aspirations, constitutional texts and constitutional practice are ignored, even if many Romanian scholars know the difference between the formal constitution and the material constitution. Even those interested in the Romanian constitutional history as a history of the forms of government are focusing on the provisions of the constitutional texts, not on the political realities.

Complex methodological approaches, like comparative constitutional history, are generally missing. Sometimes, a surface comparison of the past Romanian constitutional texts occurs to emphasize the constitutional changes. Another time, a normative-institutional comparison with the foreign constitutional texts is present, especially to establish foreign influences on the Romanian constitutions. Nevertheless, much more rewarding comparative methodological approaches are present. The foreign influences are analysed in the complex theoretical background of the constitutional transplants, whose effects on Romanian constitutions and society are discussed in broader social-cultural contexts[23].

My survey proves that the methodological paucity in the Constitutional Law textbooks differs from many Constitutional Law professors' actual perspectives. Some of them agree that the brief description of the past legal acts bearing constitutional value and constitutions is sufficient for their didactical purposes. Many others instead have a much more complex view, even if they do not use it in their textbooks. Thus, they agree that teaching Constitutional History needs a much more exhaustive approach, capable of explaining the making of the constitutions in (geo)politi-

cal, social, economic, and cultural contexts and emphasizing the role and effects of the constitutional transplants. Moreover, they agree that Romanian political life should be clearly considered, in addition to the constitutional texts, and a critical assessment of the gap between the constitutional goals and constitutional realities should be envisaged.

Conclusions: What Future for the Teaching of Constitutional History in Romania?

The future of teaching Constitutional History in Romania depends, most and foremost, on its degree of autonomy over other academic disciplines. The courses in Legal History and Constitutional Law could do an excellent job of promoting the teaching of constitutional history, but they have inner limits. Their primary focus is on the constitutional norms and institutions in force, so they never will become a complex didactical platform for teaching the Romanian constitutional evolution. Some Constitutional Law professors are advocating the introduction of optional Romanian Constitutional History courses in the academic (undergraduate) curricula, but there seems to be a real gap between intentions and reality. The very positivistic mentality in Romanian legal research and teaching hardly makes room for effective changes in the next future.

Nevertheless, autonomous or not, the teaching of Constitutional History in Romania is unlikely to have a complex didactical impact in the future without methodological recalibration and clarification of its goals. If the primary purpose of Romanian legal historians and constitutional law scholars is to inform law students about the succession in time of some particular constitutional acts/constitutions, constitutional norms and institutions, the teaching of Constitutional History will remain a simple record of the past. The following teaching topics and approaches may be considered:

a. As D. Baranger correctly puts it[24], the constitutions are not simply about legal norms and institutions, they are (also) about political power. The students of Romanian Constitutional History should be aware that the encounter between the constitutional provisions and day-to-day politics may follow unpredictable paths and have undesired outcomes. Everywhere history has witnessed a gap between the founders' constitutional projections and goals and constitutional-political realities, and Romania is no exception. On the contrary, the particular cultural, religious, (geo) political, economic and social contexts usually turned every democratic-liberal constitutional experiment into an authoritarian nightmare. Beyond the hopes related to the values and principles of the liberal-democratic constitutionalism and their institutional constitutional expression, the Romanian constitutional history was, de facto or de jure, a succession of more or less authoritarian regimes backed by powerful heads of state: the Russians imposed at 1831-1832 (the Organic Regulations) a type of 'monarchical constitutionalism' that succeeded only to give modern written shapes to the Phanariot despotism of the 18th century; the Paris Convention of 1858 introduced an authoritarian regime with a powerful prince by mixing provisions of the Organic Regulations and the Frech authoritarian Constitution of 1852; at 1864, Prince

Al. I. Cuza accorded the Statute developing the Paris Convention and turned its reign into a copycat of the Napoleon III's authoritarian regime; the Constitutions of 1866 and 1923 should have been an institutional platform for liberal-democracy and human rights; instead the prince (king since 1883) Carol I (1866-1914) proved to be a benign manager of the Romanian political systemic authoritarianism, while the King Carol II (1930-1940) was a malign one; the Romanian liberal-democratic constitutionalism actually died long before the same King Carol II gave its coup and accorded, at 1938, his authoritarian constitution; his abdication made room for worse – during the Second Word War the Machall I. Antonescu, formally proclaimed 'the Leader of the state', abrogated the Constitution of 1938 and ruled arbitrarily by decrees-laws; the communist constitutions of 1948, 1952 and 1965 were supposed to launch and consolidate the working people's democracy; instead they were only a formal shield for the authoritarian ruling of general-secretary Gheorghe Gheorghiu-Dej (1948-1965) and the dictatorial (or sultanistic) ruling of the president Nicolae Ceaușescu (1965-1989)[25]. Only a textual-normative historical record of the Romanian past constitutions offers law students a completely distorted perspective. A country with such a bad political-constitutional record should teach its law students what exactly authoritarianism was in the past, which were its external and internal triggers and its political consequences in the Romanian society, e.g. above all, the political corruption, extreme parliamentary instability, and the pauperization of the population invariably favoured the Romanian head of state's authoritarianism.

b. The professors of Constitutional Law (especially) should address the concept of 'democratic traditions' or 'constitutional traditions' in the classrooms and their textbooks, but they should do so critically. If the constitutional syntagm 'the democratic traditions of the Romanian people' must have a normative value, establishing the past most cherished constitutional values, principles, and institutions would be necessary. Stricto sensu, it would be essential to recover the ideological and institutional background underpinning the Romanian past sense of 'democracy' or 'representative government'. Building contemporary democracy on acknowledged 'traditions' could be very motivational in the eyes of Romanian law students. However, some should avoid transforming the quest for 'the democratic traditions' into a chase for constitutional myths, no matter how useful they could be. For example, right after the fall of communism, the interwar period and the Constitution of 1923 have been considered 'the golden age' of the Romanian liberal democracy. This approach filled the identitarian axiological void and encouraged the post-communist transition towards democracy and the rule of law. Many acknowledge today that the Romanian interwar period was far from any idea of a functional democracy. The teaching of constitutional history should assume its critical function by returning to the past's political realities. Since the 1830s, when a primitive form of parliamentarianism was launched in the Romanian principalities of Wallachia and Moldova, the Romanians almost never had free elections and truly representative assemblies / parliaments. During the era of the Organic Regulations the princes succeeded in controlling the

elections to the unicameral parliaments by using the old feudal networks of solidarity, force and fear; the reign of Prince Al. I. Cuza (1859-1866) launched the complete control of the parliamentary elections using the local public administration; after 1866 was installed, with the direct involvement of the prince/king Carol I, the so-called 'governmental rotative', i.e. the rotation to the government of the two official political parties, Liberal and Conservative; each new government organized new parliamentary elections to provide a more than comfortable pro-governmental parliamentary majority by manipulation, fraud and fear; 'the governmental rotative' worked very well also in the interwar period, despite the multi-party system; during the communist period, the elections at all levels were strictly controlled by the Communist Party. All these negative records put the idea of 'the democratic traditions' into a different perspective. It could turn into a reversed projection of a different political future in Romania. The Romanian law students may understand that there are no democratic traditions to be continued, only their duty to launch a post-communist one.

c. Discussing the Romanian 'democratic traditions' should encourage the professors of Legal History and, especially, the professors of Constitutional Law to address a very challenging and fashionable topic: the Romanian constitutional identity. As everyone knows, the discussion burst years ago in the frame of European constitutional integration. Nevertheless, it is a perfect matter to approach in the Constitutional Law classrooms and a clear incentive to try contributing to this hot issue: what exactly does the Romanian constitutional identity mean? From my point of view, this question cannot be answered using only a positivistic approach. Constitutional identity cannot be grasped without historical insight. The Romanian constitutional concept of 'democratic traditions' makes an identitarian standpoint and must be handled appropriately. In its turn, the so-called eternity clause enshrined in Article 152 of the 1991 (2003) Constitution cannot be understood outside history. The historical approach is much better positioned to identify and explain the constitutional markers of the Romanian constitutional identity. Article 152 says

> 1. The provisions of the present Constitution concerning the national, independent, unitary, and indivisible character of the Romanian state, the Republic as the form of government, territorial integrity, the independence of the judicial system, political pluralism, and the official language may not be the object of a constitutional amendment.
> 2. Similarly, no amendment shall be adopted if it would result in the elimination of citizens' fundamental rights and freedoms or of their guarantees.

Only from a historical perspective can Romanian law students discover and understand the bipolar character of the Romanian constitutional identity. The independence of the judicial system, political pluralism and human rights are elements of the Eurocentric liberal-democratic pole of the Romanian constitutional identity, while the national and unitary character of the state, the territorial integrity, the Romanian as an official language are elements of the ethnocentric illiberal pole of the Romanian constitutional identity. Both poles were born in the 19th century as complementary and, at the same time, conflicting parts of the Romanian constitutional identity. The Eurocentric identitarian pole always tried

to neutralize the ethnocentric pole somehow but never succeeded. The professors of Romanian Constitutional Law are teaching about the civic spirit of the Romanian 1991 Constitution. However, this is not entirely true. The post-communist constitution has a dominant ethnocentric ethos but cannot be detected and explained outside constitutional history[26].

d. Having said all these, it is essential to understand why the teaching of constitutional history must suffer a radical methodological turn. The positivistic description of the past constitutions is totally counterproductive; they merely notify the Romanian law students about the existence of some constitutional texts in the Romanian constitutional past. The focus on constitutional ideology and practice could be completed by methodological approaches borrowed from constitutional comparative history.

Overall, the comparison may highlight how peculiar Romanian constitutional history is, e.g. how far the Romanian so-called democratic traditions differ from the liberal-democratic constitutionalism embraced and practised by other European societies in the 19th and 20th centuries. A more sophisticated methodological approach centred on constitutional culture may help law students understand the relationship between culture and tradition. After all, the Romanian Constitution itself is 'speaking' about 'the spirit' of the Romanian democratic traditions. The students may assess in what measure the appetite for authoritarianism is consubstantial to the Romanian constitutional culture. The same 'culturalist' approach may emphasize the great difficulty of eradicating or, at least, taming the Romanian constitutional xenophobia and ethnocentrism.

Against the same backdrop, law students could discover that Romanians have an 'importing mentality' that has developed over the centuries. The constitutional text of 1991 and many other important codes and laws were made by importing / borrowing / transplanting from prestigious constitutional / legal models. Accordingly, 'the legal transplant' methodological approach would be more than helpful in understanding the origin of the Romanian constitutional texts and the effects of these constitutional transplants on Romanian society. The Organic Regulations (1831-1832) were imposed by the Russians but inspired by the French Constitutional Charter of 1814; the Paris Convention of 1858 was imposed by the European Powers but inspired by the French Constitution of 1852; Cuza's Statute developing the Paris Convention (1864) heavily borrowed from the same 1852 French Constitution; the fathers of the 1866 Constitutions were accused of having faithfully imitated the Belgian Constitution of 1831, while the Constitution of 1923 was a modified copy of the previous one; the authoritarian Constitution of 1938 accorded by Carol II was inspired by the constitutional reforms of Benito Mussolini, and the Romanian communist constitutions of 1948, 1952 and 1965 were strongly inspired by the Soviet Constitution of 1936. The Romanian constitutions, either imposed from abroad or fabricated by the political elites, were always applied top-to-bottom in inappropriate social and cultural contexts. The constitutional values and institutions have become merely 'forms' incapable of changing the Romanian (cultural) substance. The Romanian theory of 'forms without substance' developed in the second half of the 19th century and the beginning

of the 20th century clearly emphasized the negative effects of this cultural inadequacy. Law students may debate on what measure the failure of the Romanian liberal democracy at the end of the 1930s resulted from this unfitness between the borrowed Western constitutional values and institutions and the peculiar Romanian (constitutional) culture. More probable than not, the proponents of the theory of forms without substance are making clear to the Romanian law students that constitutional borrowing is possible and desirable but only in a rational manner, i.e. when necessary, from the suitable constitutional model, in the correct quantity, using the most adequate mechanisms and considering the local cultural context.

[1] An elective course of *History of the Constitution* is taught at Lucian Blaga University of Sibiu, department of Public Administration, while an elective course of *Romanian Constitutionalism* is taught at the political sciences department of the Bucharest University.

[2] See, for example, V. Onișor, *Curs de istoria dreptului român*, Cluj, 1921; I. Peretz, *Curs de istoria dreptului român*, București, 1926-1931, volumes 1-4.

[3] See, for example, C.G. Dissescu, *Cursul de drept public roman*, București, 1890-1891, volumes 1-3; P. Negulescu, *Curs de drept constituțional*, București, 1927.

[4] See P. Gogeanu, *Istoria dreptului românesc*, București, 1985, pp. 84-87; 119-127; 211-218.

[5] T. Drăganu, in his textbook of Constitutional Law published in 1972 (București, Editura Didactică și Pedagogică), is incapsulating the whole Romanian pre-communist constitutional evolution in only one paragraph (p. 56-57). At his turn, N. Prisca, the reputed professor of Constitutional Law at the University of Bucharest, completely disregarded the pre-communist Romanian constitutional evolutions in his Constitutional Law textbook published in 1977 (București, Editura Didactică și Pedagogică).

[6] I. Stanomir's book *Libertate, Lege și Drept. O istorie a constituționalismului românesc*, Iași, Polirom, 2005, may be a noticeable exception, but it is rather structured and written as a monograph.

[7] See, for example, T. Drăganu, *Drept constitutional și instituții politice*, București, Lumina Lex, 1998, vol. I, pp. 390-406; M. Bădescu, *Drept constituțional și instituții politice*, București, Lumina Lex, 2001, pp. 27-42; I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice*, XIth edition, București, Editura All Beck, 2003, vol.I, pp. 81-98; M. Balan, *Drept constituțional și instituții politice. Vol. 1: Teoria generală a statului și a constituției. Constituția română în context european*, București, Editura Hamangiu, 2015, pp. 197-270; Șt. Deaconu, *Drept constituțional*, 4th edition, București, Editura C.H. Beck, 2020, pp. 82-99; M. Safta, *Drept constituțional și instituții politice*, Vol. I. *Teoria generală a dreptului constituțional. Drepturi și libertăți*, Ediția a 8-a, revizuită, București, Editura Hamangiu, 2023, pp. 156-171.

[8] C. Gilia, *Manual de drept constituțional și instituții politice. Sistemul constituțional românesc*, București, Editura Hamangiu, 2010, pp. 3ff, 21ff, 164ff, 245ff; D.C. Dănișor, *Modernitate, liberalism și drepturile omului. Drept constituțional și instituții politice*, Editura Simbol, Craiova, 2017, vol. 1, para. 302 ff.

[9] See M. Criste, *Dreptul constituțional, un drept al statului*, București, Universul Juridic, 2017.

[10] Cernea and Molcuț, cit., p. 5; L.P. Marcu, *Istoria dreptului românesc*, București, Lumina Lex, 1997, p. 3.

[11] See D.V. Firoiu, *Istoria statului și dreptului românesc*, vol. I, Cluj-Napoca, Editura Argonaut, 1998, p. 9; V. Hanga, *Istoria dreptului românesc – dreptul cutumiar*, Iași, Editura Fundației Chemarea, 1993, p. 5.

[12] I. Vasiu, *Istoria vechiului drept românesc*, Cluj-Napoca, 1997, pp. 6-7; C. Dariescu, *Istoria statului și dreptului românesc din antichitate până la Marea Unire*, București, Editura C.H. Beck, 2008, p. XVI.

[13] See M. Guțan, *Istoria dreptului românesc*, ediția 3, București, Editura Hamangiu, 2017, p. 3.

[14] C. Ionescu, *Teoria general a dreptului constitutional, Drept constitutional și instituții politice*, București,

Editura Hamangiu, 2017, pp. 323-324.

[15] See Dănișor, *Modernitate, liberalism* cit.

[16] See M. Guțan, *The Weaknesses of the Romanian Constitutional Tradition or a Constitutional Present in Quest for a Constitutional Past*, in «Romanian Journal of Comparative Law», n. 5 (2), 2014, pp. 281-298.

[17] Dănișor, cit., para. 559 ff.

[18] I must mention that my investigation is strictly limited to the Constitutional Law textbooks; I do not have information about the lectures per se, or about the applicative courses (the seminars).

[19] Balan, *Drept constituțional și instituții politice* cit., p. 215-282.

[20] See C. Ionescu, *Drept constituțional și instituții politice*, ediția 2, București, Editura All Beck, 2004, pp. 300-304; Ionescu, *Teoria general a dreptului constitutional* cit., pp. 328-332.

[21] Ionescu, *Drept constitutional* cit., p. 303.

[22] See Guțan, *Istoria* cit., pp. 222 ff.; B. Selejan-Guțan, M. Guțan, *Drept constituțional și instituții politice*, vol. 1, ediția a 4-a, București, Editura Hamangiu, 2020, pp. 60-110.

[23] See Selejan-Guțan, M. Guțan, *Drept constituțional* cit., pp. 53-59.

[24] D. Baranger, *L'histoire constitutionnelle et la science du droit constitutionnel*, in C.M. Herrera, A. le Pillouer (sous la direction de), *Comment écrit-on l'histoire constitutionnelle?*, Paris, Editions Kimé, 2012, pp. 117-118.

[25] See, for details, M. Guțan, O. Rizescu, B. Iancu, C. Cercel, B. Dima, *Șefii de stat: dinamica autoritară a puterii politice în istoria constituțională românească*, București, Universul Juridic, 2020.

[26] See, for details, M. Guțan, *Romanian Constitutional Identity in Historical Context*, in L. Csink, L. Trócsányi (eds.), *Comparative Constitutionalism in Central Europe*, Miskolc-Budapest, Central European Academic Publishing, 2022, pp. 109-128.

Two Centuries and Counting: The Study of the United States Constitution

JACK N. RAKOVE

1. *Introduction*

The historical study of the United States Constitution forms a vast and ever-swelling field of inquiry. Its appeal does not depend on the importance that departments of history have placed on it. Constitutional history is one of those old-fashioned fields that seem less engaging than many of the other "new histories" that have flourished since the 1960s. Yet in institutions where it is taught, it proves a popular subject. Some of that popularity reflects the importance that prospective law students ascribe to it. In the United States, constitutional law marks the *summa theologica* of legal thinking, and any undergraduate contemplating a legal career would find constitutional history naturally attractive. It also matters that constitutional controversies permeate ordinary political disputes. Thinking politically in the United States, often means thinking constitutionally. The active practice of constitutional law is often a continuation of politics by other means.

The framework of this history in turn begins with the two great Founding moments of the 1780s and 1860s. The first of these moments brought the framing, ratification, and amendment of the Federal Constitution; the second produced the three Reconstruction amendments that abolished chattel slavery, established a federal basis for protecting individual rights within the states, and extended the suffrage to African Americans. This was constitutional politics in the highest sense of the term.

But politics and the Constitution have been intertwined at many other moments, from the disputes that led to the formation of the first political parties in the 1790s to the two impeachments of President Donald Trump in 2020 and 2021. Nearly all the great dramas of American political history have profound constitutional origins and implications. Equally important, the origins of most of the leading cases of constitutional law are largely political in nature: they represent strategic choices made by interests or individuals seeking to pursue their

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political objectives by judicial means. The most celebrated examples of this phenomenon would involve the litigation strategy of the National Association for the Advancement of Colored People (NAACP), which ultimately led to the landmark decision in *Brown v. Board of Education* (1954), and the comparable efforts of the pro-life coalition to reverse the Supreme Court's 1973 decision upholding the right to abortion. But countless other cases illustrate the same point. As Alexis de Tocqueville famously observed in *Democracy in America*, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."

Tocqueville's oft-quoted comment implies that constitutional history should be deeply concerned with the reasoning of justices and judges. That is true but – from the perspective of working historians – only up to a point. *Decisions* certainly matter a great deal; the *opinions* ostensibly sustaining them, not so much. Within the ambit of the law schools, these opinions become objects of close study. Collectively they form the interpretive doctrines that shape how the institutions of government operate. Individually they also identify points and arguments that particular interests might wish to challenge and overturn. But from the historians' vantage point, what needs explanation are the origins and consequences of particular decisions.

A different context emerges when one asks how constitutional history relates to the discipline of political science. There the conventional wisdom holds that the United States is still governed under a Madisonian constitution. That proposition rests on the importance that scholars have long ascribed to James Madison's contributions to *The Federalist*, the collection of eighty-five essays that Madison, Alexander Hamilton, and John Jay, under the penname Publius, wrote in support of the ratification of the Constitution in 1787-1788. Hamilton was the originator and main author of *The Federalist*, writing fifty-one essays to Madison's twenty-nine and Jay's five. Yet while Hamilton's essays on the presidency and the judiciary influence modern understanding of the origins of those two institutions, scholars treat Madison's essays on the extended republic and separation of powers – especially *Federalist* 10 and 51 – as the best statement of the underlying theory of the Constitution[1].

The work that constitutional historians do might thus be said to complement the distinct agenda of legal scholars and political scientists. Again, that seems to be true, but only up to a point. Historians are not theorists. They have no interest in fashioning legal doctrines or testing general models of political behavior. More important, the nature of their research, with its emphasis on the granularity of primary sources and the diversity of viewpoints present at any moment, is more likely to produce critical assessments of the findings of scholars in other disciplines. In contemporary scholarship, this is particularly the case when judges and legal scholars advance the *originalist* theory of constitutional interpretation, which holds that the meaning of the text was *fixed* at the moment of its adoption, or when political scientists reduce the meaning of the Constitution to the familiar propositions advanced by Madison, without considering the much broader array of concepts associated with the political arguments of the revolutionary era.

Within the matrix of American constitutional studies, then, historians serve two primary functions. Their first and more important task is to explain the origins and causes of phenomena, from the great formative moments of the Revolution and Civil War, to the movements that led to other constitutional amendments and landmark judicial decisions, and to the ways in which bold individuals, multiple interest groups, and social movements regularly pursued their political ends through constitutional means. Second, in examining these problems, historians can cast a critical and sometimes skeptical light on the theorizing work of other disciplines, whether this takes the form of fashioning judicial doctrines or devising explanatory models of political behavior.

With these preliminary points in mind, then, let us examine in greater detail the questions before us. In pursuing these matters, I will draw upon four decades of teaching constitutional history at Stanford University. That began in the early 1980s, when I taught an introductory seminar on the drafting of the Federal Constitution, while I was also writing *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996). After that book appeared, I began giving a lecture course on The Constitution and Race, which evolved into The Constitution: A Brief History. I also taught a seminar on a variety of Topics in Constitutional History. These were all one-term courses taught on a quarter system, which makes the working historian mindful of the wisdom of the "less is more" principle of modern architecture. But one advantage of teaching a survey of this kind to undergraduates is that it encourages the professor to think about the overall framework of the subject. That is what the rest of this essay will attempt to summarize.

2. *Founding Moments*

The United States has had two founding moments, and how we conceive their origins and consequences, and the relation between them, sets much of the framework for any overarching interpretation of its constitutional history. The first moment covers the rough quarter century of the Revolutionary era, from the initial imperial controversy of 1764-1766, through the crisis of independence and the adoption of the first state constitutions (1774-1777), to the adoption of the Federal Constitution and its first amendments (1787-1791). An underlying continuity of issues gives intellectual coherence to this entire period. Questions about political representation, the sources of sovereignty, restraints on executive power, the identification and protection of fundamental rights, and the very nature of a constitution were raised, disputed, and revised throughout this period. When one studies the climactic debates of the late 1780s, one sees how the questions raised and the solutions reached culminated questions first raised with the Stamp Act crisis of 1765-1766. Equally important, from the complementary vantage points of scholarship and pedagogy, the evidentiary record of these debates and controversies is readily available and widely accessible in a vast array of primary sources, many of which have been scrupulously edited by skilled platoons of documentary editors. Then, too, a scholarly and popular fascination with the Revolution's leaders has led

to whole-life publication of their personal papers, the letters they received as well as sent. No other nation has been more deeply invested in its founding moment than the United States[2].

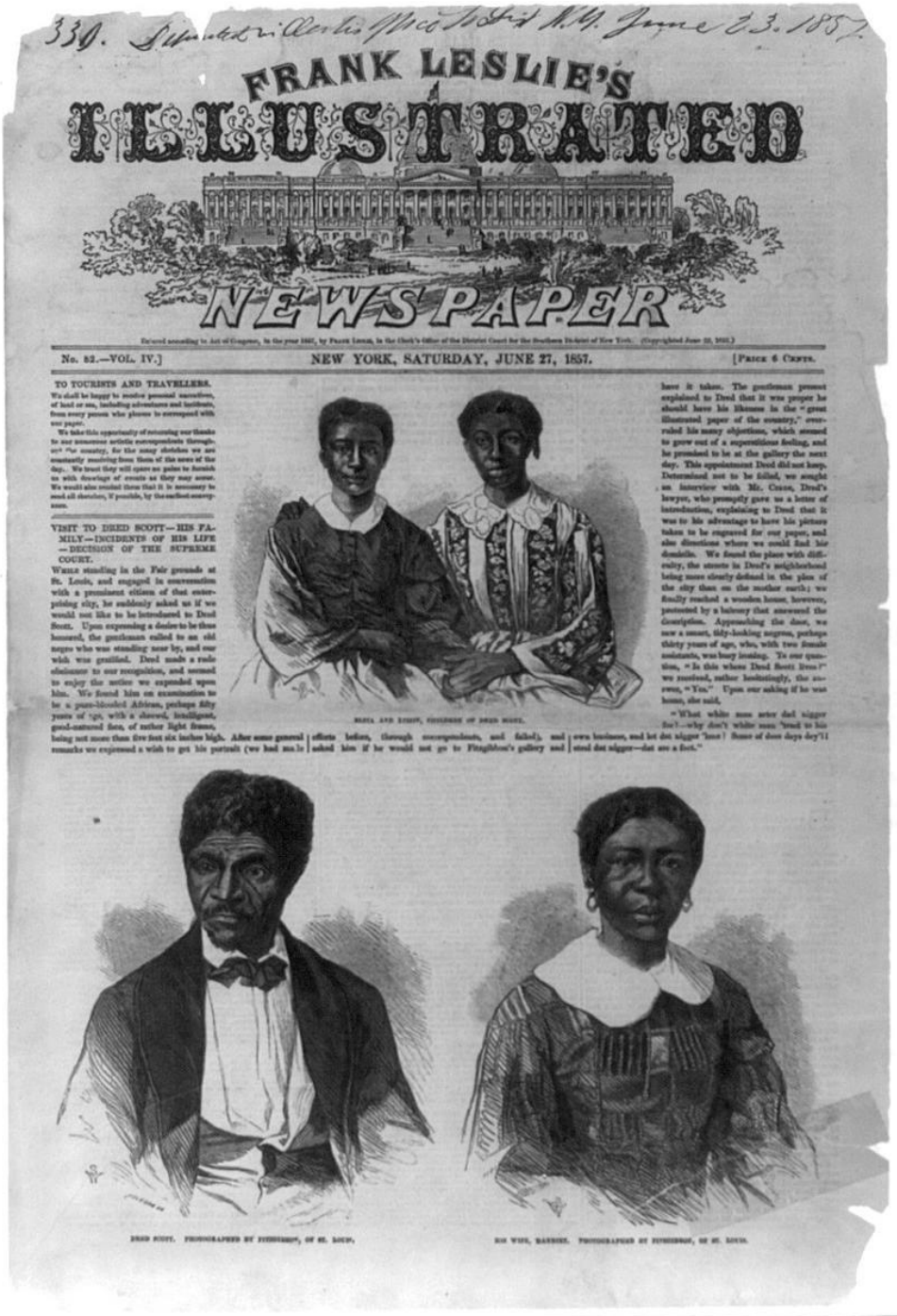
These factors give the study of Revolutionary-era constitutionalism a remarkable depth, focus, and coherence. By contrast, explaining the Second Founding (1865-1870), in either scholarship or pedagogy, poses a more difficult task. Its periodization is no simple matter, nor can one tidily identify a handful of critical moments that capture its dynamics. Where the chronological boundaries of revolutionary constitutionalism can be tightly drawn, the Second Founding requires one to roam more broadly and imaginatively. To think systematically about the origins and consequences of this event, scholars need to go as far back as the Missouri controversy of 1819-1821 and as far forward as the *Plessy v. Ferguson* decision of 1896, which effectively authorized the Jim Crow regime of racial segregation and white supremacy.

To make sense of these four-score years of American constitutional history, then, one needs to incorporate at least these eight categories of analysis.

First, in the realm of high politics, one must begin with the three ante bellum crises that exposed the inherent volatility of sectional politics: the Missouri Crisis of 1819-1821; the Nullification Crisis of the early 1830s; and the Compromise of 1850, the aftermath of the war with Mexico. These episodes illustrate the normative importance of compromise in national politics, a norm that ostensibly originated in the two compromises over representation at the Federal Convention in 1787. The presidential election of 1860 destroyed the efficacy of that norm. The crucial explanatory problem here involves asking why leaders of the Confederate states, driven by the passions of their constituents, treated a single election as a sufficient justification for secession. That perception in turn leads us to view the prior compromises suspiciously, looking for the weak points that portended later and ultimately insuperable difficulties.

Second, this impetus to compromise reflected the stake that political parties had in preserving the Union. Since the 1960s, scholars long emphasized the role of *party systems* in stabilizing American politics. In this view, the structural separation of powers embedded in the Constitution virtually required the invention of political parties for national governance to prove effective. There had been, political scientists held, three party systems in the post-Revolutionary United States: the Federalist and Republican parties during the quarter century after the adoption of the Constitution; the Democratic-Republican and Whig parties that emerged after 1832; and, following the collapse of the Whig party in 1851, the fractious Democratic and newborn Republican parties that contested the election of 1860.

The idea of party systems proved attractive to political scientists and some historians because it provided a framework for analyzing the structure of American politics over different periods and for identifying the functions that organized parties can pursue[3]. One of these functions was to produce coalitions that could govern nationally, and because capturing the presidency was essential to controlling the national government, parties had to strive to form interstate links. Had the framers of the Constitution adopted a parliamentary



FRANK LESLIE'S
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TO TOURISTS AND TRAVELLERS.

We shall be happy to receive personal narratives, of land or sea, including adventures and incidents, from every person who chooses to correspond with our paper.

We take this opportunity of returning our thanks to our numerous artistic correspondents throughout the country, for the many sketches we are constantly receiving from them of the news of the day. We trust they will spare no pains to furnish us with drawings of events as they may occur. We would also remind them that it is necessary to send all sketches, if possible, by the earliest conveyance.

VISIT TO DRED SCOTT—HIS FAMILY—INCIDENTS OF HIS LIFE—DECISION OF THE SUPREME COURT.

WHILE strolling in the Fair grounds at St. Louis, and engaged in conversation with a prominent citizen of that enterprising city, he suddenly asked us if we would not like to be introduced to Dred Scott. Upon expressing a desire to be thus honored, the gentleman called to an old negro who was standing near by, and our wish was gratified. Dred made a rude obeisance to our recognition, and seemed to enjoy the notice we expended upon him. We found him on examination to be a pure-blooded African, perhaps fifty years of age, with a shrewd, intelligent, good-natured face, of rather light frame, being not more than five feet six inches high. After some general remarks we expressed a wish to get his portrait (we had made

efforts before, through correspondents, and failed), and asked him if he would not go to Fitzgibbon's gallery and have it taken. The gentleman present explained to Dred that it was proper he should have his likeness in the "great illustrated paper of the country," overruled his many objections, which seemed to grow out of a superstitious feeling, and he promised to be at the gallery the next day. This appointment Dred did not keep. Determined not to be foiled, we sought an interview with Mr. Cross, Dred's lawyer, who promptly gave us a letter of introduction, explaining to Dred that it was to his advantage to have his picture taken to be engraved for our paper, and also directions where we could find his domicile. We found the place with difficulty, the streets in Dred's neighborhood being more closely defined in the plan of the city than on the mother earth; we finally reached a wooden house, however, protected by a balcony that answered the description. Approaching the door, we saw a smart, tidy-looking negress, perhaps thirty years of age, who, with two female assistants, was busy ironing. To our question, "Is this where Dred Scott lives?" we received, rather hesitatingly, the answer, "Yes." Upon our asking if he was home, she said,

"What white man arter dat nigger for?—why don't white man 'tend to his own business, and let dat nigger 'lone? Some of dese days dey'll steal dat nigger—dat are a fact."

MARIA AND EMILY, CHILDREN OF DRED SCOTT.

DRED SCOTT. PHOTOGRAPHED BY FITZGIBBON, OF ST. LOUIS.

HIS WIFE, HARRIET. PHOTOGRAPHED BY FITZGIBBON, OF ST. LOUIS.

Visit to Dred Scott - his family - incidents of his life - decision of the Supreme Court, *in Frank Leslie's Illustrated Newspaper (1857 June 27)*

model akin to the British system, a multiple party system could well have evolved. But they had other ideas.

The concept of party systems has recently been attacked, however, for two sets of reasons. First, many historians now believe that parties were far more fluid, unstable, and subject to rapid formation and dissolution, than the party system model suggests. The idea that highly organized national party competition was replicated at the lower levels of governance seems delusional. Second, a framework focusing on electoral competition will necessarily emphasize the importance of mobilizing a white male electorate and make the winning of elections the primary goal of political activity. But such an emphasis will neglect the political activities of the formally disenfranchised, who looked for other mechanisms than elections to influence public debate and raise social issues[4].

That realization leads, *third*, to understanding the importance of social movements to constitutional politics. The reforms antebellum Americans favored pursued diverse objectives. The temperance movement sought to cure the measurable surge in alcohol consumption that emerged after the Revolution. Militant Protestants opposed the decision of the Jeffersonian Republicans to allow postal service on Sundays, a moral evil that threatened the solemn practice of the Christian sabbath. Most important, the antislavery movement generated the most volatile issue in American politics, focusing first on ending the slave trade and then on abolishing slavery itself. This was an issue that political parties desperately wished to repress, but which citizens and voluntary associations insisted on addressing.

The emergence of these social movements transformed American politics in two major ways. Petitioning had long been the device that individuals, communities, and special interests had used to submit their requests and grievances to public authorities. But in post-Revolutionary America, petitioning became a mechanism for collective protest and a vehicle for mobilizing and enlarging the number of supporters attached to particular causes. Second, petitioning was inherently democratic because it was not restricted by the limitations that gender and (to a lesser extent) property imposed on the exercise of the franchise. Women could petition as well as men or join associations that advanced the causes they favored. So could African Americans and members of radical religious groups. Indeed, to a significant extent, women and African Americans formed the voluntary associations that dominated antislavery agitation, offering an alternative to the male world of electoral politics but also an incentive to society more generally to take this great question seriously[5].

This is a form of what scholars call "popular constitutionalism," a term that can mean either that political coalitions openly campaigned on constitutional claims or, alternatively, that the people at large found innovative ways to advance their positions. Yet within the framework of governance, another path lay open: constitutional litigation. This is the *fourth* and most familiar category of analysis, the one that represents the dominant concern of American constitutional scholarship. In the period between 1840 and the close of the nineteenth century, six decisions lay atop the list of legally significant cases. Two preceded the Civil War: *Prigg v. Pennsylvania* (1842), and, more

momentously, *Dred Scott v. Sandford* (1857); and four later decisions, beginning with the *Slaughterhouse* case (1873) and ending with *Plessy v. Ferguson* (1896), which worked out the implications of the three Reconstruction-era amendments. (This second set of cases will be discussed later.)

Prigg dealt with a sensitive issue that had a massive impact in free and slave states alike. Article IV of the Constitution gave owners a legal right to recover slaves who fled to free territory. But how that right would be enforced, and whether northern officials or citizens were obliged to assist the recapture of fugitive slaves, were delicate questions. As antislavery feelings expanded in the North, legitimate questions could be raised about the due process rights of the accused fugitives, reinforced by qualms over seeing individuals they knew being legally kidnapped into slavery. In the South, however, any resistance to enforcing the Fugitive Slave Act of 1793 was perceived as an insult to their owners' property rights. In *Prigg*, the Supreme Court affirmed owners' legal right of recapture, but it imposed no positive obligations on free state governments to support this process. Many northern states enacted Personal Liberty Laws that left the act still difficult to enforce[6].

Dred Scott v. Sandford tested a thornier question. Owners often carried their slaves with them when they visited or resided in free states and territories. At some point, residence in a free jurisdiction would emancipate the slave. But as northern states began holding that *any* residence in their jurisdiction would be emancipatory, southern states moved in the opposite direction. Dred Scott's case arose when his military owner brought him back to Missouri after an extended residence in Illinois and the Minnesota territory, where slavery was invalid under the Missouri Compromise of 1821. It took eleven years for Scott's case to reach the Supreme Court, but in its decision, the Court declared that the territorial restriction on the extension of slavery set by the Missouri Compromise was unconstitutional. Moreover, in the opinion that mattered most, Chief Justice Roger Taney asserted not only that slaves had no right to seek federal legal protection, but that African Americans in general, whether enslaved or free, had none of the rights of citizens or even persons. The entire race was a degraded people, possessing no "rights which the white man was bound to respect"[7].

In *political* terms, the gutting of the territorial aspect of the Missouri Compromise was the most important part of *Dred Scott*; but it was the racist degradation of African Americans that mattered most *constitutionally*. Among the many immediate causes of the Civil War, the most important part of *Dred Scott* certainly was one. But even if many politicians hoped that this one suit would miraculously provide a judicial solution to "the impending crisis" of sectional conflict, the sources of that conflict were too intense to be dissolved so neatly. As Don Fehrenbacher observes in his classic study of *Dred Scott*, there is no simple way to measure its impact. The dominant *casus belli* was the election of a Republican president drawing all of his electors solely from northern states, plus California and Oregon. Explaining why this one election drove the secessionist states to leave the Union still remains a puzzle—until one considers how deeply embedded the South was in the "peculiar institution" of slavery, and how

easily they viewed any threat to its persistence as a mortal peril.

"And the war came," Lincoln recalled in his Second Inaugural Address. The Civil War itself marks the *fifth* category of analysis that merits attention. Its consequences were immense, complex, and often unexpected. Politically, the departure of the southern delegations enabled Republican majorities in Congress to pursue legislative visions that would have been inconceivable before 1861. Legally, the scale of warfare that was unleashed after 1861 led Lincoln to launch a fresh effort to codify and reform the laws of war, with Professor Francis Lieber, a Berlin native, playing the key role in drafting what the legal historian John Fabian Witt has called *Lincoln's Code.* In the South, the constitution drafted for the Confederacy incorporated many of the states'-rights ideas that had dominated southern thinking before 1861, arguably to the detriment of its war effort. Southern writers, engaging in wartime speculation that now seems almost fantastic, imagined the brave new world they would create if they emerged victorious, vindicating the wisdom of chattel slavery while their dominant crop still reigned as King Cotton. In the North, this kind of speculation took a different form, as writers imagined how the Union would be reconstituted after the rebellion was suppressed.

The most consequential development occurred on the battlefield. Whenever Union armies entered Confederate territory, slaves by the thousands fled their plantations. At first the treatment of these "contrabands" puzzled Union commanders. Legally, slaves were property, not persons. Prior to 1861, one general argument against their legal emancipation was that their owners would then deserve compensation under the Fifth Amendment. There was thus a preliminary question whether slaves could be confiscated as enemy property or could simply liberate themselves by escaping their owners. But that question took little time to answer. When Lincoln greeted the new year of 1863 with the Emancipation Proclamation, the abolition of slavery joined the preservation of the Union as the second great war aim. But the Proclamation applied only to slaves living behind Confederate lines. It did not affect the border states of Maryland, Delaware, Kentucky, or Missouri. Nor was the future status or abolition forever ensured. As an executive act promulgated in wartime, it could be overturned legislatively or judicially.

The ultimate solution to this problem was the adoption of the Thirteenth Amendment in 1865. That development, along with the addition of the Fourteenth and Fifteenth Amendments in 1868 and 1870, identified the *sixth* and most important turning point in the nineteenth-century history of the Constitution. This constitutional transformation is what warrants describing the beginning of the Reconstruction of the South as a Second Founding[8].

In retrospect, the use of a constitutional amendment to abolish slavery seems so obvious and compelling a tactic as to barely need a historical explanation. In fact, as Michael Vorenberg argued in a seminal monograph, the resort to the amendment process marked a surprising shift in American constitutional culture. Six decades had passed since the ratification of the Twelfth Amendment, which altered the presidential election system. Although many other amendments were proposed after 1804, none ever came close to adoption. The Con-

stitution bequeathed by the founding generation was becoming almost a sacred text. Using the amendment process to achieve fundamental legal and social change thus opened up a new and expansive path of reform[9].

The importance of this development became evident in the months following the end of the war and Lincoln's assassination. With the newly elected Thirty-Ninth Congress not due to assemble until December 1865, President Andrew Johnson, a Unionist Democrat from Tennessee, had some initiative in determining how Reconstruction would unfold. His willingness to pardon former Confederate officials was one cause of alarm. But more disturbing was the enactment of so-called Black Codes throughout the South that actively restricted the freedom of Black labor. If the old ruling class could not restore slavery per se, it could find other means to keep African American laborers subservient.

Congressional Republicans adopted a two-pronged strategy to remedy this situation. One critical measure was the Civil Rights Act of 1866. The act reversed the effective denial of full citizenship to African Americans that *Dred Scott* had proclaimed. All citizens would enjoy the equal protection of the laws and the full range of civil rights over persons and property vested in every citizen. Section 2 of the Thirteenth Amendment had provided one basis for this statute by empowering Congress to enforce emancipation. Yet the Civil Rights Act had to be enacted over the veto of President Johnson, indicating that its permanence could not be taken for granted. Moreover, because this empowerment of every citizen in the exercise of civil rights implied a massive transformation of state law, it would radically alter the structure of American federalism, Republicans concluded that the Act needed further constitutional authority. That is what the Fourteenth Amendment provided.

The amendment had multiple purposes. Because the interpretation of Section 1 has dominated modern legal scholarship on the Constitution, the historical importance of the remaining sections has been somewhat neglected. Section 1 deserves quotation in full:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first sentence effectively overturned the racist suppositions that informed Taney's opinion in *Dred Scott*; the second laid a principled basis for enforcing the Civil Rights Act of 1866 (and for "persons" rather than "citizens" alone).

But the Fourteenth Amendment had further purposes. Because the Thirteenth Amendment gutted the Three Fifths Clause of the original Constitution, which had benefitted slave states in the apportionment of representation and presidential electors, Section 2 provided that their membership in the House of Representatives would be reduced should male voters be deprived of their suffrage. Section 3 prohibited any officeholder who had sworn an oath to "support the Constitution" and thereafter "engaged in insurrection or rebellion against the same" from holding office in the future,

unless amnestied by Congress. Section 4 guaranteed the security of the public debt that the Union had contracted to suppress the rebellion, while barring Southern states from assuming or paying their own obligations. Section 5 echoed the Thirteenth Amendment by giving Congress "the power to enforce, by appropriate legislation," the entire amendment.

While the analysis of Section 1 dominates modern legal scholarship, the other provisions of the Fourteenth Amendment are viewed almost as historical curiosities. That is an error, because Sections 2-4 illustrate its deeper political purposes. Collectively they dealt with the pressing political challenges of Reconstruction, not only to address the dire situation that emerged in the defeated Confederate states, but also to help maintain Republican rule[10].

One major element of that effort involved creating a new political landscape in the south. The Thirty-Ninth Congress had stopped short of including the suffrage – a distinct *political* right subject to the jurisdiction of state legislatures – among the *civil* rights needing protection. But as the provisional governments organized under President Johnson retained whites-only electorates and officials, the need to remake the South politically became evident. With Johnson repeatedly vetoing their measures, congressional Republicans, possessing the super-majorities to enact legislation, broadened their agenda. Conventions would be summoned to draft new constitutions; new governments would be elected; male African Americans would receive the right to vote and hold office; and the states would need to ratify the new constitutional amendments before their delegations could return to Congress. The South would remain under military occupation, and martial law and military courts would be available to enforce these obligations.

To guarantee African American suffrage, the Fifteenth Amendment was proposed in 1869 and ratified in 1870. Beyond its obvious importance to the South, the amendment mattered in northern states, too, because the two parties had grown more competitive nationally. Proponents naively hoped that possession of the suffrage would radically alter the character of southern politics. Armed with the vote, supported by northern interests, and capable of forming alliances with other southerners, African Americans would be better able to protect their rights and interests.

The three amendments adopted between 1865 and 1870 were thus truly equivalent to a second founding. Though respect for federalism remained important, the United States became much more of a nation-state and much less of a confederation than it had been in 1861. Yet fundamental constitutional change does not occur in a political and social vacuum. Throughout the South, the white population desperately wanted to preserve its political command, economic dominance, and most important, its racial supremacy. To achieve these ends, it was also willing to employ violence and political terror, a strategy made easier by the brutal experience the Civil War had provided. The appearance of the Ku Klux Klan and other para-military groups imperiled Republican officials and terrorized African Americans, requiring the South to remain under military occupation.

Thus in addition to the constitutional transformation that Reconstruction entailed, its actual implementation became an exercise in *transitional justice* – our sev-

enth category of analysis. Dismantling the old slavocracy and enhancing liberty for the freedmen defined the complementary challenges that Republicans faced after 1865, and even more so after 1869, when Ulysses S. Grant, the Union's former commanding general, replaced Andrew Johnson as president. Thinking of Reconstruction as a case of transitional justice enlarges the framework for both scholarship and teaching, enabling one to make analytical or pedagogical comparisons to the experiences of other modern nations, such as South Africa and Argentina. How far does one go in prosecuting the leaders and abettors of the defeated regime or, on the other hand, attempting to reconcile them to the new government? How deep and costly a commitment does the victorious party want to make to ensure that its original objectives are attained, especially when enthusiasm to sustain the struggle wanes? How does one balance the urgency of maintaining a military occupation against the benefits or restoring normal civil justice? One important outcome of Reconstruction was the creation of the Department of Justice. Before 1861, federal legal activity had been a highly decentralized matter, and the attorney general acted not as the head of an active department but merely as the national government's lead counsel. Now there was an institutional basis for national legal activity, a development which had a lasting impact on the structure of governance.

But litigation can be slow and painstaking, and often requires repetition in multiple locations. The most important task that federal courts faced after 1870 was to convert the broad principles enunciated in Section 1 of the Fourteenth Amendment into coherent legal doctrines. As the legal historian William Nelson argued in his influential book on *The Fourteenth Amendment*, its framers had no need to resolve the divergent emphases and even tensions that their appeals to different principles reflected. But courts would have to make these choices. Beginning with the *Slaughterhouse* decision of 1873 and the *Civil Rights Cases* of 1883, the Supreme Court sharply narrowed the potential impact of Section 1[11].

The focal point of these developments was the interpretation of the second sentence of Section 1, which established three further legal categories of analysis: the privileges and immunities of citizens, and the rights of all persons to due process and equal protection. In *Slaughterhouse* the Court narrowed the Privileges and Immunities Clause to cover only national rights secured under the federal Constitution, not a variety of other claims based on state law. The effective outcome of this ruling, by a narrowly divided Court, was to strip the Clause of any serious use. A decade later, in the *Civil Rights Cases,* the Court overturned the Civil Rights Act of 1875, which barred the owners of private businesses from refusing to serve African American customers. These were merely private acts of discrimination, the Court held, not public acts of state where the claims of equal protection would matter more. In effect, the Court treated racial prejudice as an attitude so deeply embedded in the sentiment of white Americans as to lie beyond the scope of legal reform or regulation. One year later, in *Cruikshank v. United States*, the Court overturned the conviction of a handful of perpetrators who had been charged with abetting the slaughter of roughly a hundred Louisiana freemen who had been holding a political meeting, on the grounds that no

federal right — even under the Petition and Assembly Clause of the First Amendment or the Due Process Clause of the Fourteenth — had been infringed by this private violence.

These decisions set legal doctrines that would have a profound impact for decades to come. But they also reflected other forces that led the great project of Reconstruction to begin collapsing by the late 1870s. The Union army could not occupy the South indefinitely. Nor could northern public opinion remain convinced that the expense and commitment needed to secure equality for the freedmen was fully justified. Even among Republicans, traditional ideas of federalism began to resurge. As competition to control Congress became more intense, both parties refined the practice of partisan gerrymandering for the House of Representatives[12]. A plausible case can also be made that when the mountain and great plains states of North and South Dakota, Wyoming, Montana, Idaho, and Washington were admitted to the Union in 1889-1890, they served as "rotten boroughs" enabling Republicans to retain control of the Senate.

The erosion of the rights and liberties of emancipated African Americans did not occur overnight, but the establishment of this new form of racial subordination was effectively completed by the end of the nineteenth century. Its apotheosis came with *Plessy v. Ferguson* (1896), a ruling that joins *Dred Scott* atop the list of the Supreme Court's most reviled cases. In *Plessy* the Court upheld a Louisiana statute authorizing railroads to provide "equal but separate accommodations" for white and black riders. Homer Plessy, the plaintiff, was a light-skinned African American who could pass as white in ordinary social encounters. His suit was a genuine test case, designed to demonstrate both the arbitrary nature of racial perceptions but, even more important, the extent to which enforcing racial barriers in public transportation would violate the egalitarian implications of the Thirteenth and Fourteenth Amendments.

Plessy lost his suit by a 7-1 vote. The lone dissenter was John Marshall Harlan, who had also been the sole dissenter in the *Civil Rights Cases* a decade earlier. Harlan is one of the few justices who deservedly merits a biography, and as is often the case in writing the history of constitutional law, his dissent makes for far more compelling reading than the majority opinion. (Dissenters are free to express their legal and moral convictions without worrying about doctrinal implications for lower courts.) But where Harlan appealed to a "color-blind" Constitution, the majority held that so long as the railroad carriages were equally comfortable, the segregation of the races was a reasonable exercise of the state's police power, even if African Americans felt demeaned by the process[13].

Plessy and *Dred Scott* are frequently compared, for obvious reasons. Both treated African Americans, whether enslaved or free, as a degraded race. But *Dred Scott* had been innovative in a way that *Plessy* was not. In 1857 many observers hoped that the Supreme Court would somehow find a legal solution to a grave political threat. That hope proved terribly naïve, and while Don Fehrenbacher carefully weighed the case's importance in the many causes of the Civil War, no one would question it was always perceived as being deeply consequential. By contrast, *Plessy* effectively encoded two

decades of the "redemption" of white rule in the South. The exercise in transitional justice that began in 1866 had failed, and by the 1890s, everyone knew it. The decision in *Plessy* deeply disappointed the appellants, but the results were unsurprising. *Plessy* operated as a precedent that controlled judicial and legislative actions for the next six decades, establishing the doctrine that racial segregation was permissible so long as the activities regulated were equally available to whites and blacks alike. That fiction, rarely if ever honored in practice, justified the so-called Jim Crow practices that dominated southern life until *Brown v. Board of Education* (1954-1955) initiated the Second Reconstruction.

And that identifies the final and *eighth* category of analysis that must be addressed. The Second Founding ended in a constitutional *failure* that the United States needed decades to overturn. Given the self-confidence in American exceptionalism that informs so much American writing, the need to reckon with constitutional failure has proved a challenging task. Well into the twentieth century, the failure of Reconstruction was more often attributed to the naïvete of the reformers than to the violent and persistent resistance of a racist South. African American scholars, led by W. E. B. DuBois (1868-1963) and John Hope Franklin (1915-2009), knew better, but it took the work of other white scholars, led by C. Vann Woodward and Kenneth Stampp, to enable the revisionist view to become more successful and pervasive.

3. *The Concerns of Twentieth-Century Constitutionalism*

The turn of the twentieth century opened a new era in the history of the Constitution. Three new amendments made important alterations to the text. The Sixteenth Amendment (proposed in 1909, ratified in 1913) reversed the Supreme Court's controversial decision in *Pollock v. Farmers' Loan and Trust* (1895), which invalidated a congressional tax of two percent on annual incomes over $4,000 on the problematic grounds that this was a "direct tax" that had to be apportioned among the states on the basis of their population. The amendment made the income tax a reliable basis for funding the national government, an important tool that enabled it to use its spending power to shape social policy within the states. Two other amendments marked important steps in the democratization of politics. The Seventeenth Amendment (1913) transferred the power to elect senators from the state legislatures to the voters. The Nineteenth Amendment (1920) declared that the right to vote in national or state elections "shall not be denied or abridged … on account of sex"[14].

One other amendment deserves notice for a different reason. The Eighteenth Amendment (proposed in 1917, ratified in 1919, repealed in 1933) prohibited "the manufacture, sale, or transportation of intoxicating liquors." Prohibition was the culmination of decades of agitation promoted by the temperance movement. Although passage of the amendment proved remarkably easy, its enforcement was far less popular. The impetus it gave to bootleg liquor dealing gave organized crime a major boost. To avoid the obstructive influence

that the temperance movement exerted over state legislatures, Congress made the Twenty-First Amendment repealing prohibition subject to approval by popularly elected conventions — the only occasion on which that alternative method for ratifying amendments has been used.

Beyond these formal changes in the text, three other developments set the framework for twentieth-century constitutional history. The first of these concerned what scholars call the Lochner era, when the Supreme Court developed a judicial doctrine of substantive due process that sharply constrained legislative actions to regulate the modern economy. The second involved the sustained efforts of the political leaders of the one-party Democratic South to maintain the edifice of white supremacy and racial segregation that the Jim Crow legislation of the late nineteenth and early twentieth centuries had codified. These racial barriers were enforced by the vicious lynching of any African Americans whose behavior seemed to defy or merely insult white supremacy. Third, the organization of the National Association for the Advancement of Colored People (NAACP) in 1909 and the American Civil Liberties Union (ACLU) in 1920 marked an epochal advance in the pursuit of public interest litigation grounded in constitutional claims. The idea of pursuing political interests through constitutional litigation was hardly a novelty to Americans. But the idea of doing this *strategically*, by building one judicial victory atop another over a prolonged period, was innovative. The NAACP and the ACLU became paradigmatic examples of how organizations and the interests they represented could litigate their way to political success.

Lochner v. New York (1905) marked the moment when the Supreme Court gave the Due Process Clause of Section 1 of the Fourteenth Amendment a new importance. In *Slaughterhouse* the Court had limited the scope and impact of the Privileges and Immunities Clause; in *Plessy* it had interpreted the Equal Protection Clause to make it compatible with racial segregation and white supremacy. In ordinary usage, due process of law bears a simple, straightforward meaning: acts of government affecting the fundamental rights of "life, liberty, and property" should conform to some fixed and known set of rules. But with *Lochner* and the line of cases that it symbolized, the Court gave due process a much more expansive meaning.

In *Lochner* a narrowly divided Court overturned a New York statute limiting the working hours of bakers to sixty hours a week or ten hours a day. The law could have been easily justified as a reasonable exercise of the "police power"—that is, of the state's broad authority to act in behalf of public health and safety. Instead, the five-member majority held that the right to bargain for one's labor was so fundamental, so important to individual liberty, that its denial or limitation violated due process of law. In this view, due process could involve something other than making government act in conformity with fixed rules. Some rights were so *substantively* important that their legislative limitation would infringe due process as well[15].

Lochner foretold the restrictive role that the Supreme Court played over the next three decades in checking "progressive" legislation that sought to deal with the social evils of industrial capitalism. By the 1910s the Court had become a major target

of political criticism. But its true crisis came only in the mid-1930s, when it overturned crucial elements of the New Deal program that President Franklin Roosevelt and a solidly Democratic Congress had adopted to deal with the Great Depression. After President Franklin Roosevelt and his party overwhelmingly swept the 1936 elections, some of the Justices began to worry that the Court was losing political legitimacy. The idea that the president and Congress might simply vote to enlarge the Court—its size is *not* determined by the Constitution—may have provided another incentive. The crucial change —"the switch in time that saved nine" – came in *West Coast Hotel Company v. Parrish*, when Justice Owen Roberts joined the four more liberal judges to sustain a Washington State minimum wage law[16].

In the aftermath of this decision, the Court entertained a number of other cases that effectively laid a foundation for the modern regulatory state. This jurisprudential shift is often described, fairly, as a constitutional revolution. Arguably the most important component of this revolution was a profound shift in the interpretation of the Interstate Commerce Clause. In place of the prior view that defined commerce primarily in terms of the physical movement of goods across state lines, the new interpretation involved identifying a "substantial relationship" between the activity being regulated, on the one hand, and manufacturing and trade more generally, on the other. The acceptance of this expansive definition was facilitated by a major change in the composition of the Court. Roosevelt made seven appointments in the years immediately following the switch, dramatically demonstrating how important the appointment power could be in moments of heated contest. The Supreme Court was now politically consistent with national political sentiment, as it was expressed through elections.

In pursuing their agenda, the New Deal Democrats thus transformed the national political landscape. Democrats controlled Congress for decades to come, losing the House of Representatives only in 1946 and 1952, while holding the Senate until 1980. One important element in this success was a shift in political allegiances of African Americans and the Jewish community formed of first- and second-generation immigrants. Both groups had previously favored Republicans, but amid the Depression the New Deal agenda proved highly attractive. Yet to succeed nationally, the Democrats required the continued loyalty of the one-party South, where Republicans remained wholly uncompetitive. Important elements of the New Deal agenda would benefit the South, most notably the creation of the Tennessee Valley Authority, which became the basis for the electrification of much of the rural South, the economic development of the region, and a powerful example of the new role the national government could play in promoting collective social welfare.

Yet in accepting these and other benefits, southern political leaders and their white constituents clung to one tradition: to preserve the segregationist and racial supremacist regime they had created in the late nineteenth century. The maintenance of this regime fulfilled the same function that the treatment of chattel slavery as an institution subject solely to state law had enjoyed before 1861. Southern political leadership became more cohesive and effective with each passing decade. After

1900 – and in defiance of the expectations of the framers of the Constitution – members of Congress began to think of service there in careerist and professional terms. Moreover, the advantages of incumbency were reinforced in both the one-party South and within Congress, where influential committee chairmanships were generally awarded on the basis of seniority. When vital regional interests were at stake, southern senators could use the filibuster — a rule requiring two-thirds of the Senate to agree to terminate a debate and proceed to a vote — as the ultimate check on legislation they opposed. Civil rights legislation equivalent to the measures that Congress had enacted during Reconstruction were a virtual impossibility—unless they were so weak as to be inconsequential[17].

Understanding the force of this commitment is not a hard task for *scholars*, but it does pose a greater challenge to classroom *teachers* precisely because they need to deal directly with the nature of racial and racist attitudes. That much seems obvious. What bears further emphasis, however, is recognizing how much the distinctive and tragic characteristics of the South have *always* mattered in American politics. Counterfactually one can speculate how the free and slave states would have evolved had the Confederacy survived the Civil War intact. In the early 1860s, many southern thinkers remained optimistic that the revival of their "cotton is king" economy would preserve slavery as an institution and the prosperity of their region. But even as a tightly organized minority region, the South acted as an independent variable and often decisive element in American politics.

That is what makes the emergence of sustained public interest litigation, as pioneered by the NAACP, such an important factor in constitutional politics. Without adequate access to any political institution in the segregated South, the NAACP had nowhere else to turn but to the courts. Because most of the laws the NAACP opposed came from state and local governments, its obvious strategy would be to apply Section 1 of the Fourteenth Amendment against these jurisdictions and insist on giving the Equal Protection Clause a robust reading. But mounting a litigation campaign of this kind is hard work. One needs to identify the most vulnerable object of attack; to find the best fact pattern to sustain a case; and to recruit plaintiff-litigants who can bear the vexations, threats, and literal dangers of sustaining their case. In the realm of education, any attempt to desegregate elementary and secondary schools or even undergraduate institutions seemed likely to generate massive protests based on the blatant fear of social intermixing. A more sensible, prudent, and less expensive strategy would focus instead on professional schools, and thereby set precedents that might later be extended to lower levels of education[18].

The appeal to federal courts to adjudicate in support of fundamental individual rights had another source: the American Civil Liberties Union. The main original mission of the ACLU was to protect free speech claims against the repressive persecution that followed the nation's entrance into the First World War and the postwar Red Scare against pro-communist agitators. Although issues of free speech and the free exercise of religion were its core commitments, its concerns grew substantially over time, to the point that protecting the first eight amendments to the Constitution defined the ACLU's greater agenda. When

the sesquicentennial of the Bill of Rights was celebrated in 1941, Americans generally and lawyers more particularly gave new importance to the additional articles that James Madison, almost singlehandedly, had convinced his colleagues in the First Congress of 1789 to consider.

By the 1930s, then, the nation had entered a new epoch, when "rights talk" — rather than discussions of the powers and structure of governance — would dominate its constitutional concerns. The portent of this new era appeared in the most famous footnote in American jurisprudence. *U.S. v. Carolene Products Company* was just one more case in which the Supreme Court developed its new Commerce Clause doctrine. But in footnote 4, Justice Harlan Stone introduced a new set of criteria by which the Court might henceforth consider overturning duly enacted statutes. In the realm of economic legislation, the Court should now show greater deference to the political branches. But there were three other conditions under which the Court could subject legislation to closer scrutiny:

> first, when it involved specific guarantees of rights, including those stated in the first eight amendments to the Constitution, which could be applied against the states under the Fourteenth Amendment;
> second, when ordinary political processes did not offer litigants adequate recourse to redress their grievances;
> and third, when the parties seeking relief belonged to "discrete and insular minorities," whether religious, ethnic, or racial in nature[19].

The first category anticipated the development of the "incorporation doctrine", which explicitly extended nearly all of the rights enumerated in the first eight amendments against the states. The second clearly applied to the disfranchised African American population in the South. The third category fit the situation of religious sects like the Jehovah's Witnesses, whose often obnoxious behavior played a catalytic role in the evolution of doctrines relating to the free exercise of religion[20]. It would also cover the harsh treatment imposed on Japanese Americans during World War Two, when, in defiance of their status as American citizens, the government arbitrarily interned them in isolated camps[21].

This subordination of Japanese Americans marks one of the bleakest chapters in American law. Though far different in duration and severity from the centuries-long oppression of African Americans, it fostered a significant shift in public sentiment that made overt issues of racial discrimination and oppression an open subject of public controversy. The mass murder of millions of European Jews during the Holocaust only deepened this sentiment. It was against this background that the NAACP finally concluded that it could attack segregated schools. Building on the precedents it had gained in its suits pursuing desegregation in graduate education, the NAACP believed the Supreme Court would be willing to reconsider the entire edifice of racial segregation it had legitimated in *Plessy v. Ferguson*.

The outcome of this strategic choice was the Court's unanimous holding in *Brown v. Board of Education*, the most celebrated judicial decision in American (and perhaps even global) constitutional history. The details of this famous decision need not concern us here. But two points deserve major emphasis. First, rather than engage in the kind of nuanced reasoning and extensive citations to legal precedent that commentators might have expected, Chief Justice

Earl Warren wrote an elegant opinion that was, at heart, simply an appeal to egalitarian principles. That opinion, though not its results, therefore disappointed many commentators for its very brevity. Second and more important, the appeal left open difficult questions about how to enforce the decision. For many southern whites, the Court seemed to be attacking an entire way of life that they desperately wished to control. "Massive resistance" was the name given to the southern response to *Brown*[22].

For historians, then, the real problem involves explaining how the United States moved from the initial judgment in *Brown* to the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. These were the true milestones of the Second Reconstruction. Although the initial role that the Supreme Court played was an important catalyst, it was only secondary in a larger story. The massive opposition that the *Brown* decision aroused through much of the South led the Court to reiterate a famous statement from *Marbury v.* Madison, the famous judicial review decision of 1803, affirming that it was "emphatically" the duty of the judiciary to "say what the law is." But that statement could not overcome the multifold efforts of countless southern jurisdictions, from school boards to state governors and legislatures, to preserve a segregated society[23].

The story of this decade of political change after 1954 has multiple dimensions. One notable aspect of this story involves the role of African American college students sitting in at segregated lunch counters and refusing to leave unless they were served. Protest marches that drew violent responses from local police were widely covered on television news — then a novelty — eliciting popular sympathy from millions of viewers. The refusal of southern officials to conform to judicial orders desegregating schools led the administration of President John Kennedy, initially somewhat hesitatingly, to pursue additional legal remedies. It was the southern "backlash" against *Brown* that helped to persuade other Americans that a mere judicial decision would not complete the greater work. The tragic assassination of President John F. Kennedy in November 1963 also advanced the case. His successor, Lyndon Baines Johnson, treated enactment of the Civil Rights Act and Voting Rights Act as a tribute to Kennedy's legacy and an opportunity to demonstrate his own impressive legislative skills[24].

Those two acts number among the most important pieces of legislation Congress ever passed. Drawing upon the broad reading of the Interstate Commerce Clause fashioned during the New Deal, the Civil Rights Act gave African Americans equal access to every form of business: restaurants, hotel, theaters, stores, and everything else. Equally important, the Voting Rights Act and its later revisions empowered African Americans to exercise their Fifteenth Amendment right to vote throughout the South, while imposing other restrictions on electoral laws that could be manipulated to minimize their political influence. These acts drove the Second Reconstruction that attained many of the goals its predecessor had failed to secure a century earlier. The repercussions of these acts still dominate American politics six decades later.

Yet while the hard work of the civil rights movement in the 1960s became primarily a political struggle, the Supreme Court was reshaping American constitutionalism in other ways. Under the leadership of Chief

Justice Earl Warren and his successor, Warren Burger, the Supreme Court pursued a "rights revolution" of another kind. Following the path marked by Footnote 4 of *Carolene Products*, the Court developed the "incorporation doctrine," which held that nearly all the rights identified in the first eight amendments to the Constitution could be applied and amplified against the states. Nor did this approach always depend on the literal text of the Constitution. In two epochal cases, *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973), the Court inferred that "penumbras, formed from emanations" from the Bill of Rights established a general right of privacy that protected the right of married couples to practice conception and of pregnant women to decide whether to obtain abortions.

Over time, *Roe v. Wade* arguably became the most controversial decision in American judicial history. When we consider the ongoing repercussions of that case, and those relating to the civil rights laws of the mid-1960s, one can argue that 1973 marked a turning point when we move from the realm of *constitutional history*, properly defined, to the rush of *current events* whose consequences are not yet known, which as yet makes their true historical analysis quite difficult.

4. *The Uncertain Path Ahead: A Few Final Thoughts*

Of course, the constitutional history of particular events and decisions occurring over the past half century can already be written. The best examples here cover momentous judicial decisions: *Roe v. Wade* and its aftermath, including the movement that culminated in the Supreme Court's recent decision to repudiate the constitutional right to abortion; the Court's acceptance of same-sex relations as a legitimate expression of a personal right to privacy; and its endorsement, now increasingly problematic, of a neutral standard for judging claims of religious exemptions to particular laws and regulations[25]. Such studies often illustrate how so many legal challenges arise from contrived cases selected and shaped by public interest litigators. Another involves recognizing how the justices often invite challenges to judicial doctrines they want to modify or overturn — including gutting the Voting Rights Act.

There are, however, two broader topics that identify matters of immediate concern. One involves the role of historians in evaluating the so-called originalist arguments that dominate modern constitutional interpretation. The other concerns how historians, today and in the future, will deal with the degradation of constitutional norms embedded in the behavior of Donald Trump and the deterioration of the Republican party into an authoritarian cult.

Historians naturally assume that any inquiry into the original intended or understood meaning of a constitutional text must be inherently historical in nature. That was the inspiration, formed in the early 1970s — before the word *originalism* was coined — that led me to write *Original Meanings*, which explain how a historical approach to this problem could work. But avowed originalists, both on the bench and in the law schools, have turned away from relying on historical sources. They describe their own approach as being inherently linguistic in nature: a search for the public or

semantic meaning of contested terms. In this view, historical analysis appears too indeterminate to satisfy the jurists' desire for certainty. Historical evidence can still illustrate linguistic usage; but the specific political purposes that explained the adoption of these terms seems largely irrelevant to this quest. The obvious rejoinder that historians need to make is to insist that the original meaning of a constitutional clause can never be understood or explained if one does not examine the purposes and debates surrounding its adoption. And their duty as teachers is to explain why a historical approach makes much better sense than the linguistic turn[26].

Dealing with the Trump problem and the degeneration of the Republican party poses far graver difficulties. Historians have always assumed that, once past the Civil War, the nation would always enjoy constitutional stability. They were equally confident that the peaceful transfer of power through democratic elections has been the dominant norm of political behavior since 1801 – again except in 1861. To have a sitting president abandon those norms, foment an insurrection to annul an election, survive two impeachments on the basis of partisan fealty, and remain the dominant figure in his party: these are conditions that stagger any historian's imagination, not merely because they are so anomalous, but because they reveal that the entire constitutional system is in danger[27]. Such a perception will force historians to search for causal explanations they have rarely considered previously. It will be a great source of intellectual stimulation – and perhaps political despair.

[1] See generally, J. Rakove, C. Sheehan (eds.), *The Cambridge Companion to The Federalist*, New York, Cambridge U.P., 2020.

[2] B. Bailyn, *The Ideological Origins of the American Revolution*, 50th anniversary edition, Cambridge, Harvard U.P., 2017; G. Wood, *The Creation of the American Republic, 1776-1787*, Chapel Hill, University of North Carolina, 1969; J. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, New York, Knopf, 1996; P. Maier, *Ratification: The People Debate the Constitution, 1787-1788*, New York, Simon Schuster, 2010.

[3] W. Chambers, W. Burnham (eds.), *The American Party Systems: Stages of Political Development*, 2d ed., New York, Oxford U.P., 1975.

[4] R. Shelden, E. Alexander, *Dismantling the Party System: Party Fluidity and the Mechanisms of Nineteenth-Century U.S. Politics*, in «Journal of American History», 3/110, 2023, pp. 419-448.

[5] D. Carpenter, *Democracy by Petition: Popular Politics in Transformation, 1790-1870*, Cambridge, Harvard U.P., 2021.

[6] P. Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity*, Chapel Hill, University of North Carolina, 1981.

[7] The classic study is D. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, New York, Oxford U. P., 1978; and see M. Graber, *Dred Scott and the Problem of Constitutional Evil*, New York, Cambridge U.P., 2006.

[8] E. Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*, New York, Norton, 2019.

[9] M. Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*, New York, Cambridge U.P., 2001.

[10] M. Graber, *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform after the Civil War*, Lawrence KS, Univ. Press of Kansas, 2023.

[11] W. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*, Cambridge, Harvard U. P., 1988.

[12] P. Argersinger, *Representation and Inequality in Late Nineteenth-Century America*, New York, Cambridge U.P., 2012; H. Richardson, *The Death of Reconstruction: Race, Labor, and Politics in the Post-Civil War North, 1865-1901*, Cambridge, Harvard U.P., 2001; P. Herron, *Framing the Solid South: The State Constitutional Conventions of Secession, Reconstruction, and Redemption*, 1860-1902, Lawrence KS, University Press of Kansas, 2017.

[13] C. Lofgren, *The Plessy Case: A Legal-Historical Interpretation*, New York, Oxford U.P., 1987.

[14] The best study of the amendment process is D. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*, Lawrence KS, University Press of Kansas, 1996.

[15] P. Kens, *Lochner v. New York: Economic Regulation on Trial*, Lawrence KS, University Press of Kansas, 1998; and see H. Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*, Durham NC, Duke U.P., 1993.

[16] W. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*, New York, Oxford U.P., 1995.

[17] On this immensely important development, see D. Bateman, I. Katznelson, J. Lapinski, *Southern Nation: Congress and White Supremacy after Reconstruction*, Princeton, Princeton U.P., 2018; and I. Katznelson, *Fear Itself: The New Deal and the Origins of Our Time*, New York, Liveright, 2013.

[18] M. Tushnet, *The NAACP'S Legal Strategy Against Segregated Education, 1925-1950*, Chapel Hill, University of North Carolina Press, 1987, 2004.

[19] *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152n.4 (1938).

[20] S. Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution*, Lawrence KS, University press of Kansas, 2000.

[21] P. Irons, *Justice at War: The Story of the Japanese American Internment Cases*, New York, Oxford U.P., 1983.

[22] J. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*, New York, Oxford U.P., 2001; and see L. Kalman, *The Strange Career of Legal Liberalism*, New Haven, Yale U.P., 1996, pp. 15-59.

[23] In this and the following paragraphs I rely on M. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, New York, Oxford U.P., 2004.

[24] J. Zelizer, *The Fierce Urgency of Now: Lyndon Johnson, Congress, and the Battle for the Great Society*, New York, Penguin, 2015, pp. 85-130.

[25] M. Ziegler, *Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment*, New Haven, Yale, 2022; D. Carpenter, *Flagrant Conduct: How a Bedroom Arrest Decriminalized Gay Americans*, New York, Norton, 2012; C. Long, *Religious Freedom and Indian Rights: The Case of Oregon v. Smith*, Lawrence KS, University Press of Kansas, 2000.

[26] For my preliminary thoughts on this subject, see J. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, in «San Diego Law Review», 48/2, 2011, pp. 575-600.

[27] Similarly, see J. Rakove, *Impeachment, Responsibility, and Constitutional Failure: From Watergate to January 6*, in M. Flinders, Ch. Monaghan (eds.), *British Origins and American Practice of Impeachment*, London, New York, Routledge, 2024, pp. 206-237.

Teaching Constitutional History in Brazil: an Experience in an Undergraduate Legal History Course Employing Active Teaching Methods

DIEGO NUNES

1. *Introduction*

Constitutional History is a relatively recent area of study within Brazilian Legal History. Previously, some works in Constitutional Law have touched upon this topic. For instance, Waldemar Martins Ferreira's book[1] (well-known for its anti-Vargas stance) aiming to align Brazil with a liberal tradition of Constitutionalism. In the realm of institutional history, specific works include volumes about the Federal Supreme Court by Leda Boechat Rodrigues[2] and Emilia Viotti da Costa[3]. With the current growth of Legal History in Brazil, there are now groups dedicated to Constitutional History in various regions such as Brasilia[4], Mossoró[5], as well as other places like Florianópolis[6], Curitiba[7], and São Paulo[8], where researchers are actively working on this subject.

When delving into the teaching of Constitutional History, we encounter a significant challenge in navigating this subject. There isn't a singular approach but rather a multitude of perspectives to explore, both broad and specific. To illustrate, let's outline the various approaches taken by different institutions:

- At the University of Brasília (UnB)[9], the Ph.D. Program offers a research line focused on Constitution and Democracy, organized into sublines. One such subline centers on "Narratives, Constitutional History, and State Building," which includes courses such as "History of Public Law," "History of Brazilian Political Institutions," and "Historical and Sociological Dimensions of Constitutionalism," alongside seminars covering specific topics.

- The Federal University of "Semi-Árido" (UFERSA)[10] in Mossoró, Rio Grande do Norte, incorporates two courses within its Ph.D. Program: "Historical and Sociological Dimensions of Constitutionalism," evidently influenced by UnB (with faculty members who are UnB alumni), and "Brazilian Political Constitutional Thought."

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- At Uninter[11] in Curitiba, the Ph.D. Program offers the course "History of Public Law."

- The University of São Paulo (USP)[12] integrates the study of Constitutionalism into the LL.B. curriculum through the course "History of Political Ideas in Brazil."

- The Federal University of Santa Catarina (UFSC)[13] in Florianópolis includes the course "History of Public Law and Constitutionalism" within its Ph.D. Program. Moreover, these topics are also covered in compulsory courses such as Legal History in LL.B. and History of Legal Culture in LL.M.

Despite the various approaches, whether they focus on Public Law (distinguishing between Constitutional and Administrative Law) or Political Theory (separating the Legislative, Executive, and Judiciary branches), they all center around Constitutionalism as the common thread binding these discussions. The experiences of the French and American revolutions in the 18th century, along with the reforms in Iberia during the 19th century, are crucial, as we will explore further, as is the Brazilian constitutions during both the Monarchy and the Republic.

My journey followed a similar path. During my tenure as a professor at the Federal University of Uberlândia (UFU)[14] in the State of Minas Gerais, my initial role involved teaching a master's course on fundamental rights, and I introduced a syllabus on "History of Public Law and Constitutionalism" into the overall program. Concurrently, in the LL.B. course, I instructed on "History of Legal Thought," where discussions on Enlightenment and Liberalism naturally led to exploration of Constitutionalism.

This trajectory continued when I transitioned to Associate Professor at UFSC. In my classes on "Legal History" for first-year students, I delved deeper into Constitutional History, particularly focusing on the legal debates of the 18th and 19th centuries and began incorporating examination of the legal landscape in the 20th century. However, I have not yet had the opportunity to teach the course "History of Public Law and Constitutionalism" at the LL.M. and Ph.D. levels in Florianópolis.

Before delving into the core of our discussion, I want to emphasize two aspects that I find significant but cannot elaborate on here. Firstly, it's crucial to address the lack of diversity among colleagues teaching constitutional history in Brazil. The field predominantly comprises white men, like me, with few exceptions like Rio de Janeiro[15]. It's imperative to promote diversity among legal and constitutional history scholars[16]. Secondly, there's a concerning lack of emphasis on teaching constitutional history, or legal history in general[17], not only in Brazil[18] but also elsewhere[19]. We have limited opportunities to reflect on our teaching practices, particularly with other legal historians[20]. While we frequently discuss our research, we often neglect the equally fundamental aspect as the legal education[21].

The aim of this article is to outline my teaching approach in Legal History, with a particular focus on Constitutional History. The first section will lay out the foundation of my teaching methodology, which is rooted in a Comparative Constitutional History perspective. Here, I will discuss the selection of sources and the approaches I employ. In the second section, I will delve into the specifics of my teaching practice, high-

lighting the use of active methodologies to incorporate questions about Brazilian Constitutional History into my Legal History course.

2. *Teaching Comparative Constitutional History: Sources and Approaches*

In my current Legal History course, aimed at first-year Bachelor of Laws students, I've structured the curriculum into three main sections. But before that, I've proposed a section "zero" that serves as an introduction, covering methodological issues and fundamental concepts essential for studying legal history.

The first section, the most extensive, provides an overview of Western Legal History, with a focus on the connections between Continental Europe and Latin America, particularly Portugal and Brazil. The second section delves into the History of Brazilian Law during the Republic era. Lastly, the third section concludes with a brief general summary, aiming to tie together all the key aspects covered.

Throughout the course, I employ active teaching methodologies. The introductory section leans towards theory, though I incorporate some activities. For the legal history timeline, I strike a balance between traditional lectures and in-class exercises. Finally, the discussion on the history of Brazilian law is conducted in an interactive manner.

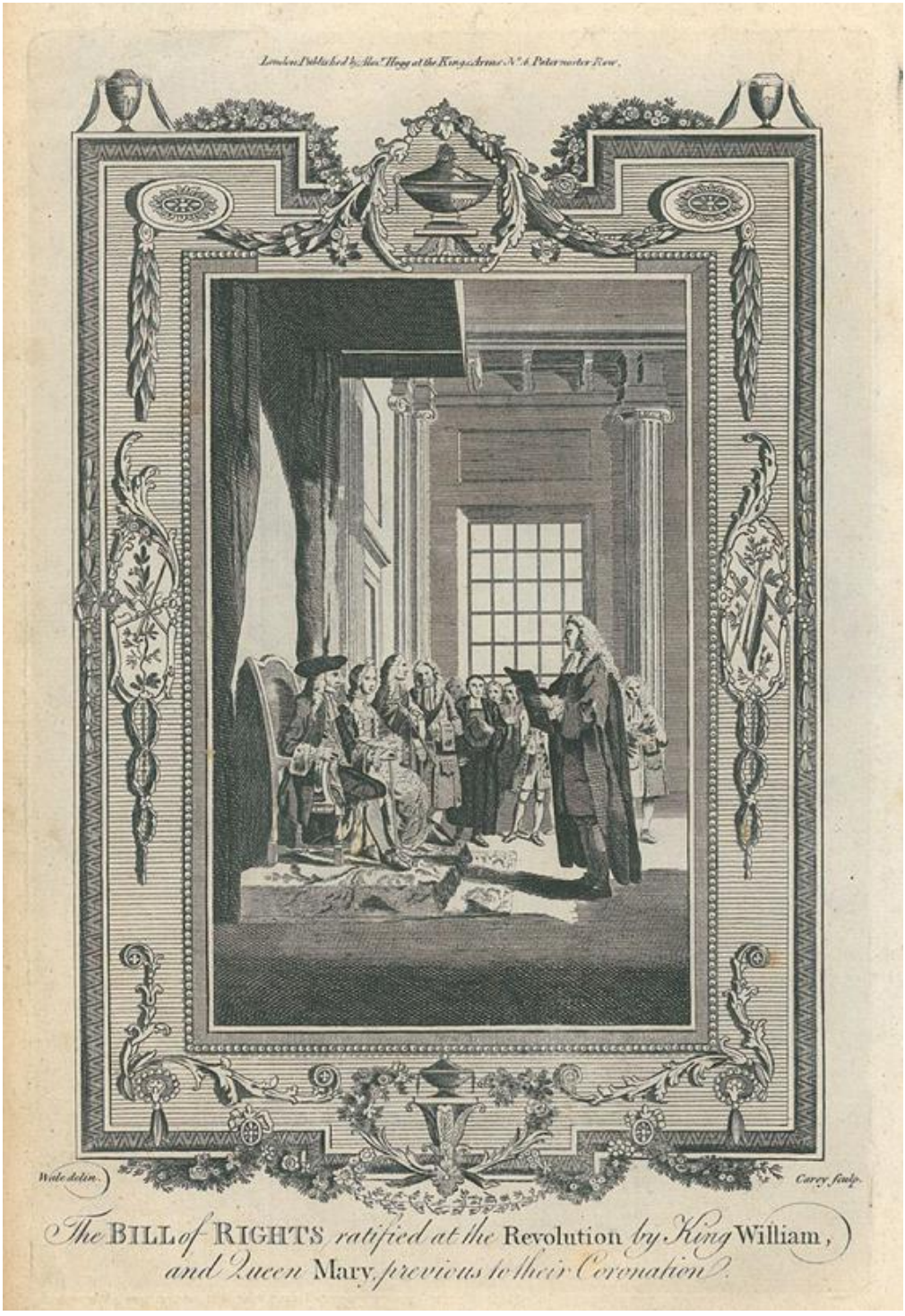
Focusing on content aspects, I've divided the legal timeline into five blocks: 1. Antiquity, with a focus on Roman Law; 2. The Middle Ages, discussing the *ius commune* tradition (including aspects of public law such as tyrannical governance); 3. Pre-Modern Law, exploring early Brazilian legal developments during colonialism, *polizei*, and the conflicts between state law (*ordonnances*) and *ius commune*; 4. Modern Law, examining the emergence of declarations of rights, constitutions, and codification of law; and 5. Contemporary Law, discussing legal theories and human rights following World War II.

In this article, I will focus on my strategies for engaging with arguments on Constitutionalism. Specifically, I will discuss the iconography of declarations of rights and constitutions, constitutional and declaration preambles and constitutional processes in metropolises and their colonies, with a particular focus on England and the United States, France and Haiti, and Portugal and Brazil.

2.1 *The Visual Representation of Declarations and Constitutions*

One of the initial elements I introduce in my courses to stimulate and engage students in the discussion is visual support. While it may not be feasible to delve deeply into detailed concepts of iconography or legal iconology[22], it's crucial to place these images in context. That's why I always begin by showcasing Eugène Delacroix's "Le 28 Juillet. La Liberté guidant le people." This painting serves as a reminder that it depicts not the French Revolution of 1789, but the events of 1830[23], highlighting the differences in the constitutional discourse between these two periods.

An interesting observation stemming from this episode is the prevalence of artis-


London Published by Alex.r Hogg at the Kings Arms N.o 6 Peternoster Row.
Wale delin.
Carey sculp.
The BILL of RIGHTS ratified at the Revolution by King William,
and Queen Mary, previous to their Coronation.

tic interventions in constitutional matters. Both painting and the press have played vital roles in celebrating and communicating the emergence of constitutionalism, allowing us to delve deeper into the historical context beyond mere textual analysis of the constitutions and the individuals involved.

Beginning with the Glorious Revolution in England and the enactment of the Bill of Rights, John Cary's "The Bill of Rights ratified at the Revolution by King William, and Queen Mary, previous to their Coronation" (circa 1783-1797) offers a fascinating insight. As the title suggests, acceptance of the declaration's terms was a prerequisite set by Parliament before the king and queen could be crowned. This depiction encapsulates the emergence of a new power dynamic under the unwritten English Constitution, characterized by the principle of "the king in parliament".

Taking a cue from the developments in the metropolis, nearly a century after the American colonies asserted their rights and embarked on the journey to independence, they proceeded to adopt constitutions, culminating in the establishment of a federal constitution encompassing all states. In Virginia, where this process began, I often refer to Jack Clifton's oil painting, "Adoption of the Virginia Declaration of Rights" (circa 1794). In this portrayal, George Mason, who penned the initial version of the 1776 Declaration of Rights, addresses the assembly while others listen and take notes, indicating the revisions the text underwent during debates in the House of Burgesses. These documents are not merely composed of philosophical elements but also incorporate political and legal arguments, often influenced by circumstances, such as the omission of any mention of slavery.

The second most recognized image among students regarding constitutionalism is the tableau "Declaration of the Rights of Man and of the Citizen" by Jean-Jacques-François Le Barbier (circa 1789), which contains the entire text of the French

declaration. While the concept and imagery were clear at the time, they may not be as obvious today. The idea of presenting the declaration in a *tableau* is intriguing, as it connects the text to other sacred texts, albeit now secular rather than religious. This image serves as a form of official propaganda and is rich in iconographic symbols:

- The "eye of Reason" casts its light upon France, symbolizing the overthrow of absolute monarchy.

- The laurel garland represents power.

- The woman on the left personifies France, adorned with a crown and a blue coat adorned with *fleur-de-lys*. She has broken free from the chains of absolute monarchy by divine right. The clouds behind her symbolize the obscurantism and lack of fundamental freedoms of the *Ancien Régime*, which are fading away.

- The woman on the right embodies Freedom, holding a scepter in her right hand, guiding her with the radiant eye of reason, and a triangle symbolizing equality among men (though not women, as criticized by Olympe de Gouges in her "Declaration of the Rights of Woman and of the Female Citizen" of 1791). Her left hand indicates the new rules that will govern relations among the French people.

- The serpent biting its tail, an Ouroboros, represents the eternal cycle of life and the immutable nature of rights. It encircles a red cap: the Phrygian bonnet, worn by liberated slaves as a symbol of their freedom.

- The beam represents France's military strength, under control to ensure that the French people will not initiate aggression but possess the means to defend themselves if attacked.

Examining these details is crucial because, in general, people may not realize that France at that time was not a republic but had transitioned into a constitutional monarchy. Some symbols, like the red cap, could confuse students. As previously noted, the Phrygian bonnet is typically associated with Marianne, the symbol of the French Republic. Therefore, this reinterpretation was necessary to align the declaration with the republican tradition and differentiate it from the English Bill of Rights, despite their strong historical connections, particularly regarding the original reasons for convening the Estates-General.

It's no coincidence that France's tradition celebrates radical solutions during the revolution, such as the execution of Louis XVI. A vivid depiction of this spirit can be found in "Journée du 21 janvier 1793 la mort de Louis Capet sur la place de la Révolution: présentée à la Convention nationale le 30 germinal" by Isidore Stanislas Henri Helman (well-known for Charles Monnet's engraving), created between 1793 and 1794. The scene of the guillotine's imposition upon the French king in the Place de la Révolution is rich with symbolism. For instance, the empty pedestal in front of him once held an equestrian statue of his grandfather, Louis XV. When the monarchy was abolished on September 21, 1792, the statue was torn down and melted.

In a sense, the allegories of Haitian independence are also marked by bloodshed. During that era, the Island of Saint-Domingue was a French colony. From the images of the slave revolt in 1791, through the wars against France and the struggle for independence, numerous scenes of violence are depicted. Generally, these images aim to be shocking, portraying black individuals in peasant attire killing white people. Surprisingly, one of the more epic

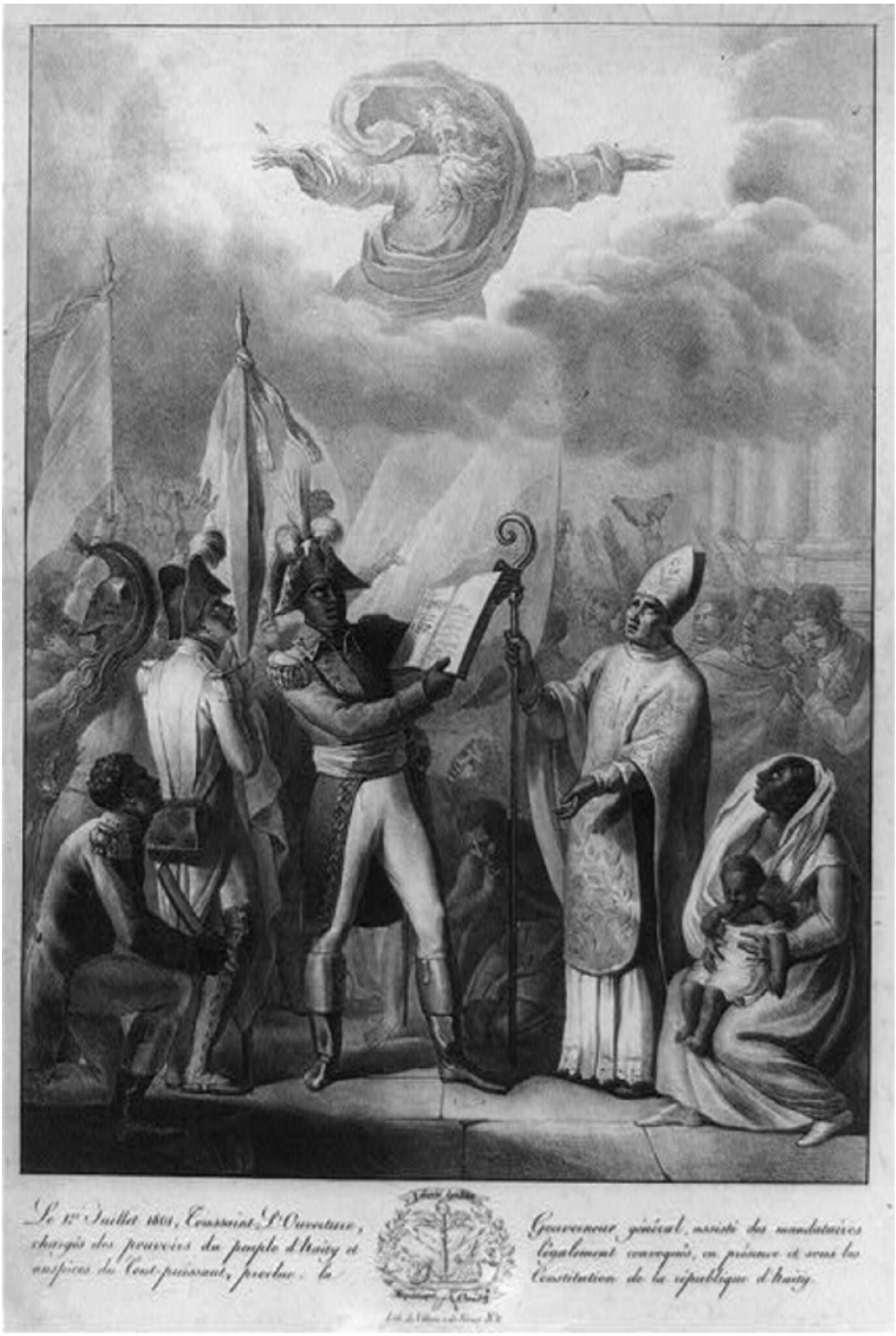

DÉCLARATION
DES DROITS DE L'HOMME
ET DU CITOYEN,
Décretés par l'Assemblée Nationale dans les séances des 20, 21,
23, 24 et 26 août 1789,
acceptés par le Roi.
PRÉAMBULE
LES représentans du peuple François constitués
en assemblée nationale, considérant que l'ignorance,
l'oubli ou le mépris des droits de l'homme sont les seules
causes des malheurs publics et de la corruption des gouvernemens,
ont résolu d'exposer dans une déclaration solemnelle, les droits
VII.
NUL homme ne peut être accusé, arrêté ni
détenu que dans les cas déterminés par la loi, et
selon les formes qu'elle a prescrites. Ceux qui solli-
tent, expédient, exécutent ou font exécuter des ordres ar-
bitraires, doivent être punis; mais tout citoyen appelé ou saisi


Journée du 21 Janvier 1793
Présentée à la Convention Nationale

paintings portrays a battle between Haitians and Poles. The Polish Army had allied with Napoleon, hoping for his assistance against Russia, Prussia, and Austria. This event was captured by January Suchodolski in "Battle of San Domingo" (also known as the Battle for Palm Tree Hill) in 1845. Initially convened to suppress a prison riot, the soldiers found themselves on the field facing rebels fighting for freedom. Some of the Polish men switched sides and joined the rebellion. Referred to as "the White Negroes of Europe" by Jean-Jacques Dessalines, Haiti's first head of state, they were granted Haitian citizenship after independence[24]. In Haitian constitutions, all citizens are referred to as *Noirs*.

The images depicted in the first "Haitian" constitution vary significantly, as evident in the lithograph "Le 1er Juillet 1801, Toussaint-L'Ouverture, empowered by the people of Haiti and under the auspices of the Almighty, proclaims himself Governor-General, accompanied by legally appointed representatives, in the presence and under the Constitution of the Republic of Haiti," created by Villain in 1801. This refers to the unique constitution of the Saint-Domingue colony in 1801, which liberated the black population of the island following a slave revolt. Christian symbolism was prominently featured, including depictions of God, a bishop, a mother with a child, and the people blessing the text held by Toussaint Louverture, the leader of the newly autonomous region of Saint-Domingue. Napoleon's disregard for the crucial clause regarding the end of slavery led to the war for independence and the adoption of the Constitution of 1805, which reinstated the image of a nation of free black men[25].

Now, let's delve into the Portuguese-Brazilian experience. It's intriguing because, following the British-North American and French-Caribbean experiments[26], the Luso journey absorbed many aspects of previous independence movements.


Le 15e Juillet 1801, Toussaint L'Ouverture,
chargés des pouvoirs du peuple d'Haïty et
auspices du Tout-puissant, proclame la
Gouvernement général, assisté des mandataires
légalement convoqués, en présence et sous les
Constitution de la république d'Haïty.

The Liberal Revolution of Oporto in 1820 hastened the convening of Extraordinary General Courts (an assembly reminiscent of the *Ancien Régime*, akin to the French General Estates or Cádiz in Spain). Since 1808, following the Napoleonic invasion, Prince Regent John VI and the entire Lusitanian court had been relocated to Rio de Janeiro. Then, in 1815, he declared a change in Brazil's status, transforming it from a colony into part of the United Kingdom of Portugal, Brazil, and the Algarve. This arrangement failed to satisfy both the Portuguese, who felt distant from power, and the Brazilians, who remained under Luso rule. When the courts were convened, only four delegates from Brazil were included. This marked the beginning of the independence process, exacerbated by Prince John's return to Lisbon, leaving his son Peter in Brazil to maintain control. However, in September 1822, Brazil declared its independence, prompting Portugal to declare its own constitution.

Turning to Portugal, we encounter "Allegory of the Constitution of 1822" by Domingos Sequeira (1822). In this composition, the characters are depicted within a monumental architectural setting where a crowned female figure, personifying Lusitania, stands prominently on a platform, expressing gratitude for her liberation. Flanking her are figures representing Strength and Reason. At the forefront of the platform, dressed in white, stands Liberty, whom the surrounding people implore for. It's a profoundly dramatic scene indeed.

We didn't come across significant allegorical representations of the Brazilian Constitution of 1824. Instead, the focus is on Pedro I, the first emperor of the newly independent nation, as depicted in "Dom Peter I, Emperor of Brazil" by Henrique José da Silva (1825). This artwork captures the drama of Peter's decision for Brazil, his heroic declaration of independence, and his glorious coronation.

It's also pertinent to discuss the Imperial Constitution, as Peter I dissolved the elected constituent assembly in 1823 and appointed a State Council to complete the task. The issue revolved around the question of whether the assembly or the dynasty held true constituent power. The emperor refused to be governed, leading to the emergence of a fourth power, the Moderator, inspired by Benjamin Constant's concept of neutral power.

In the Brazilian monarchy, the crown held the ultimate authority. The emperor served as the head of government, appointing ministers (executive power), selecting senators and influencing the Chamber of Deputies (legislative power), and appointing judges (judiciary power).

In conclusion, it's evident how illuminating images can be in presenting revolutionary and constitutional themes. The intricacies captured in paintings, lithographs, and other artistic mediums are highly educational, often delving into aspects that may not be entirely clear in declaration and constitutional texts. However, we shouldn't overlook the significance of these written documents themselves. In the next topic, I'll discuss how I incorporate them into my classes.

2.2 *The Preambles of Constitutions and Declarations*

Preambles are intriguing texts. Generally, they are often overlooked or relegated to a secondary position because, as we learn in Constitutional Theory, they lack enforceability. In essence, we cannot directly derive rules from these texts. However, in Legal History, this is not a hindrance; on the contrary, preambles can be highly useful for understanding legal texts[27] or may even be subject to analysis themselves.

Firstly, I'd like to highlight the presence of the sacred. In the case of the British Bill of Rights, it's interesting to observe the presence of clergy in the Lords Chamber: «Whereas the Lords Spiritual and Temporal and Commons assembled at Westminster, lawfully, fully and freely representing all the estates of the people of this realm, did upon the thirteenth day of February in the year of our Lord one thousand six hundred eighty-eight present unto their Majesties, then called and known by the names and style of William and Mary, prince and princess of Orange, being present in their proper persons, a certain declaration in writing made by the said Lords and Commons in the words following, viz.» God is also invoked in the French Declaration of 1789: «Therefore the National Assembly recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and of the citizen: [...]». Secularization would come in the subsequent phases of the revolution. Similarly, constitutions in the Catholic world—Spain, Portugal, and Brazil—would assert (in capitalized letters) the blessing of the Holy Trinity upon the preamble text.

The language used wasn't neutral. The notion of "declaring" rights was carefully considered[28]. Unlike "constituting," which implied a current political action, declarations focused solely on rights already in existence. These were described as "certain" and "inherent" (in Virginia), or as "natural, unalienable, and sacred," to all people "may remind them unceasingly" (in France). Particularly in England, and initially in the

United States and France, declaring rights was simpler than establishing them, even when the content was novel: the liberties under the old regime were vastly different from those post-revolutions and new constitutions, akin to political treaties.

Other linguistic uses corroborate this. The declaration of rights by the "good people" of Virginia signaled allegiance to the new order established in the colonies. As previously mentioned, the French Declaration of the Rights of Man and of the Citizen explicitly excluded not only women but also slaves and Jews[29]. Similarly, the famous "We the People" in the preamble of the American Constitution didn't encompass all residents of the new states, evident from a mere reading of the electoral processes outlined within the document.

The preamble of the Brazilian Imperial Constitution was particularly noteworthy. Similar documents, such as those of Spain and Portugal, emphasized the connection between the new text and the old laws of the nation, striving for national prosperity under this revised political agreement. As mentioned earlier, the drafting process was contentious, leading to the dissolution of an elected assembly and its replacement with a council appointed by the emperor. The Brazilian preamble reflected this, explaining how the final text, influenced by the emperor's intervention, was deemed favorable, while also highlighting the desired oath of allegiance to the emperor by the new composition of the national assembly.

In short, preambles serve as crucial sources for observing aspects often overlooked when comparing constitutional texts, which tend to be similarly abstract. As discussed, this approach often limits the scope of rights to bourgeois men, with preambles providing more genuine insights into the contexts. Consequently, they are valuable for classroom use, allowing students to grasp the nuances of each case.

2.3 *The Constitutional Process in Metropolises and Their Colonies*

To conclude this section, I aim to outline my strategy for decolonizing the teaching of Constitutional History while acknowledging a broader context. I explore the emergence of constitutionalism in the shadow of colonialism, a paradox when considering abstract liberal ideals. By examining the experiences of England and the United States, France and Haiti, and Portugal and Brazil from a comparative perspective, we can prompt students to ponder why these historical narratives matter, how they relate to our (peripheral) experiences, and which strategies proved effective in each case.

Former colonies, whether in revolutionary or reformist contexts, shared a common background but diverged in their futures. On one hand, these experiences were united by certain factors, notably the prevalence of Contractualism, particularly evident in the influence of John Locke's theory. On the other hand, the uniqueness of these experiences led to different constitutional arrangements: the United States adopted a republic, Haiti experienced an erratic succession of regimes, and Brazil established a monarchy. Moreover, external factors played a significant role in the success of the United States, the struggles of Haiti, and the fluctuations of Brazil. How each nation dealt with slavery was central to their trajectories.

The United States and Brazil viewed Haiti as a cautionary example to avoid: the idea of a "civilized" nation[30] governed by free black people was deemed unacceptable at the time. Slavery persisted in the United States until the Civil War of the 1860s, while Brazil abolished it gradually through a series of laws controlling the transition, culminating in the 1870s and 1880s. Politicians often cited the perceived "anarchy" of "negroes" in Haiti as justification for maintaining slavery[31]. While the constitution of Haiti declared the nation free, American and Brazilian texts remained silent on this foundational aspect of their countries' histories.

Hence, it's evident that the processes of constitutionalization weren't just interconnected at the center but also extended to the periphery, and this connection wasn't solely directed from the center outward. Another illustration is the Portuguese constitutional charter of 1826, which Peter IV, also known as Peter I of Brazil following his father John VI's death, imposed. This constitution also granted moderating power to the emperor, a fact that intrigued Carl Schmitt[32].

As we've observed through visual representations and preamble texts, constitutionalism's circular nature is marked by continuous interaction and influences from various directions. This complex mosaic isn't straightforward to present, but it's imperative for our students not to adhere to traditional, linear narratives centered around the Global North. Teaching Constitutional History in a country like Brazil presents an opportunity to delve into cutting-edge Legal History methodologies and serve as an example of how North America and Europe could reassess their trajectories. To achieve this, in my opinion, we must not only alter the discourse, but also reform our practices, as I'll discuss in the following section.

3. *Teaching Brazilian Constitutional History: Using Active Methodologies in a Legal History Course*

As I mentioned earlier, my Legal History course is divided into three main sections: a methodological introduction, an overview of Western legal history focusing on Constitutional History in modernity, and an in-depth study of Brazilian Legal History during the Republic. To teach this course, I employ active methodologies, blending traditional lectures with interactive exercises. During the general overview, I incorporate both vertical lessons and exercises, but I shift towards student-led activities when we delve into discussions about Brazilian law.

My objective in this segment is to highlight the activities related to Constitutional History, which typically take place in the final weeks of the course and follow a chronological sequence. To achieve this, I present two activities within the legal-historical panorama, covering legal modernity and contemporary law, as well as a guided activity focusing on Brazilian Law during the Republic.

In the Legal Modernity module, I propose a Moot Court exercise to delve deeply into concepts such as Constituent Power and Constitutional arrangements. This interactive simulation allows students to actively engage with the principles and processes that shape constitutional structures.

In the Contemporary Law module, the activity explores the interaction between International Human Rights and National Fundamental Rights, using Art as a vehicle to understand the advancement of rights for vulnerable groups. Through the analysis of artistic expressions, students gain insight into the evolving landscape of rights and their impact on a global and national scale.

Finally, in the History of Brazilian Law section, I guide students through simulations of Supreme Court historical cases, particularly those from authoritarian periods. These simulations involve re-evaluating past cases to assess the independence of judges during dictatorships. This exercise encourages students to critically evaluate judicial decisions in challenging political contexts and explore the complexities of maintaining judicial integrity during turbulent times.

3.1 *Legal Modernity: Constituent Power and Constitutional Arrangements - Historical Characters' Moot Court*

The initial activity presented to students is a "moot court"[33], a method widely recognized in International Law and common law jurisdictions for practicing the rhetorical aspects of certain subjects. In this exercise, two teams of students are given a predetermined amount of time to present arguments on a previously chosen theme, taking turns to engage in rounds of discussion. Nowadays, moot court groups are highly developed in many universities, and some competitions have gained considerable renown.

In my course, the moot court exercise also involves a role-playing component[34]. In addition to discussing a specific argument, students are required to assume the roles of historical figures.

The focus of the discussion is the emergence of constitutionalism in Brazil, particularly centered around the constitutional assembly of 1823 and the Constitution of 1824. The key figures involved are the Brazilian emperor, "Dom Pedro" (Peter I of Brazil, following Peter IV of Portugal), and the congressman "Frei Caneca" (Friar "Mug," a nickname derived from his family business, a ceramics fabric). Having previously discussed above the Brazilian monarch, we can now introduce his adversary.

Frei Caneca, a member of the Carmelite order and a politician, was part of a movement of liberal clergy in Brazilian politics during that period[35]. He served as a deputy for the province of Pernambuco in the National Assembly, but was later implicated, tried, and executed for his involvement in the Equator's Conference, a secessionist movement in Brazilian North-East zone.

While it's important to note that these two historical figures did not engage in a direct debate, examining Frei Caneca's congressional speeches and Dom Pedro's decrees reveal a crystallization of the two main political factions in imperial politics: liberals versus conservatives. These opposing stances shaped the arguments during the constitutional debate that defined Brazil's transition to an independent state.

In these discussions, two key arguments stand out: the nature of Constituent Power and the constitutional arrangements of powers and functions. Concerning the first argument, I've chosen to focus on the dilemma of precedence between the sov-

ereignty of the national assembly and the power of the dynasty. On one hand, the congressmen engaged in constituent work declared themselves free to deliberate on all matters. On the other hand, the emperor perceived certain issues as personal prerogatives beyond the purview of the people's representatives. In essence, the question boils down to whether the constitution was an imperial concession or a product of popular movement. As previously discussed, the outcome was the dissolution of the assembly, the establishment of a council, and the introduction of a constitution imposed by the monarch.

Regarding the second argument, I've chosen to examine the establishment of the Moderator Power, the fourth branch outlined in the constitutional charter. This serves multiple purposes: firstly, it allows the emperor to appoint agents across all three powers, including ministers, senators, and ordinary judges. Secondly, it grants him the authority to intervene in the exercise of powers; since the government acts in his name, he has the power to dissolve the chamber of deputies and call for legislative elections, as well as the authority to pardon criminal convictions. Thirdly, the emperor is deemed "inviolable and sacred" and is not held accountable by law or politics, as he is considered the "perpetual defender of the nation."

This discussion is intriguing because it reflects themes present in the Western legal and political tradition of the era. Specifically, two French figures, Benjamin Constant and Abbé Sieyès, serve as notable examples. Constant's concept of Neutral Power[36] bears striking parallels to the Brazilian experience of Moderator Power, making him a direct reference point. While Sieyès's influence may be less obvious, a closer examination reveals that the ideas of the Brazilian friar draw clear inspiration from the French abbot[37]. It's noteworthy that both figures were clergymen engaged in politics within a liberal framework. I encourage students to delve into the works of Sieyès and Constant to gain deeper insights into the Brazilian constitutional context.

The class will be divided into six groups: two representing Dom Pedro, two representing Frei Caneca, and two acting as juries. Each trio will tackle different aspects of constitutional power. The first trio will debate constituent power fundamentals, while the second will focus on moderator power.

Each group must prepare a written memorandum (1-3 pages) and engage in two rounds of 5-minute oral debates. During the debates, each group can designate two representatives. Dom Pedro's and Frei Caneca's groups must submit their memorandums to the jury groups 48 hours before the presentation.

Following each debate, the jury will articulate the reasons for selecting the best debater. To support their arguments, Dom Pedro's groups will reference the decrees concerning the opening and dissolution of the Constituent Assembly of 1823; Frei Caneca's groups will utilize his speeches from that assembly, and the jury groups will refer to the Imperial Constitution of 1824. Additionally, selected texts from Benjamin Constant and Abbé Sieyès will be used.

The evaluation criteria consist of a score ranging from 0 to 10, divided into five points for memorandums (assessing both form and content, including writing style, use of bibliography, and adaptation), four points for oral debates (evaluating form,

content, rhetoric, and coherence with the memorandums), and one point by the costumes according to the assigned character (king, clergyman, or judge), aiming to add a playful dimension and alleviate the tension inherent in this type of exercise.

My experience with this exercise has been very positive. The students have been actively engaged and have presented well-constructed memorandums and debates. One concern, however, has been the attire, as some students seemed more focused on their costumes than on their arguments. It's the professor's role to maintain the necessary seriousness to either uphold or redirect the focus. Following all presentations, feedback is provided for each group, followed by a closing speech to the entire class, linking the highlighted aspects to the broader themes of the previously discussed module.

In this regard, the activity helps to illustrate how Brazil's initial constitutional experience intersects with the tradition of liberal constitutionalism and its constraints. For instance, the inclusion of the concept of moderator power in the constitutional text, though rare, indicates the ongoing debate within the political sphere. Thus, moderator power in Constitutional History isn't a uniquely Brazilian phenomenon (like the "jaboticaba," a Brazilian fruit used figuratively to denote something exclusive to Brazil)[38]. On the contrary, the debate over the alignment of political powers and legal functions (whether the Executive branch solely administers, the Parliament solely legislates, and the Judiciary solely adjudicates) was under construction and in contention during that period and beyond.

Regarding the issues raised by students during the exercise, several key points should be noted. Frei Caneca's groups benefit from their strong grounding in Enlightenment tradition, which allows them to easily connect their arguments with their backgrounds in political and legal thought. On the other hand, Dom Pedro's groups have the advantage of historical victory. Despite the challenges prevailing political and legal norms, the Brazilian imperial constitution endured for almost a century, making it the longest-lasting in our tradition.

Another significant issue highlighted is the polarization within the contemporary Brazilian political debate, where left-wing students align with Frei Caneca's discourse and right-wing students with the emperor's speech.

Additionally, there is a current argument circulating in radical right-wing circles about the survival of moderator power in our present-day Constitution of 1988. This presents a notable paradox since the 1988 Constitution is celebrated as the "Citizen Constitution" following a democratic process that incorporated popular aspirations. The heterodox idea posits the role of the military forces in resolving impasses when branches of government are in conflict, based on a provision in the constitutional text concerning "the guarantee of law and order". This provision essentially places the Army, Navy, and Aeronautics under the same constitution and, consequently, under the authority of the Executive, Legislative, and Judicial branches, with particular emphasis on the President, who serves as the commander in chief of all forces[39].

Despite the complexities of this debate, it opens up dialogue about the utilization of the past and the continuities and ruptures within Constitutional History. While challenging, it underscores the importance of

legal history in law courses[40] and the civil obligation of legal education to uphold constitutional values[41], even in contexts where academic freedom may be contested[42].

In my opinion, this activity is highly valuable as it encourages students to analyze present-day issues through a historical lens. It provides an opportunity to delve into fundamental notions of constitutionalism, grounding these concepts in primary sources and understanding Brazilian particularities within the broader context of Global Constitutional History.

3.2 *Contemporary Law: International Human Rights and National Fundamental Rights - Art, Rights, and Vulnerable Groups*

The second activity proposed for students resembles a "vernissage" or soirée. In this exercise, each team of students can present an artistic expression focused on predefined themes. The manifestation should be partially original or, at the very least, a collage of existing pieces, encompassing mediums such as music, photography, paintings, digital art, etc. The aim of this exercise is to elicit personal impressions about the topics and observe how legal thought begins to influence students' reasoning.

Groups may choose to exhibit photography or painting collections, showcase fiction or non-fiction films, stage theatrical plays, or perform musical concerts. Subsequently, they are required to upload a file containing their presentation materials (video recordings, photos, scripts, etc.) onto the Moodle online platform and present or perform them in the classroom. The evaluation criteria consist of a score ranging from 0 to 10, divided into five points for the support material (assessing both form and content, including text writing, use of legal texts, and adaptation) and five points for the presentation (assessing aesthetics and coherence with the script).

I have selected eight issues sensitive to the Brazilian reality: #1: women; #2: black people; #3: children; #4: indigenous and traditional (such as *quilombolas*, *ribeirinhos*, etc.) people; #5: the prison population; #6: religious minorities; #7: LGBT+ people; and #8: persons with disabilities. Some of these topics are addressed by specific human rights conventions (e.g., CEDAW for women), while others are addressed more broadly in international treaties (e.g., LGBT+ people).

The exercise, titled "Art, Rights, and Vulnerable Groups," draws upon primary sources such as the Universal Declaration of Human Rights (1948), the American Convention on Human Rights (1969), also known as the "Pact of San Jose, Costa Rica," and the Constitution of the Federative Republic of Brazil (1988). The objective is to determine whether the vulnerable group chosen by each team is protected by these documents and whether their rights can be classified as international human rights or national fundamental rights. Following this initial analysis, teams may research additional declarations, conventions, international treaties, and domestic legislation pertaining to their chosen subject.

Subsequently, teams are tasked with comparing "law in the books" to "law in action" regarding their respective topics and presenting this contrast through art. Generally, students respond well to mediums such as music, cinema, and other forms of art, and some demonstrate genuine talent in their

execution. While factors such as shame, shyness, or other psychological, moral, or religious considerations may occasionally interfere, it is rare for an entire group to be unable to produce an acceptable result.

This activity delves into the discussion of how rights are articulated. Firstly, international documents such as the Universal Declaration and the American Convention on human rights primarily focus on civil rights, encompassing individual liberties (such as life, liberty, equality, and property) and political rights (such as the right to vote and be elected). These texts establish legal protections based on a traditional notion of equality, rooted in formalistic legal principles, while also incorporating a humanitarian perspective, which asserts that no right should be denied to any individual. It's important to note the liberal essence of these rights, which are designed to shield individuals from state interference, a crucial consideration especially in the aftermath of World War II when all states were tasked with safeguarding the new global order. Notably, communist countries advocated for the inclusion of social rights in the 1948 Declaration, expressing their dissent by abstaining from the vote when these rights were not included[43]. The situation only began to change after the decolonization of Africa, marked by the signing of the International Covenant on Economic, Social, and Cultural Rights in 1966.

Moreover, national constitutions have increasingly been tasked with implementing social rights, following the examples set by Mexico (1917) and Germany (1919), and later incorporated into the second Brazilian republican constitution (1934). The liberal tradition of constitutionalism and international law regards human rights as possessing universal value, with fundamental rights being temporal and spatial variations of these universal rights[44]. The post-Cold War era witnessed a shift in the international order towards acknowledging the intersectionality of human rights, leading to conventions addressing specific groups such as women (1979) and children (1989). This was instrumental in recognizing the collective and diffuse nature of these rights, as reflected in newer constitutions like Brazil's 1988 Federal Constitution.

Lastly, it is essential to consider the practical significance of these conventions in protecting vulnerable groups. While the existence of norms is crucial for recognition, the role of courts, including constitutional courts and human rights courts within regional integration systems, is vital in interpreting and applying these norms in cases where legal texts are ambiguous or lacking. For instance, despite the absence of a specific convention on LGBT+ rights, courts in the Inter-American system[45] and Brazil[46] have addressed issues related to LGBT+ discrimination. Courts play a pivotal role in responding to legal challenges within constitutionalism and international law, even in cases where clear guidelines may be lacking[47].

In conclusion, this exercise offers students the opportunity to explore various approaches to situating human rights within a constitutional framework. In contrast to the previous exercise, this one delves into contemporary notions of constitutionalism, thereby facilitating a deeper understanding of Brazilian particularities within the international order. It serves as yet another tool for connecting classroom discussions to the broader context of global constitutional history.

3.3 *History of Brazilian Law: Supreme Court and Authoritarianism - Rejudging Historical Cases*

The third activity planned for students serves as a distinctive approach to the module on the History of Brazilian Law. Rather than following the typical vertical class-horizontal class sequence (comprising lectures and activities), this exercise fosters active learning through independent research by student teams. Each team is tasked with studying a specific historical period, with initial literature recommendations provided. Subsequently, the presentations are shared with other teams, collectively constructing a comprehensive panorama.

A significant aspect of this activity is its focus on the Vargas Era (1930-1945) onwards. As previously mentioned, in the broader Western context, I emphasized the Imperial Constitution of 1824. During the feedback session for the exercise, I advanced the discussion to include constitutional review. This is crucial at that time because the Brazilian legal framework lacked judicial review, relying instead on the traditional *référé législatif* supplemented by opinions from the Council of State[48]. Therefore, I introduced the concept of judicial review in the American context and its adoption in Brazil post the proclamation of the Republic in 1889. The transition to the new regime transformed the former Supreme Tribunal of Justice, akin to a *Cour de Cassation*, into a Supreme Court upon the establishment of federal justice in 1890. This system persisted through the enactment of the first Republican Constitution in 1891. Building upon this foundation, we can transcend the limitations posed by primary sources, given that all case files from the First/Old Republic in the Supreme Court are manuscripts.

Each group is assigned a specific period of Brazilian constitutional history: #1: Vargas Era; #2: Democratic Interval (1946-1964); #3: Military Dictatorship (1964-1985); and #4: New Republic (1985-present). Corresponding to each period, I have designated one case from the Federal Supreme Court to be rejudged by the groups. Given that I teach two Legal History courses simultaneously (one in the morning and one in the evening), I have selected two cases from each era, sourced from the Brazilian Supreme Court's website under the "historical judgments" section[49]:

#1: Vargas Era:

- In the case of Olga Benario[50], a German Jewish woman trained by the Komintern to assist the Brazilian Communist Party in starting a revolution, she was expelled by President Vargas. At that time, she was pregnant with Luiz Carlos Prestes, the party's leader. They were arrested in 1936 following the failed military coup promoted by the Communist Party in November 1935. They lived undercover as a common couple, using the same cover to clandestinely enter Brazil and then began dating. They never officially married, so Olga couldn't claim the right to remain in Brazil. Before the birth of their child, she wasn't recognized as the mother of a national. The habeas corpus wasn't issued to release Olga, but to keep her imprisoned as a rebel alongside Prestes and other communists. It was also a ploy to ensure the childbirth happened in Brazil. The Supreme Court ruled that Olga should be "free beyond [Brazilian] borders." She was deported by Brazilian authorities to Nazi Germany on a ship, and after giving

birth to her daughter Anita in prison, she was sent to a concentration camp and murdered in a gas chamber[51].

- Regarding the case of the National Liberation Alliance[52], a left-wing coalition established in 1935 advocating for land reform, cessation of external debt payments, and nationalization of foreign companies, it included workers, low-level military personnel (*tenentes*), communists, and intellectuals. Its motto was "bread, land, and freedom." Following the "Red Riot" in November 1935, the party was dissolved by presidential decree. The party leadership took legal action (*Mandado de Segurança*)[53] to maintain its activities, but this was denied by the Supreme Court. Subsequently, in November 1937, Vargas staged a *coup d'état*, leading to the extinction of all political parties[54].

#2: Democratic Interval (1946-1964):

- The case involving the annulment of the Brazilian Communist Party's registration[55] occurred at the end of the Estado Novo regime in 1945 when Vargas granted amnesty to communists. They re-entered electoral politics, and in 1946, elected Prestes as a senator and a dozen federal deputies, including the writer Jorge Amado. In 1947, a legal suit was filed against the party in Electoral Justice, accusing it of undermining national sovereignty by being part of the Communist International. The electoral court banned the party, and its leaders appealed to the Supreme Court not to reverse the decision but to use a habeas corpus to gain access to the party's headquarters and retrieve documents. The court rejected the appeal, arguing the common nature between a civil association and a political party. The communists sought to avoid a repeat of the 1936 experience when Prestes was arrested, and documents found in his house were used to prosecute other supporters[56].

- In the case of Café Filho's "impeachment"[57], Vargas' vice-president who assumed the Executive after his suicide in 1954, President Café Filho suffered from a heart condition the following year. After his recovery, he was prevented from returning to power. In this case, there wasn't a high crime as outlined in the Constitution, and rather than facing prosecution by deputies and judgment by senators, the National Congress, supported by the Army, prevented Café Filho's return, citing his inadequate health. Café Filho appealed to the Supreme Court through a *Mandado de Segurança* to return to the presidency, but the court upheld the victory of force over the law. Subsequently, the Army blocked the next successor, the Chamber of Deputies' president, Carlos Luz, and supported the Federal Senate's president, Nereu Ramos, who completed the term of office[58].

#3: Military Dictatorship (1964-1985):

- The case of Mauro Borges[59], governor of the state of Goiás, stands out. He came under investigation by the military police after the 1964 coup because he was suspected of being disloyal to the new regime. According to the state constitution, the head of state could only be prosecuted by the legislative assembly. When the army besieged the governor's palace, Governor Borges appealed to the Supreme Court, seeking a preventive habeas corpus — an order to declare any future imprisonment illegal. This case is notable because it marked the first time the court granted an individual *ad limina* decision in a habeas corpus, where the rapporteur decided alone and then presented the case to his colleagues. The court upheld

the initial decision and granted the order to block the arrest. As a result, the President sought approval from Congress and gained the authority to decree a federal intervention in Goiás. Borges was removed from office and lost his political rights under the dictatorship[60].

- Another significant case is that of Vito Miracapillo[61], an Italian missionary priest in a small town in the state of Pernambuco, who refused to conduct a service on Independence Day. The priest justified his decision not only with traditional arguments about the separation between state and church but also by presenting social questions typical of Liberation Theology, a leftist strand of Catholic thought. Consequently, he was considered an enemy of Brazil due to the association of that theology with Marxism, leading the President to sign his expulsion decree. In response, Miracapillo presented a habeas corpus to the Supreme Court to remain in Brazil. Despite showing deference to governmental discretion, the tribunal deemed the presidential act legal[62].

#4: New Republic (1985-nowadays):

- In this period, two notable cases revolve around the impeachment of Fernando Collor[63], the first president elected after the military dictatorship. He confronted the Supreme Court with several *mandados de segurança* during and after the political process in the Chamber of Deputies and Federal Senate, questioning the use of the Impeachment Act of 1950 in accordance with the 1988 Constitution. In the first case[64], Collor argued a lack of respect for his right to a fair trial because the Congress Regiment was not adhered to regarding the composition of the accusation committee and the time allotted to present his defense. Although the first appeal was not accepted, he was granted an extended deadline to prepare his defense.

- In the second case[65], following the impeachment, Collor contested the punishment imposed on him. The Brazilian Constitution states that the consequences of impeaching a president include the definitive removal from office and the loss of political rights for eight years. Although the Congress's condemnation deemed both punishments necessary, Collor argued that they should be analyzed separately. However, the Supreme Court upheld the Congress's decision.

The objective of these simulations is to rejudge these notable historical cases, with students assuming the roles of legal actors (attorneys, prosecutors, and judges)[66]. To facilitate this, classes are divided into larger groups, typically combining two smaller groups from previous class activities. These groups are responsible for studying the case in depth, including the historical context, court practices, relevant constitutional and legal provisions, and division of roles before executing the simulation. This role-playing exercise is comprehensive, requiring students to draft their arguments and present them in a simulated courtroom setting.

To enhance the authenticity of the simulation, I provide students with robes similar to those worn in the Brazilian Supreme Court. While suits and ties are not mandatory, most groups opt for formal attire, embracing the courtroom aesthetic. Although our university lacks a dedicated space for this activity, students and I make efforts to transform the classroom, utilizing the Supreme Court's plenary layout to arrange chairs and incorporate symbolic elements

such as the position of the chief justice and other justices, attorneys, prosecutors, secretaries, etc.

The activity is evaluated on two fronts. Individual role-play grades are based on a scale from 0 to 10, assessing the students' written submissions aligned with their assigned roles, their ability to rejudge the case in line with its historical and legal contexts, and their proficiency in employing legal terminology and understanding legal institutions relevant to the case. Group grades are also scored on a scale from 0 to 10, focusing on the presentation of the judgment summary (including photos and videos) on the Moodle online platform and the oral presentation in the classroom, which encompasses time management (5 minutes per student), adherence to courtroom rituals adapted to the classroom setting, characterization (costumes, environment), and pre and post-presentation organization.

This activity's complexity serves to educate budding legal students on the functioning of legal judgments while fostering a critical perspective on the justice system. Incorporating historical analysis adds depth to the examination, illustrating the evolution of courtroom practices throughout the 20th century across different political epochs in Brazil.

A significant challenge lies in discerning whether alternative decisions were feasible in the past, thus prompting questions about the independence of the Brazilian Supreme Court. There are no easy answers, as law alone cannot account for all contextual factors. Cooperation from disciplines such as Political Science, Sociology, Anthropology, Psychology, and even Genealogy is essential for drawing meaningful conclusions. Legal disciplines, including Jurisprudence, Legal History, and Constitutional Law, offer insights into why the Supreme Court may adhere to or diverge from constitutional principles, and the extent to which it may align with or resist governmental or parliamentary actions.

For instance, during the Vargas Era, cases were adjudicated under the declaration of *état de siège*, which imposed constraints prescribed by the Constitution itself, particularly in managing writs such as *habeas corpus* and *mandado de segurança*, aimed at safeguarding individual rights. In these instances, procedural rules acted as formidable barriers. However, extralegal considerations, such as the perceived communist threat or a formalistic interpretation of the law, influenced outcomes. Moreover, the judiciary's role varied across democratic and authoritarian regimes, with courts sometimes legitimizing political decisions, as seen in the banning of the communist party, or refraining from challenging politics to maintain legitimacy, as in the deposition of President Café Filho. Cases selected to represent the Military Dictatorship era demonstrate the enduring effects of long-term authoritarian rule, with the Supreme Court initially asserting its independence (Governor Borges's case) but later exercising greater caution (Priest Miracapillo's case). In the early years of the New Republic, the Supreme Court began testing its expanded powers under the current Constitution through judicial review, with a presidential impeachment serving as a litmus test for the judiciary's influence.

These cases collectively depict the Supreme Court as a conservative institution, eliciting feelings of injustice among students upon reading the selected decisions. The challenge lies in assessing whether

past Brazilian constitutions were similarly conservative. While the presence of a bill of rights or guarantee writs may not suffice to drive civilizational progress, it is imperative for the Supreme Court to recognize its role in upholding the rule of law.

Finally, as an activity that deals not only with content issues but also performance, certain social questions may arise. Secondary concerns such as clothing can represent broader issues. Some students protest, arguing that they don't have a suit to use in simulations. I always remind them that it's not mandatory, but what they really want to say is, "We don't feel like we belong in this world" (the world of the justice system). Some protest against the elitism of the courts; however, it's mostly an economic argument. This is important because in such cases, they not only face limitations in acquiring clothes but also books and other necessities. In a country marked by inequality like Brazil, this cannot be ignored; it affects their ability to stay in university and enter the job market. Additionally, clothing may raise gender issues. Noting that the Supreme Court's composition lacks any woman as judges, some female students wear suits and ties. It's a clever strategy to highlight a limitation of this exercise: how can we replicate courtrooms with only male judges in mixed-gender classes? These students highlight the paradox of trying to adhere closely to the symbols (where formal clothing is one), while knowing that these clothes were originally designed only for men. The first woman justice in the Brazilian Supreme Court, Ellen Gracie Northfleet, was appointed only in 2000.

I am very confident in this activity. Despite complaints from regular students about the effort required to prepare for the simulation, my experience shows great overall engagement and satisfaction. Not only does it help them better understand legal history, but it also provides insight into legal professions in practice. The students present well-written memorials and engage in oral debates, delving into the historical context. Regarding the issues raised by students during the exercise, some seem content to adhere to the law passively, repeating old arguments from each case, while others strive to find creative solutions within the historical context, exploring alternative outcomes that align with our older constitutions. In any case, it's not about lack of interest in the activity, but rather different approaches to confronting the legal phenomenon that highlight varying visions of Constitutionalism. In today's Brazil, where the Supreme Court plays a leading role in the political arena and amidst electoral polarization, it's natural to see contrasting views on the law.

Thus, this complex exercise appears suitable for showing students the directions taken by the Supreme Court during the 20th century and serves as a good way to illustrate Brazilian republican constitutions in action. Simultaneously, it serves as a persuasive introduction to the justice system for students.

Conclusions

This article aimed to showcase my teaching approach in Brazil, particularly in a Brazilian LL.B. course focusing on Legal History for first-year students. I utilized active methodologies to center on Constitutional History within a broader range of teaching

possibilities, considering the various approaches to the field in Brazil.

In the first section, I outlined the foundations of my teaching methodology. Drawing from a comparative constitutional history perspective, I introduced the sources utilized and outlined how I structure classes vertically. I employed visual aids, such as iconography depicting declarations of rights and constitutions, to enhance understanding of revolutions and the enactment of constitutions. By focusing on constitutional and declaration preambles, I emphasized their significance in revealing overlooked aspects and bringing historical experiences to life, essential from a legal-historical standpoint. Additionally, I compared constitutional processes through the lens of the metropolis-colonies dichotomy, exploring cases such as England-United States, France-Haiti, and Portugal-Brazil, highlighting the circulation of constitutionalism ideas and diverse directions of influence. This decolonial approach was particularly relevant for students accustomed to narratives centered on the Global North.

In the second part, I delved into the active methodologies employed to teach Brazilian Constitutional History. Utilizing moot court scenarios featuring historical figures such as Dom Pedro and Frei Caneca, students were encouraged to analyze the evolution of constitutionalism in Brazil and grasp different constitutional frameworks. By introducing fundamental notions of constitutionalism, students could contextualize Brazilian particularities within global constitutional history. Through the exhibition of art and discussions on vulnerable groups and human rights, students were prompted to consider the integration of global human rights into national constitutions and explore issues of jurisdictional tutelage. Simulating historical cases of the Supreme Court provided a platform for debating creative and deferential constitutional hermeneutics, showcasing the evolution of Brazilian jurisprudence throughout the last century, and offering insight into legal professions.

Given the constraints of the course, I had to prioritize certain aspects while highlighting others. For instance, while it was not feasible to delve into topics such as original and derivative constituent power, which are significant, especially given the numerous amendments to the 1988 Constitution, or to address issues like academic freedom, often threatened in Brazil, or explore alternative teaching methodologies like Problem-Based Learning. Nevertheless, it's important to recognize the multitude of methods available to foster historical debate on Constitutionalism.

Ultimately, teaching Constitutional History in Brazil presents an opportunity to expand legal history methodologies and serves as an example for how the Global North can reassess their approaches, which often tend to be self-centered or unidirectional. Ensuring student engagement[67] and autonomy[68] is crucial in the field of Legal History, and depending solely on traditional narratives is no longer sufficient to achieve this objective. Achieving this objective, in my view, necessitates a critical review of discourses and practices and the sharing of perspectives to pave the way forward.

[1] W. Martins Ferreira, *História do Direito Constitucional Brasileiro*, São Paulo, Max Limonad, 1954.

[2] L. Boechat Rodrigues, *História do Supremo Tribunal Federal*, Rio de Janeiro, Civilização Brasileira, 1965 (4 v.).

[3] E. Viotti da Costa, *O Supremo Tribunal Federal e a construção da cidadania*, 2 ed., São Paulo, Unesp, 2006.

[4] Research group "Percursos, narrativas, fragmentos: história do direito e do constitucionalismo", in <http://dgp.cnpq.br/dgp/espelhogrupo/4979486258943273>, January 2024. See, for example, A.L.C.L. Seelaender, *Preaching Against the Earthquake. The Rise of State Intervention and the Resistance to It in Brazilian Constitutional and Administrative Law*, and C. Paixão, M. Meccarelli, *Constituent power and constitution-making process in Brazil: concepts, themes, problems*, both in «Giornale di storia costituzionale», n. 40, 2020.

[5] Research group "História do constitucionalismo brasileiro: a construção social da cidadania e mudança constitucional no Brasil entre 1920 a 1988", in <http://dgp.cnpq.br/dgp/espelhogrupo/212250>, January 2024. See, for example, M. Casseb Continentino, *History of Constitutional Review in Brazil (From Foundation to Nowadays)*, in «Giornale di storia costituzionale», n. 40, 2020.

[6] Research group "IUS COMMUNE - Grupo Interinstitucional de História da Cultura Jurídica", in <http://dgp.cnpq.br/dgp/espelhogrupo/24008>, January 2024. See, for example, A. Dal Ri Jr., L. Dal Ri, *Reception of norms of international law in the Brazilian Constitutional Experience: Doctrinal Conceptions about Executive Power overlays Between the Empire and the Republic (1824-1988)*, and D. Nunes, *António Manuel Hespanha and the Brazilian Constitutional History*, both in «Giornale di storia costituzionale», n. 40, 2020.

[7] Research group "Direito, História e Poder Judiciário", in <http://dgp.cnpq.br/dgp/espelhogrupo/386951>, January 2024. See, for example, W. Guandalini Jr., *Moderating Power in the 19th century Brazilian Constitutional Doctrine*, in «Giornale di storia costituzionale», n. 40, 2020.

[8] Research group "História do Direito e do pensamento jurídico brasileiro", in <https://pos-graduacao.direito.usp.br/linhas_de_pesquisa/historia-do-direito-e-do-pensamento-juridico-brasileiro/>, January 2024. See, for example, R. Mafei Rabelo Queiroz, *Abuse of Rhetorical Power and Presidential Impeachment in Brazil: Reflections from Legal History*, in «Giornale di storia costituzionale», n. 40, 2020.

[9] Universidade de Brasília (UnB), Programa de Pós-Graduação em Direito, Lista de Oferta (syllabus), <http://ppgd.unb.br/documentos/relatorios-de-atividades>, January 2024.

[10] Universidade Federal Rural do Semi-Árido (UFERSA), Programa de Pós-Graduação em Direito, Lista de Oferta (syllabus), <https://ppgd.ufersa.edu.br/disciplinas/>, January 2024.

[11] Centro Universitário Internacional (UNINTER), Programa de Pós-Graduação em Direito, Lista de Oferta (syllabus), <https://www.uninter.com/mestrado/wp-content/uploads/2023/08/HISTÓRIA-DO-DIREITO-PÚBLICO.pdf>, January 2024.

[12] Universidade de São Paulo (USP), Programa de Pós-Graduação em Direito, Lista de Oferta (syllabus), <https://direito.usp.br/docentes>, January 2024.

[13] Universidade Federal de Santa Catarina (UFSC), Programa de Pós-Graduação em Direito, Lista de Oferta (syllabus), <https://ppgd.ufsc.br/curriculo-mestrado/>, January 2024.

[14] Universidade Federal de Uberlândia (UFU), Programa de Pós-Graduação em Direito, Lista de Oferta (syllabus), <http://www.cmdip.fadir.ufu.br/sites/cmdip.fadir.ufu.br/files/Anexos/Bookpage/EMENTA%20-%20PDI048%20-%20História%20do%20Direito%20Público%20e%20do%20Constitucionalismo.pdf>, January 2024.

[15] Research group "Grupo de Pesquisa Corpografias Gênero, Raça e Direito", in <https://ippur.ufrj.br/pesquisa/laboratorios-nucleos-e-grupos-de-pesquisa/>, January 2024. See, for example, C.P. Carvalho, *Transition to democracy and the Brazilian presidential system post-1946: the relationship between institutional design and political instability*, in M. Meccarelli, C. Paixão, Cl. Roesler (ed.), *Innovation and transition in Law: experiences and theoretical settings*, Madrid, Dykinson, 2020, pp. 225-246.

[16] In that way, I would venture to mention the collection "Novos Rumos da História do Direito" (New Routs to Legal History), departed from my related course at UFSC's Ph.D. on Law, where I am opening space to these new agents to present situated perspectives (including on constitutional history) by themselves. See D. Nunes (ed.), Ph. Oliveira de Almeida, V.H. dos Santos, M.D. Barbosa (Coord.), *A Cor da História & a História da Cor* (Coleção Novos Rumos da História do Direito – vol. 1), Florianópolis, Habitus, 2022 and D. Nunes (ed.), A.L. Sabadell, B. Madruga da Cunha (Coord.), *Resistências e reivindicações femininas na cultura jurídica do século XX* (Coleção Novos Rumos da História do Direito – vol. 2), Florianópolis, Habitus, 2024, available also as ebook at Ius Commune webpage, in <https://iuscommune.paginas.ufsc.br/livros/>, January 2024.

[17] G.N. Bechara *A história do direito nos cursos jurídicos de graduação: trajetória e situação contemporânea*, Dissertation (LL.M.), Florianópolis, Universidade Federal de Santa Catarina, 2015.

[18] We have the classical article by W.M. Ferreira, *A história do direito nos cursos jurídicos do Brasil*, in «Revista da Faculdade de Direito da Universidade de São Paulo», n. 45, 1950, pp. 429-446, and the recent discussion by R.M. Fonseca, *O deserto e o vulcão. Reflexões e avaliações sobre a História do Direito no Brasil*, in «forum historiae iuris», June 15, 2012.

[19] See, for example, I.C. Pilarczyk, A. Fernandez, B. Young (eds.), *Law, Life, and the Teaching of Legal History: Essays in Honour of G. Blaine Baker*, Montreal- Kingston, McGill-Queen's University Press, 2022; R.M. Jarvis, *Teaching Legal History: Comparative Perspectives*, London, Wildy, Simmonds and Hill Publishing, 2014; K. Modeer, P. Nilsen (eds.), *How to Teach European Comparative Legal History: Workshop at the Faculty of Law, Lund University, 19-20 August 2009*, Lund, Lund University Press, 2011.

[20] A good example to change this situation was the recent online seminar from the journal "Comparative Legal History", by the European Society of Comparative Legal History, "Dialogues on Teaching Comparative Legal History" on October 19, 2022, in <http://esclh.blogspot.com/2022/09/online-seminar-journal-comparative.html>, January 2024.

[21] On Brazilian debate, see J. Garcez Ghirardi, *Métodos de Ensino em Direito: conceitos para um debate*, 2 ed., São Paulo, Almedina, 2020; M. Feferbaum *et al.*, *Ensino Jurídico e inovação: dicas práticas e experiências imersivas*, São Paulo, Almedina, 2020; G. Forma Klafke, M. Feferbaum, *Metodologias ativas em direito: guia prático para o ensino jurídico participativo e inovador*, São Paulo, Atlas, 2020; J.-R. Capella, *A aprendizagem da aprendizagem: uma introdução ao estudo do direito*, Belo Horizonte, Fórum, 2011.

[22] To a brief overview on the issue, see G. Martyn, *Introdução à Iconologia Histórica do Direito*, in A. Dal Ri Jr., C. Dias Corrêa, D. Nunes (eds.), *ANAIS XVI Encontros de História do Direito da UFSC: Printing & Iconology as Legal-Historical Sources*, Florianópolis, UFSC, 2020, pp. 12-37; and for a complete analysis, see St. Huygebaert, G. Martyn, V. Paumen, E. Bousmar, X. Rousseaux (eds.), *Art of law: artistic representations and iconography of law and justice in context, from the Middle Age the First World War*, Cham, Springer, 2018.

[23] L. Lacchè, *La libertà che guida il popolo: le tre gloriose giornate del luglio 1830 e le "Chartes" nel costituzionalismo francese*, Bologna, Il Mulino, 2002.

[24] S.G. Dapía, *The Polish Presence in Latin America: An Introduction*, in «Polish American Studies», n. 69/1, 2012, pp. 5-8.

[25] On the Haitian constitutional experience in the 19th century, see M.V. Lustosa Queiroz, *Constitucionalismo Brasileiro e o Atlântico Negro: a experiência constituinte de 1823 diante da Revolução Haitiana*, 4 ed., Rio de Janeiro, Lumen Juris, 2023, p. 79-112.

[26] And the Spanish-Central and South American one, which I touch upon in class but won't elaborate on here to save time and space. See J.F. Esteban Lorente, *La Constitución Española de 1812 en Goya*, in «Anales de Historia del Arte», Volumen Extraordinario, 2008, pp. 365-374.

[27] A. Walmott Borges, *Preâmbulo da Constituição e a Ordem Econômica*, Curitiba, Juruá, 2003, pp. 34-54.

[28] L. Hunt, *Inventing Human Rights: A History*, New York, W.W. Norton & Company, 2007, pp. 113-145.

[29] Ivi, pp. 146-175.

[30] A. Ribeiro da Silva Jr., *Civilização e barbárie na ciência do direito internacional*, Dissertation (LL.M.), Florianópolis, Universidade Federal de Santa Catarina, 2015.

[31] Queiroz, *Constitucionalismo Brasileiro e o Atlântico Negro* cit., pp. 113-210.

[32] C. Schmitt, *Der Hüter der Verfassung* (1931); UK. tr. *The guardian of the constitution*, in L. Vinx (ed.), *The guardian of the constitution. Hans Kelsen and Carl Schmitt on the limits of constitutional law*, Cambridge, Cambridge University Press, 2015, p. 150-151.

[33] University of Oxford, Faculty of Law, Mooting: What Is It and Why Take Part?, <https://www.law.ox.ac.uk/mooting-what-is-it-and-why-take-part/mooting-what-it-and-why-take-part#:~:text=WHAT%20IS%20MOOTING%3F,submissions%2C%20and%20present%20oral%20argument>, January 2024.

[34] L.P. Pires Pinto Sica, *Avaliação em role-play: o professor de direito Fellini*, in J. Garcez Ghirardi (coord.), *Avaliação e métodos de ensino em direito*, «Cadernos DIREITO GV», n. 7/5, sep. 2010, pp. 56ss.

[35] The constitutional face of this phenomena was also known as "Constitutionalism in Cassocks", see L. Morais de Araújo Pinheiro, *Constitucionalismo de Batina. A ideia de Constituição do clero revolucionário pernambucano entre 1817 e 1824*, Rio de Janeiro, Lumen Juris, 2022.

[36] B. Constant, *Principes de politique applicables à tous les gouvernements représentatifs*, Paris, Eymery-Hocquet, 1815.

[37] E.J. Sieyès, *Qu'est-ce que le Tiers-État?* (1789) US. tr. *What Is the Third Estate?*, in M. Sonenscher (ed.), *Political writings. Including the Debate between Sieyès and Tom Paine in 1791*, Indianapolis/Cambridge, Hackett Publishing Company, 2003, pp. 92-162.

[38] R.M. Fonseca, *Tra mimesi e jabuticaba: recezioni e adattamenti della scienza giuridica europea nel Brasile del XIX secolo*, in B. Sordi (a cura di), *Storia e diritto: esperienze a confronto (atti dell'incontro internazionale di studi in occasione dei 40 anni dei Quaderni fiorentini (Firenze, 18-19 ottobre, 2012)*, Milano, Giuffrè, 2013, pp. 415-425.

[39] Recently, the Brazilian Supreme Court ruled that any interpretation that elevates the Armed

Forces to the status of moderating power is unconstitutional: Brasil, Supremo Tribunal Federal, *Ação Direta De Inconstitucionalidade n. 6457*, Distrito Federal. Relator Min. Luiz Fux, julgamento em Plenário, Sessão Virtual de 29.3.2024 a 8.4.2024.

40 P. Grossi, *Il punto e la linea. Storia del diritto e diritto positivo nella attuale crisi delle fonti*, in «Quaderni camerti di studi romanistici», n. 39, 2011, pp. 31-39.

41 P. Grossi, *La legalità costituzionale nella storia del diritto moderno*, in Id., *L'invenzione del diritto*, Roma-Bari, Laterza, 2017.

42 D. Nunes, *Academic Freedom in the Brazilian Constitutional History*, in «Historia Constitucional», n. 22, 2021, pp. 791-809.

43 B. Clavero, *Sujeito sem direitos e inimigo sem garantias na declaração universal das Nações Unidas, 1945-1966*, in Id., *Constitucionalismo global*, Goiânia, Palavrear, 2017.

44 A.M. Hespanha, *Pluralismo Jurídico e Direito Democrático: prospetivas do direito no século XXI*, Coimbra, Almedina, 2019, pp. 100ss.

45 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 of November 24, 2017 requested by the Republic of Costa Rica. Gender identity, and equality and non-discrimination of same-sex couples state obligations concerning change of name, gender identity, and rights derived from a relationship between same-sex couples (interpretation and scope of articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to article 1, of the American Convention on Human Rights)*, <https://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf>, January 2024.

46 Supremo Tribunal Federal, *Ação Direta de Inconstitucionalidade por Omissão (ADO) n. 26, de 2013* and *Mandado de Injunção n. 4733, de 2012*, <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=414010>, January 2024.

47 P. Grossi, *Le molte vite del giacobinismo giuridico. Ovvero: la 'carta di Nizza', il progetto di 'Costituzione europea' e le insoddisfazioni di uno storico del diritto*, in Id., *Mitologie giuridiche della modernità*, Milano, Giuffrè, 2007.

48 M. Casseb Continentino, *História do Controle da Constitucionalidade das Leis no Brasil. Percursos do pensamento constitucional no século XIX (1824-1891)*, São Paulo, Almedina Brasil, 2015.

49 Supremo Tribunal Federal, Conheça o STF, Julgamentos Históricos, <https://portal.stf.jus.br/textos/verTexto.asp?servico=sobreStfConhecaStfJulgamentoHistorico>, January 2024.

50 Côrte Suprema dos Estados Unidos do Brasil, *Petição de Habeas corpus n. 26.155, paciente Maria Prestes, Relator o Sr. Ministro Bento de Faria*, Distrito Federal, 1936.

51 D. Nunes, *Woman, revolution, law: The expulsion of Olga Benario Prestes before the Brazilian Supreme Court (1936)*, in S. Vandenbogaerde, I. Lellouche, H. Duffuler-Vialle, S. Dhalluin & B. Debaenst (eds.), *(Wo)Men in Legal History*, Lille, Centre d'Histoire Judiciaire, 2016, pp. 123-133; see also the entry *Olga Benario*, in A. Alves de Abreu *et al.*, *Dicionário Histórico Biográfico Brasileiro pós 1930*, 2 ed, Rio de Janeiro, FGV, 2001.

52 Côrte Suprema dos Estados Unidos do Brasil, *Petição de Mandado de Segurança n. 111, impetrado em favor da Aliança Nacional Libertadora, Relator o Sr. Ministro Arthur Ribeiro*, Distrito Federal, 1936.

53 G. Faustino Santos, *The invention of mandado de segurança: protecting rights and (re)bullding the state in the Vargas Era*, Macerata, eum, 2024; F.N. De Gaspari, *STF cerceado? (1930-1937)*, Curitiba, CRV, 2020.

54 See the entries *Alianca Nacional Libertadora* and *Revolta Comunista de 1935*, in A. Alves de Abreu et al, *Dicionário Histórico Biográfico Brasileiro pós 1930*, 2 ed, Rio de Janeiro, FGV, 2001.

55 Brasil, Supremo Tribunal Federal, *Petição de Habeas Corpus n. 29.763, paciente Luiz Carlos Prestes e outros, Relator o Sr. Ministro Castro Nunes*, Distrito Federal, 1947.

56 H.R. da Silva, *A democracia ameaçada: repressão política e a cassação do PCB na transição democrática brasileira (1945-1948)*, «Histórica – Revista Eletrônica do Arquivo Público do Estado de São Paulo», n. 39, 2009; see also Tribunal Superior Eleitoral, Cancelamento de registro do Partido Comunista Brasileiro, <https://www.tse.jus.br/jurisprudencia/julgados-historicos/cancelamento-de-registro-do-partido-comunista-brasileiro>, January 2024.

57 Brasil, Supremo Tribunal Federal, *Petição de Mandado de Segurança n. 3.557, impetrado em favor de João Café Filho, Relator o Sr. Ministro Hahnemann Guimarães*, Distrito Federal, 1956.

58 R. Mafei, *Como remover um presidente: Teoria, história e prática do impeachment no Brasil*, Rio de Janeiro, Zahar, 2021, pp. 73-83; R. Westin, *Dois presidentes do Brasil sofreram impeachment em 1955*, in «Agência Senado», August 31, 2016, <https://www12.senado.leg.br/noticias/materias/2016/08/31/dois-presidentes-do-brasil-sofreram-impeachment-em-1955>, January 2024.

59 Brasil, Supremo Tribunal Federal, *Petição de Habeas Corpus n. 41.296, paciente Mauro Borges Teixeira, Relator o Sr. Ministro Gonçalves de Oliveira*, Distrito Federal, 1964.

60 F. Recondo, *Tanques e togas. O STF e a ditadura militar*, São Paulo, Companhia das Letras, 2018, chapter 2; E. de França Belém, *Supremo concedeu habeas corpus para Mauro Borges mas ditadura atropelou a Justiça*, in «Jornal Opção», May 5, 2018, <https://www.jornalopcao.com.br/colunas-e-blogs/imprensa/supremo-concedeu-habeas-corpus-para-mauro-borges-mas-ditadura-atropelou-a-justica-124421/>, January 2024.

61 This is the only case used that was

not available online in the Supremo Tribunal Federal website. I thank to Professor Maria Pia Guerra (UnB) the full online copy of the case files obtained in the court archives: Brasil, Supremo Tribunal Federal, *Petição de Habeas Corpus n. 58.411, paciente Vito Miracapillo, Relator o Sr. Ministro Djaci Falcão*, Distrito Federal, 1980.

62 M.P. Guerra, *O padre e a pátria: direito, transição política e o Supremo Tribunal Federal na expulsão de Vito Miracapillo (1980)*, Thesis (Ph.D in Law), Brasília, Universidade de Brasília, 2016; Recondo, *Tanques e togas* cit., introduction and conclusion.

63 Mafei, *Como remover um presidente* cit., chapter 3; Câmara dos Deputados, *20 anos do impeachment do Collor*, <https://www2.camara.leg.br/atividade-legislativa/plenario/discursos/escrevendohistoria/destaque-de-materias/20-anos-do-impeachment>, January 2024.

64 Brasil, Supremo Tribunal Federal, *Petição de Mandado de Segurança n. 21.564, impetrado em favor de Fernando Affonso Collor de Mello, Relator o Sr. Ministro Octavio Gallotti (Relator para o acórdão ministro Carlos Velloso)*, Distrito Federal, 1992.

65 Brasil, Supremo Tribunal Federal, *Petição de Mandado de Segurança n. 21. 689, impetrado em favor de Fernando Affonso Collor de Mello, Relator o Sr. Ministro Carlos Velloso*, Distrito Federal, 1993.

66 Sica, *Avaliação em role-play* cit.

67 bell hooks, *Teaching to transgress: education as the practice of freedom*, New York, Routledge, 1994.

68 P. Freire, *First Words* (US. tr. *Paulo Freire's Introduction to The Pedagogy of Autonomy*, by Peter Lowns, June 2005), <https://acervoapi.paulofreire.org/server/api/core/bitstreams/41f369cd-830d-4720-af96-71b5fd9f1725/content>, January 2024; P. Freire, *Pedagogia da autonomia: Saberes necessários à prática educativa*, São Paulo, Paz e Terra, 2011.

Teaching constitutional history today: human rights, authoritarian legacies, and the role of the judiciary

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Introduction

Constitutional history has attracted the attention of researchers from various disciplines, such as law, history, political science, sociology, and international relations. It is a well-established academic area, with research topics, varied approaches, and a much-debated methodology[1]. However, there has been little theoretical and methodological reflection on the teaching of constitutional history, especially in law schools[2].

Based on the subject of this dossier, this article aims to think about the teaching of constitutional history from the perspective of legal educations, especially in the Brazilian context. This article aims to think about the teaching of constitutional history from the perspective of legal education, especially in the Brazilian context[3]. There is a lively debate about the disciplinary position of legal history and the pedagogical advantages of historical study for the academic formation of jurists[4]. Thus, the purpose of this text is to discuss the important role played by constitutional history in law schools and the study of judicial decisions as a pedagogical tool.

This article adopts a perspective of teaching constitutional history through the connection between constitutionalism and Brazilian authoritarian experiences. In this sense, judicial decisions can be an interesting tool for reflecting on how the judiciary understands the debate on political transitions, human rights violations, memory, and political amnesty.

Initially, we intend to highlight constitutional history's critical function and what pedagogical-academic gains there may be in teaching this subject within law schools. Next, we will analyze judicial decisions as a possible teaching object, above all by addressing the context of contemporary constitutional history.

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The critical function of constitutional history

Constitutional history is a multidisciplinary field encompassing various methodologies and approaches. Its teaching and research are beyond any specific faculty or department. However, in defending a critical approach to constitutional history, our point of observation is internal to law faculties and concerns legal education. The critical perspective can offer its most significant potential in the legal space because of the traditional problems of legal teaching (formalism, dogmatism, abstraction) and the historical understanding that jurists generally adopt (anachronistic, evolutionist, linear).

Professor Ricardo Fonseca reviewed the legal history field in Brazil to understand the absence of this discipline in Brazilian legal education during the 19th century and much of the 20th century[5]. For Fonseca, this absence is linked, among other factors, to the vicissitudes of the national political and legal formation. In Brazil, considering the traces of political continuity after independence – unlike the countries of Spanish America – the use of historical discourse to legitimize national identity was not central. A second possible reason lies in the centrality of the discipline of Roman law, which possibly prevented the flourishing and consolidation of legal history as a legal discipline for a long time[6].

Nevertheless, even in some law schools that created the subject of legal history at some point, its teaching perspective and materials carried on an academic tradition that developed historical-legal study as a «ratification of dogmatics»[7]. In that context, the teaching of the history of law was uncritical and served to reproduce some of the legitimization strategies indicated by António Hespanha, i.e., through tradition/naturalization or the idea of progress[8]. Legal history would then demonstrate that a legal concept belonged to the «nature of things» and had existed since antiquity, which ended up hiding the distinction between terminological continuity and semantic discontinuity. It could also be used to make the present sacred through a vision that places it as something inevitable and the end point of a line constructed retrospectively[9].

When we think about constitutional history, the picture becomes even more complicated, considering that the teaching of legal history has long taken private law as its central axis. If we consider some early works on Brazilian constitutional history[10], we noticed they were not concerned with the basic theoretical-methodological requirements of the contemporary historiographical *métier*.

According to Fonseca's analysis, the academic landscape has undergone a significant transformation. While the author once characterized it as an academic "desert", the past two decades have witnessed a proliferation of disciplines, themes, sources, and approaches in legal and constitutional history. This "explosion" of academic works and research centers has revolutionized the field[11]. However, there is still much to be done in order to completely revitalized how jurists deal with the past, whether in research or teaching.

Some works have tried to draw attention to these problems in two different areas: the use of history by jurists when analyzing the contemporary legal system and methodological errors made by legal historians.

In a classic text on socio-legal research in Brazil, Professor Luciano Oliveira warns law students, "Don't talk about the Code of Hammurabi!"[12]. The aim was to avoid «the usual historical incursions that usually precede the approach to the subject in the present»[13] in the form of the recurrent "historical introductions"[14], exemplified by the usual "jumps" between historical periods that are very different from each other and which only have the purpose of justifying the contemporary law by attesting that the concept has existed since time immemorial. The use here is instrumental and follows an evolutionism and anachronism approach, which reinforces the mythological belief in current legal dogma[15].

This attitude does not take methodological issues seriously. It is a kind of methodological impurity based on low-quality textbooks[16]. However, as Fonseca and Paixão's work seeks to highlight, the theoretical-methodological aspects are central to constitutional historiography[17]. Every step is crucial to the development of the research, from the selection of sources to the adjustment of the timeframe, from the theoretical framework to the type of analysis. The lack of awareness about the theoretical-methodological dimension generates another drawback: the proliferation of legal history textbooks purporting to produce "great syntheses"[18] based on "great events" or "great characters"[19], which do not incorporate the basic requirements of historical research.

This academic production – not just textbooks but also articles and theses – has three more methodological problems.

The first is the lack of primary sources or, at most, the use of only legislative sources[20]. In the first case, there is the circular reproduction of theoretical common sense, i.e., the replication of statements with no empirical basis. In the other case, when one reduces constitutional history to a mere description of constitutional texts, we end up with a static and formalistic view. Even when using doctrinal sources, like books and articles, it is crucial to engage in a more refined methodological reflection and not simply accepting author's ideas at face value. The absence of primary sources is specifically problematic regarding constitutional history, characterized by a plural typology of sources[21].

The second problem is the failure to engage with historiography[22]. When jurists include "historical introductions" to their textbooks, they rarely discuss academic research. In general, there is a lack of knowledge about the state of the art on the studied subject. At most, there is a reference to some dated historiographical work without putting it into perspective based on more recent productions. By failing to use primary sources or incorporate recent academic research, one can only reproduce, once again, the discourse of common sense.

The last of these problems refers to a «constitutionalism of absence» in Brazil[23]. Often, one portrays constitutional history as a history of failures, disappointments, and the lack of effectiveness of constitutional norms[24]. What is wrong with this assumption? Reducing constitutional history to such moments becomes a methodological trap, as it «prevents the memory of the constitutional past»[25], «eternalizes what it intends to denounce»[26], and ultimately constitutes an anachronistic and simplistic stance[27]. As Professor Menelick de Carvalho Netto points out, «The traditions of any political-legal community are always

plural»[28]. Understanding the repressive apparatuses of authoritarian regimes is significant, but it is also necessary to highlight the discourses and practices of resistance.

Given this context, what role can constitutional history play in the legal education? Two legal historians stand out for their influence on the Brazilian community on this subject: António Manuel Hespanha and Paolo Grossi[29]. Both have considered not only the tools and methodological concerns of the discipline but also the epistemological contributions that legal history can provide as a subject in law school. In this sense, legal history can play an important «critical function» or «subversive role» in law schools[30].

For Hespanha, legal history constitutes a formative, critical, and reflective form of knowledge. Unlike dogmatics, which seeks to create certainties, legal history aims to «problematize the implicit and uncritical assumption of dogmatic disciplines, that is, that the law of our days is rational, necessary, and definitive»[31]. In this sense, legal history plays a role in relativizing legal mythologies[32].

This pedagogical goal requires, according to Hespanha, the adoption of some scientific strategies. Firstly, it is necessary to instill a robust methodological conscience about the writing of constitutional history, that is, the deconstruction of the naive conception that historical narrative is reduced to a simplistic account of what «really happened.» In this sense, historians need to be aware of the «poietic character» of their intellectual activity, of how their «mental processes shape historical reality», and that this creative process is socially and culturally rooted[33].

The second strategy is to understand that the object of legal history is «law in society»[34]. As a product of society, law plays an essential disciplinary role, but at the same time, its production is conditioned by a complex set of social layers. Considering law in society also points to a critique of the teleological interpretation of the constitutional phenomenon. The present is not the result of a progressive evolutionary line towards the apogee but merely a «random arrangement», the product of historical contingencies[35]. The past has its autonomy and differences[36].

Contextualization then becomes fundamental[37]. Legal history can help us understand that law belongs to a dimension of society since it is the historian's task to place legal texts – «the emerging summit of a submerged continent» – in their historical context, with all their richness and complexity[38]. Legal history can also contribute to comparing and contrasting different values, visions, and worlds, thereby highlighting an attitude of estrangement and openness to experiences outside the present[39].

We could add one last contribution from legal history: the teaching of history can help in the fight against denialism or ideological revisionism. The discipline's potential for critical reflection can help identify legal arguments that distort knowledge of the past in a double sense, either by resorting to outright lies (denialism) or selectively appropriating proven facts without contextualization (ideological revisionism)[40].

This role is especially relevant in constitutional history, which works more closely with issues such as authoritarian regimes, human rights violations, and the state of exception. Although the idea of historical truth is complex and "provisional", it rep-

resents a powerful tool for criticism[41]. The teaching of constitutional history can help denounce the real motivation behind denialism and ideological revisionism: «erasing, silencing and hiding the facticity of the past» and «imposing unique and authoritarian meanings on history and life»[42].

Judicial decisions and their role in teaching constitutional history

The critical function of constitutional history presented above can contribute to discussing one of the primary sources used in legal education: judicial decisions. Judges' opinions and rulings – especially from supreme courts and constitutional courts – are among the most important legal materials in law courses.

In the realm of constitutional history, we can understand judicial sources from various points of view. Judicial decisions can serve as primary sources for historians, as a factual basis for their historiographical representation, and as a resource for legal teaching. Court cases can be thought of in their institutional dimension – studying justice, its organization, and its agents – and their social and political dimension, that is, by understanding social conflicts, including those of groups that have been forgotten or marginalized by official history. From this perspective, judicial decisions are excellent resources for teaching constitutional history and demonstrating the dynamics of legal experience[43].

Another possible perspective for using judicial decisions in legal history classes that is equally relevant to legal education from a critical approach is the understanding of judicial decisions as spaces for constructing constitutional memory[44]. In such situations, history plays a relevant role in the judges' legal arguments, which makes identifying the uses and abuses of the past a fruitful field of study[45].

This observation raises several interesting questions for discussion in the classroom: Should judges be concerned with the past? Is history part of judicial reasoning? What is the difference between the judge's approach and that of the historian? What is the link between memory and constitutional interpretation?

The discussion about teaching constitutional history cannot renounce one premise: we teach legal history in the present time. In other words, the repertoire of past legal experiences is inseparable from understanding contemporary history. Of course, looking to the past requires careful and detailed use of historical sources, always with an awareness of the alterity that marks the encounter with these sources. In the wise expression of Moses Finley, referring to the history of classical antiquity, the past presents itself to the historian as a territory that is «desperately foreign»[46].

However, the historical operation takes place in the present. This disjunction between temporal dimensions is constitutive of the historian's activity. It would be no different in relation to law, and especially in relation to constitutionalism. Its history refers to the past but communicates with the present.

Talking about constitutionalism means, among other things, discussing issues related to the rule of law, fundamental rights, coexistence between peoples and nations, and the status of international human rights protection standards. This is a contempo-

rary requirement following the course of the 20th century, marked by catastrophes and atrocities and the attempt to build a system – deeply anchored in legal categories – to protect human dignity[47].

Aside from the legal instruments conceived in the post-war context – treaties, conventions, international organizations – there is an important historical element for understanding the dilemmas of contemporary constitutionalism: the role of trials of those accused of serious human rights violations. In various scenarios, the activity of judges and courts has been at the center of disputes over the meaning of human rights[48].

Notoriously, there have been several emblematic criminal judgments since the Nuremberg trials. In 1961, the process against Adolf Eichmann in Jerusalem brought to the public arena, with global interest, the question of responsibility for atrocities committed during the conflict between 1939 and 1945. Not only was the trial remarkable, but so was its press coverage. Hannah Arendt's book, written from reports produced for the New Yorker magazine[49], is one of the most influential non-fiction works of the period after World War II – the expression "banality of evil" has become part of the political and historical repertoire of contemporary times[50].

In the 1980s and 1990s, at a time of redefinition of collaborationism in occupied France and new research into the Vichy regime, there were trials related to the atrocities committed by French and German government agents during the war. The criminal cases involving Klaus Barbie, Maurice Papon, and Paul Touvier were widely reported[51]. In all of them, there were charges of crimes against humanity – which made the trials possible, given the *non-applicability of statutory limitations*.

In the 1980s, several Latin American countries that had been under military dictatorships went through processes of re-democratization[52]. In this context, important lawsuits were filed to hold political and military agents accountable for serious human rights violations. The country that experienced this judicialization most intensely was Argentina. This movement began in 1985 with the famous *Juicio a las Juntas*, which brought the leaders of dictatorial governments to the dock. There were various developments, including establishing rules that granted amnesty to those convicted. However, from the 21st century onwards, these rules were considered unconstitutional, and criminal liability for agents of the regime was resumed, with numerous prosecutions and convictions[53].

Another court decision would have significant repercussions concerning Latin American dictatorships. In 1998, former Chilean dictator Augusto Pinochet was detained under an international arrest warrant issued by Spanish magistrate Baltasar Garzón. The accusation against Pinochet was about the various acts of human rights violations committed against Spanish citizens living in Chile during the years of the military regime. Pinochet was traveling in the UK, and the British authorities served the arrest warrant in October 1998. Pinochet remained in prison until 2000, and he could return to his home country only after several discussions about possible immunity linked to the office of President of the Republic[54].

Finally, it is worth noting that the Inter-American Court of Human Rights has built up a solid body of rulings on the se-

verity of violations committed by national states in cases of political persecution of opponents, either by rejecting the granting of pardons and amnesties to military personnel, politicians, and agents of the national security system, or by emphasizing the seriousness of conduct such as forced disappearance and execution. The impact of the judgments varies from country to country. Nevertheless, it is impossible to remain indifferent to the decisions that have condemned several Latin American countries, including Peru, Brazil, Chile, Uruguay, El Salvador, Honduras, Guatemala, Colombia, Paraguay, and Argentina[55].

In many of these cases, a historically new concept is being used in the judicial arena: *crimes against humanity*. This conceptualization marks a transformation in classic criminal law and, of course, in the very act of judging. Although the defendants are determined and individualized, their conduct involves an unprecedented dimension: the gravity of the acts committed affects humanity as a whole[56].

The constant activity of creating categories and concepts inherent to the very existence of law finds a new field after this provision on crimes against humanity. Related instruments emerge, equally necessary for exercising jurisdiction in these situations. This is the case with the notion of non-applicability of statutory limitations, which is central to international human rights law. The extent and depth of the crimes committed against the so-called *jus cogens* of international human rights law evoke the need to put aside a fiction inherent in law practice. The statute of limitations, one of how the law relates to the passage of time, must give way to the persistence of violations over time as an instrument capable of enabling perpetrators to be held accountable, even if belatedly[57].

Another vital mechanism, built on Latin American countries' harrowing experience with the dictatorships of the second half of the 20th century, is *permanent crime*. This is a crucial conceptual innovation for the correct legal framing of the situation of the disappeared – the victims of authoritarian regimes whose fate is unknown, a practice that has become sadly common in Latin American dictatorships[58].

These examples show that a contemporary understanding of human rights involves perceiving the connection between law and trauma. In Shoshana Felman's precise description:

> In an era in which trials – televised and broadcast – ceased to be a matter of exclusive interest to jurists and penetrated and increasingly invaded culture, literature, art, politics, and the deliberations of public life of society at large, the hidden link between trauma and law has gradually become more visible and more dramatically apparent[59].

Two consequences follow from this statement. The first, already highlighted, concerns the undeniable presence of historical elements linked to human rights violations in contemporary times. The second, which interests us here because of its impact on the teaching of constitutional history, involves the centrality of judicial processes and legal institutions. The protection of human rights, as well as the possibility of holding to account agents and governments involved in serious atrocities committed in times of war or during authoritarian regimes, are increasingly dependent on the functioning of judicial bodies. Moreover, trials with the characteristic of exemplarity are emerging – in the public

sphere, media coverage, and political arena. Contemporary legal experience places a unique centrality on trials as they assume the dimension of trauma. As Paul Ricoeur said, they bear the mark of the «exemplarity of the singular»[60].

Memory and history in the Brazilian Supreme Court: the amnesty debate

There is a factor that should be highlighted in this centrality of the courts when discussing emblematic cases. An attitude of caution, criticism and detachment is crucial when it comes to the rationale behind the decisions, the assumptions adopted by the actors in the judicial process, and the role of the courts in contemporary society. As Niklas Luhmann states, the courts are at the center of the legal system in modern society. Courts are required to always produce decisions, using elements belonging to the legal system itself. This leads to intense and constant textual creation[61].

A key task for law schools is to build a critical culture concerning the textual work of judges and courts. This is indeed one of the main tasks of research in law, at any level of learning, from the beginning of undergraduate courses to postgraduate activities. As pointed out by Pietro Costa, researchers need to maintain a «strategy of suspicion» about the documents which are subjected to the scrutiny of legal history. Cautiously reading sources, distrusting assumptions, seeking to understand the explicit and unexplained premises of judgments – all of this belongs to the research skills of a constitutional and legal historian[62].

This applies especially to *decisions by domestic judicial systems which disregard the guidance of the emblematic post-war rulings mentioned above*. A significant example comes from Brazil.

The pace and timing of transitional justice measures are different in each country that overcomes an authoritarian regime. Many factors come into play when it comes to the definition and timing of these measures: among them are the ability of politicians from the dictatorial regime to hold political power in a democratic context, the method of transition from dictatorship to democracy, the role of the judiciary and the extent to which there is pressure from civil society to hold agents of the regime accountable. On the Brazilian side, in the early years of democracy a predominant discourse praised a "peaceful" transition from dictatorship to democracy, claiming that a sort of pact between political forces emerged to overcome the authoritarian regime[63].

Even though this description lost strength in the years following the end of the dictatorship, it still had some impact on various institutional domains in Brazilian society, including the judiciary. The Brazilian Supreme Court heard an original brought by the Brazilian Bar Association case in 2008, which sought a ruling from the court that could support criminal liability for officers of the dictatorship who committed serious human rights violations (particularly cases of disappearance, execution, and torture). But the Supreme Court ruled in 2010 that these acts may not be prosecuted, based on an interpretation of the Brazilian Constitution enacted after the dictatorship (in 1988) as a pact, and granting full validity to an amnesty law that

was passed by the National Congress during the military dictatorship (in 1979)[64].

It is worth briefly highlighting a few quotes from the ruling. The teaching of constitutional history can help deconstruct the judges' historical and conceptual representations, especially regarding the legal institute of amnesty.

For the rapporteur of the case, Justice Eros Grau, the interpretation of constitutional norms must consider the historical background of the amnesty law's enactment. What would be this historical context? According to Grau, it was the «conciliated transition», which was «smooth due to certain commitments» and promoted the absolution of all, «some acquitting themselves». He claimed that to say otherwise would mean to ignore history[65].

This argument about the importance of the "historical context" and the possible existence of a "pact" between civil society and the military was followed by several other justices of the court. Justice Carmen Lúcia argued that «society spoke loudly about the bill, which became the so-called amnesty law», adding that this law was the subject of «wide-ranging debate and express and specific manifestations by the main personalities then involved in the process of the so-called liberalization». Likewise, Justice Celso de Mello held that the amnesty «was unequivocally bilateral (and reciprocal)» due to the «effective cooperation and active participation of civil society and the militant opposition». Justice Ellen Gracie even spoke of «sufficiently documented history» to describe the amnesty as «reconciliation and forgiveness». For his part, Justice Gilmar Mendes argued that reciprocal amnesty was an instrument for a «pacted» constitution, «presenting itself as a means of overcoming the friend/enemy distinction». Justice Cezar Peluso said that the amnesty was an agreement resulting from the «concord of the Brazilian people»[66].

The Supreme Court's ruling was intensely criticized in academic circles as soon as it was released. A large body of literature exists on the topic, which led to a great deal of research in undergraduate and postgraduate law courses in Brazil. A further significant development took place. A few months after the Supreme Court's ruling was issued (April, 2010), the Inter-American Court of Human Rights examined Brazil's stance on the disappeared of the military regime for the first time. The ruling in the Gomes Lund case ("Guerrilha do Araguaia") came out in November 2010, clearly establishing the impossibility of invoking amnesty laws to avoid prosecuting agents accused of crimes against humanity. In 2018, a new ruling by the Inter-American Court of Human Rights, in the Vladimir Herzog case, reaffirmed this guideline.

Several appeals were lodged against the Supreme Court's ruling, but none were decided until April 2024, at the closing of this piece. In 2014, a political party filed a lawsuit similar to that of 2008, also pending in the Supreme Court[67].

Does constitutional history make any contribution to understanding this issue?

Firstly, by broadening our knowledge of the subject, the study of constitutional history can dispel some interpretations. The concept of amnesty appears as a privileged point of observation in Brazilian history. In the republican era, thirty-eight political amnesties were granted, almost a third of them during the period 1945-1964. In some cases, amnesty represented a means

of neutralizing the criminalization of political opponents, being associated with the struggle for democracy and the defense of individual rights[68].

However, these measures were far from being a form of justice or reparation for violated rights. In at least three episodes – 1945, 1956 and 1961 – amnesty was granted to state agents guilty of common crimes, political crimes and crimes of responsibility. On other occasions, amnesty also acted as a form of repression. In 1969, the military junta that ruled Brazil rescinded the amnesty granted in 1961 to military personnel expelled for political reasons since 1934. Such episodes confirm the complexity of the amnesty concept; a notion that lies in the realm of tension between law and politics and has multiple faces[69].

Secondly, studying constitutional history can reveal some of the contradictions and weaknesses in the traditional discourse on amnesty. It is still perceived by part of society as a sovereign act of the state that "perpetually silences" the criminal process or as a measure of "pacification of the Brazilian family" and "forgiveness" of crimes committed[70]. This was one of the main arguments of the Brazilian Supreme Court in ADPF 153, as seen above.

Reflecting on the issue further, we need to challenge the direct connection between amnesty and the ideals of oblivion, pacification, and forgiveness. Portraying amnesty as forgetting raises the question: to what extent is it possible to have a commanded amnesia? This inquiry unveils the paradox of an obligation which is based on a clause such as «you must not forget to forget»[71]. The cost of this enforced silence is a loss of understanding of the context since victim and oppressor become side by side in the same measure of clemency. Equating political opposition with a crime against humanity undermines democracy.

Appealing to pacification contains other contradictions. As soon as a dictatorship can be portrayed as a civil war with "two sides", peace naturally appears as something virtuous and necessary, and conflict and dissent become seen as bad for democracy. Following this reasoning, the case for criminal accountability comes across as revenge. The "pacification of the Brazilian family" argument thus aims to create an imaginary national political unity. However, like Paul Ricœur points out in the case of crimes committed by state officials, wouldn't the problem with this unity be to «erase from official memory the examples of crimes that could protect the future from the failures of the past?»[72].

And finally, forgiveness. A remission of wrongs is also an image used to describe amnesty. But is it possible to have an anonymous and generic forgiveness? Is it the state or the victim-citizen who forgives? Even this association requires a shift in meaning, because, unlike what amnesty traditionally calls for, forgiveness presupposes memory, since it demands recognition of an offense[73]. Forgiveness that purports to be generic, without identifying the officers responsible for the dictatorship's serious human rights violations, is unlikely to bring justice to the victims. Thus, the logic of forgiveness – unconditional, asymmetrical, unrestricted – ends up being incompatible with an act of amnesty passed by the very regime responsible for the atrocities committed against its citizens.

Conclusion

Judicial rulings therefore play an ambiguous role in teaching constitutional history: on the one hand, their centrality to the understanding and analysis of contemporary constitutionalism is clear. On the other hand, it becomes evident, by observing the Brazilian Supreme Court's ruling on amnesty, that the justice system itself can be an instrument for disregarding crucial aspects of constitutionalism, such as the protection of fundamental rights and human dignity.

This is why it is essential to apply the «strategy of suspicion» proposed by Pietro Costa. We need to scrutinize, unveil and criticize the presuppositions – both explicit and unexplained – of judicial rulings. This is a core responsibility for constitutional history and must be taken seriously by those responsible for teaching it in law schools.

Both research and the teaching of legal history relate to current debates about the place of history in contemporary times. Authors such as François Hartog, Serge Gruzinski and Nicolas Offenstadt discuss the role of the historian in current society. The uses of history by extremist political ideologies, the emergence of negationist currents regarding the atrocities of the past, all this has led historians to call for a public dimension to historical knowledge[74].

All these thoughts highlight the key importance attached to the connection between history and present times. As we know, a large and thought-provoking body of literature exists on the interplay between the judge and the historian[75]. The works that deal with this connection always emphasize the differences and approximations between judicial activity and historical research. We don't intend to delve into this fascinating debate here, but it is interesting to point out an aspect stressed by Paul Ricoeur: judge and historian share the same deontology. Both professions have impartiality as their goal and horizon[76]. In this sense, Hartog points out that both are «third parties» who keep this close connection with the duty of impartiality[77].

However, as Ricoeur points out, judges have a crucial difference from historians. The judge needs to decide, he needs to finish analyzing the case. There is a time limit that must be fulfilled. For the historian, there is a greater openness: the writing of history is constantly being re-elaborated. The community of historians – and even readers – is constantly renewing methods, techniques and forms of research. And new sources can always be discovered. Writing is therefore not finished.

Such constant questioning of history can take place in a range of institutional and social environments. But there is one space from which it cannot be absent: the university. Law students also need to be part of this continuous movement of knowledge and criticism of history. According to Ricoeur, it is «an unlimited process of revision that makes the writing of history a perpetual rewriting»[78]. Professors, researchers, and students of legal history – and particularly constitutional history – are responsible for keeping this endless rewriting alive.

[1] On this subject, see the articles that appear in the dossier on constitutional history of the *Giornale di Storia Costituzionale (19, 1/2020) and the Rejur - Revista Jurídica da Ufersa (v. 6, n. 12, 2022)*. See also J. V. Suanzes-Carpegna, *Historia e historiografía constitucionales*, Madrid, Editorial Trotta, 2015; A. M. Hespanha, *Questões de etiqueta jurídica: se, como e por que a história constitucional é uma história jurídica*, in J. M. Carvalho, A. P. Campos (org.), *Perspectivas da cidadania no Brasil Império*, Rio de Janeiro, Editora Civilização Brasileira, 2011. In the Brazilian context, see A. Koerner, *Sobre a história constitucional*, in «Estudos Históricos», v. 29, n. 58, 2016; C. Paixão, *Percursos da história constitucional: parâmetros, possibilidades e fontes*, in C. Paixão; C. Paiva (edited by), *História Constitucional Brasileira: da Primeira República à Constituição de 1988*, São Paulo, Almedina, 2023.

[2] We could argue the same for Legal History in general. For an exception, see R. Jarvis (edited by), *Teaching Legal History. Comparative perspectives*, London, Wildy, Simmonds & Hill Publishing, 2014. The volume discusses issues related to Constitutional History, such as "Legal History and the U.S. Constitutional History", "Legal History and the Government", and "Legal History and Human Rights".

[3] The authors are grateful to Claudia Paiva Carvalho, Ana Carolina Couto, Francisco Rogério Pinto and Fernando Henrique Honorato, who read the first draft of the paper and made valuable comments.

[4] For the North American context, see R. Jarvis, (edited by), *Teaching Legal History. Comparative perspectives*, cit.

[5] R. M. Fonseca, *O deserto e o vulcão - Reflexões e avaliações sobre a História do Direito no Brasil,* in «Forum Historiae Iuris», June 2012, pp. 6-11.

[6] Fonseca, *O deserto e o vulcão - Reflexões e avaliações sobre a História do Direito no Brasil*, cit.

[7] Fonseca, *O deserto e o vulcão - Reflexões e avaliações sobre a História do Direito no Brasil*, cit., pp. 12-13.

[8] A. M. Hespanha, *Cultura Jurídica Europeia. Síntese de um milénio*, Coimbra, Almedina, 2019, pp. 14-23; A. M. Hespanha, *Legal History and Legal Education*, in «Rechtsgeschichte – Legal History», n. 04, 2004, pp. 41-45.

[9] Hespanha, *Cultura Jurídica Europeia. Síntese de um milénio*, cit., Hespanha, *Legal History and Legal Education*, cit.

[10] F. Freire, *História constitucional da República dos Estados Unidos do Brasil*, Rio de Janeiro, Typografia Moreira Maximino, 1894; A. Roure, *Formação constitucional do Brasil*, Rio de Janeiro, Typographia do Jornal do Commercio, de Rodrigues & C., 1914; A. Leal, *História Constitucional do Brazil*, Rio de Janeiro, Imprensa Nacional, 1915; M. Barcellos, *Evolução constitucional do Brasil*, Rio de Janeiro, Imprensa Nacional, 1933; W. M. Ferreira, *História do direito constitucional brasileiro*, São Paulo, Max Limonad, 1954.

[11] Fonseca, *O deserto e o vulcão - Reflexões e avaliações sobre a História do Direito no Brasil*, cit., pp. 5, 24.

[12] L. Oliveira, *Não fale do Código de Hamurabi! A pesquisa sócio-jurídica na pós-graduação em Direito*, in *Sua excelência o comissário e outros ensaios de Sociologia Jurídica*, Rio de Janeiro, Letra Legal, 2004.

[13] Oliveira, *Não fale do Código de Hamurabi! A pesquisa sócio-jurídica na pós-graduação em Direito*, cit.

[14] Fonseca, *O deserto e o vulcão - Reflexões e avaliações sobre a História do Direito no Brasil*, cit., A. C. L. Seelaender, *História constitucional brasileira*, in D. Dimoulis (edited by), *Dicionário brasileiro de direito constitucional*, São Paulo, Saraiva, 2012.

[15] Oliveira, *Não fale do Código de Hamurabi! A pesquisa sócio-jurídica na pós-graduação em Direito*, cit.; Fonseca, *O deserto e o vulcão - Reflexões e avaliações sobre a História do Direito no Brasil*, cit.; D. Nunes, R. Sontag, R. Sirotti. *Para uma história do direito penal*, in L.S. de Bem (edited by), *Estudos de direito público*, Belo Horizonte, D'Plácido, 2018; G. S. Siqueira, *Observações sobre como o Direito ensina errado a História do direito*, in «Passagens», v. 10, n. 1, 2018.

[16] Oliveira, *Não fale do Código de Hamurabi! A pesquisa sócio-jurídica na pós-graduação em Direito*, cit.

[17] Fonseca, *O deserto e o vulcão - Reflexões e avaliações sobre a História do Direito no Brasil*, cit.; R. M. Fonseca, *Introdução Teórica à História do Direito*, Curitiba, Juruá Editora, 2009; C. Paixão, *Percursos da história constitucional: parâmetros, possibilidades e fontes*, in C. Paixão, C. Paiva (edited by), *História Constitucional Brasileira: da Primeira República à Constituição de 1988*, São Paulo, Almedina, 2023.

[18] Fonseca, *O deserto e o vulcão - Reflexões e avaliações sobre a História do Direito no Brasil*, cit.; P. Cantisano, *Três problemas da história constitucional brasileira*, in F. Leal (edited by). *Constitucionalismo da realidade: democracia, direitos e instituições*, Belo Horizonte, Forum, 2019.

[19] Nunes, Sontag, Sirotti, *Para uma história do direito penal*, cit.

[20] Cantisano, *Três problemas da história constitucional brasileira*, cit.; Nunes, Sontag, Sirotti, *Para uma história do direito penal*, cit.; G. S. Siqueira, *Observações sobre como o Direito ensina errado a História do direito*, cit.

[21] Paixão, *Percursos da história constitucional: parâmetros, possibilidades e fontes*, cit.

[22] Cantisano, *Três problemas da história constitucional brasileira*, cit., Nunes, Sontag, Sirotti, *Para uma história do direito penal*, cit.; G. S. Siqueira, *Observações sobre como o Direito ensina errado a História do direito*, cit.

[23] N. C. Moreira, R. F. de Paula, *O constitucionalismo da falta no Brasil*, in «A&C - Revista de Direito Administrativo & Constitucio-

nal», v. 17, n. 70, 2017; M. C. Oliveira, *Contribuições para uma nova história e Teoria do processo de constitucionalização no marco da Teoria crítica da constituição*, in M.C. Oliveira (edited by), *Constitucionalismo e história do direito*, Belo Horizonte, Ed. Conhecimento, 2020.

[24] Cantisano, *Três problemas da história constitucional brasileira*, cit; C. E. C. Lynch, J. V. S. Mendonça, *Por uma história constitucional brasileira: uma crítica pontual à doutrina da efetividade*, in «Revista Direito e Práxis», v. 8, n. 2, 2017.

[25] Moreira, Paula, *O constitucionalismo da falta no Brasil*, cit.

[26] M. Carvalho Netto, *A hermenêutica constitucional sob o paradigma do Estado Democrático de Direito*, in «Notícia do direito brasileiro», nova série, nº 6, 1998.

[27] Lynch, Mendonça, *Por uma história constitucional brasileira: uma crítica pontual à doutrina da efetividade*, cit.

[28] Carvalho Netto, *A hermenêutica constitucional sob o paradigma do Estado Democrático de Direito*, cit.

[29] On the relevance of António Manuel Hespanha for the field of legal history in Brazil, see A. C. L. Seelaender, R. M. Fonseca, *Exemplos, repercussões, mudanças: uma visão brasileira sobre o contributo de Hespanha à história e ao direito*, in C. N. Silva, A. B. Xavier, P. Cardim (edited by*), António Manuel Hespanha – entre a história e o direito*, Lisboa, Almedina, 2015; A. P. Souza (edited by), *Estudos de história e historiografia do direito em homenagem ao professor António Manuel Hespanha*, Curitiba/Madrid, Intersaberes/Marcial Pons, 2020; D. Nunes, *António Manuel Hespanha and the Brazilian Constitutional History*, in «Giornale di Storia Costituzionale», n. 40, 2/2020; On the influence of Paolo Grossi, see R. M. Fonseca, *Laudatio*, in *Doutorado Honoris Causa a Paolo Grossi*, Curitiba, UFPR, 2011.

[30] Hespanha, *Cultura Jurídica Europeia. Síntese de um milénio*, cit., Hespanha, *Legal History and Legal Education*, cit., P. Grossi, *Storia del diritto e diritto positivo nella formazione del giurista di oggi*, in *Società, Diritto, Stato – un recupero per il dirito*, Milano, Giuffrè Editore, 2006. See also R. Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education*, Oxon/New York, Routledge, 2021; M. Meccarelli, *La storia del diritto in America Latina e il punto di vista europeo. Prospettive metodologiche di un dialogo storiografico*, in «Forum Historiae Iuris», August 2009; L. Vita, P. Cacciavillani, *Los derechos sociales en contexto: las ventajas de una perspectiva histórica crítica para la argumentación jurídica*, in L. Clérico, F. Fazio, L. Vita (edited by), *La argumentación y el litigio judicial sobre derechos sociales. Una caja de herramientas interdisciplinarian*, Buenos Aires, El Zócalo, 2021.

[31] Hespanha, *Cultura Jurídica Europeia. Síntese de um milénio*, cit. See, similarly, R. Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education, Oxon/New York, Routledge, 2021.*

[32] P. Grossi, *Mitologie giuridiche della modernità*, Milano, Giuffrè Editore, 2007; B. Clavero, *Velo de Ignorancia e Historia Constitucional*, in «Giornale di Storia Costituzionale», n. 41, 1/2021.

[33] Hespanha, *Cultura Jurídica Europeia. Síntese de um milénio*, cit. See, also, P. Costa, *"Dire la verità": una missione impossibile per la storiografia?*, in «Quaderni fiorentini per la Storia del Pensiero Giuridico Moderno», vol. 49, 2020.

[34] Hespanha, *Cultura Jurídica Europeia. Síntese de um milénio*, cit., Hespanha, *Legal History and Legal Education*, cit.

[35] Hespanha, *Cultura Jurídica Europeia. Síntese de um milénio*, cit., Hespanha, *Legal History and Legal Education*, cit., A. C. L. Seelaender, *História constitucional brasileira*, cit.

[36] Hespanha, *Cultura Jurídica Europeia. Síntese de um milénio*, cit.; Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education*, cit.

[37] Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education, cit.*

[38] P. Grossi, *Il punto e la linea (L'impatto degli studi storici nella formazione del giurista)*, in *Società, Diritto, Stato – un recupero per il dirito*, Milano, Giuffrè Editore, 2006. See, also, M. Meccarelli, *La storia del diritto in America Latina e il punto di vista europeo. Prospettive metodologiche di un dialogo storiografico*, cit.

[39] P. Costa, *Passado: dilemas e instrumentos da historiografia*, in «Revista da Faculdade de Direito da UFPR», n. 47, 2008; Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education*, cit.

[40] For a reflection on these terms in the Brazilian context, see M. Napolitano, *Negacionismo e revisionismo histórico no século XXI*, in J. Pinsky, C. B. Pinsky (edited by), *Novos combates pela história: desafios – ensino*, São Paulo, Contexto, 2021.

[41] L. Hunt, *History – why it matters, Cambridge, Polity Press, 2018.*

[42] A. L. Ávila, *Qual passado usar? A historiografia diante dos negacionismos*, in «Café História», 2019, https://www.cafehistoria.com.br/negacionismo-historico-historiografia/

[43] On the history of justice as a field of legal history, see L. Lacchè, M. Meccarelli, *Storia del diritto come storia della giustizia: materiali per una riflessione metodologica*, in *Storia dela giustizia e storia del diritto*, Macerata, eum, 2011. On the significance of judicial sources for social history in Brazil, see K. Grinberg, *A história nos porões dos arquivos judiciários*, in C. Pinsky, T. Luca (edited by), *O historiador e suas fontes*, São Paulo, Contexto, 2009; M. Dantas, F. Ribeiro, *A importância dos acervos judiciais para a pesquisa em história*, in «Lex Cult», v. 4, n. 2, 2020; S. Chalhoub, *O conhecimento da História, o direito à memória e os arquivos*

judiciais, in B. Schmidt (edited by), *Trabalho, Justiça e direitos no Brasil*, São Leopoldo, Oikos, 2010.

44 R. Siegal, *The politics of constitutional memory*, in «The Georgetown Journal of Law & Public Policy», v. 20, 2022; J. Collings, *Scales of memory: Constitutional Justice and historical evil*, Oxford, Oxford University Press, 2021; J. Balkin, *Memory and authority: the uses of history in constitutional interpretation*, New Haven, Yale University Press, 2024.

45 W. Parlett, *Historiography and constitutional adjudication*, in «The Modern Law Review», v. 86, 2023; J. Greene, Y. Tew, *Comparative approaches to constitutional history*, in E. Delaney, R. Dixon (edited by), *Comparative Judicial Review*, Elgar Publishing, 2018; J. Balkin, *Memory and authority: the uses of history in constitutional interpretation*, cit.; F. Biagi; J. Frosini, J. Mazzone (edited by), *Comparative constitutional history*, volume 2 – Uses of history in constitutional adjudication, Brill, 2022. On Brazilian context, see R. P. P. Marques, *Julgar o passado? Verdade histórica e verdade judicial na ADPF 153*, in «Rejur - Revista Jurídica da Ufersa», v. 2, n. 3, 2018; A. B. Robalinho, *Competing narratives: The use of historical arguments in constitutional interpretation in Brazil*, in Biagi, Frosini, Mazzone (edited by), *Comparative constitutional history*, cit.; C. Paixão, R. P. P. Marques, *Celebrare il colpo di stato: passato autoritario, ruolo dei tribunali e politiche della memoria nel Brasile contemporaneo*, In «Scienza & Politica», v. 35, n. 68, 2023.

46 M. Finley, *Aspects of Antiquity: Discoveries and Controversies*, New York, Viking Press, 1974, pp. 1-6.

47 See, among many other references, S-L. Hoffmann (edited by), *Human Rights in the Twentieth Century*, Cambridge, Cambridge University Press, 2011; and M. Flores, *Storia dei diritti umani*, Bologna, Il Mulino, 2008.

48 On the relevance of judges in Human Rights issues, see J. Morison, K. McEvoy, G. Anthony (edited by), *Judges, Transition, and Human Rights*, Oxford, Oxford University Press, 2007.

49 H. Arendt, *Eichmann in Jerusalem: a report on the banality of evil*, New York, Viking Press, 1969.

50 S. J. Whitfield, *Hannah Arendt and the Banality of Evil*, The History Teacher, v. 14, No. 4, 1981.

51 See H. Rousso, *Face au passé – Essais sur la mémoire contemporaine*, Paris, Belin, 2016, esp. pp. 91-192; M. Zaoui, N. Herrenschmidt, *Mémoires de justice – Les procès Barbie*, Touvier, Papon, Paris, Seuil, 2009.

52 See A. Rouquié, *À l'Ombre des Dictatures. La Démocratie en Amérique Latine*, Paris, Alban Michel, 2010.

53 For a description of the connections between some authoritarian regimes in South America and the judiciary, see C. Paixão, *Dictatorships*, in T. Duve, T. Herzog (edited by), *The Cambridge History of Latin American Law in Global Perspective*, Cambridge, Cambridge University Press, 2024.

54 See R. Brody, M. Ratner (edited by), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, The Hague, Kluwer Law International, 2000.

55 Main cases: Caso Barrios Altos Vs. Perú (2001), Caso La Cantuta Vs. Perú (2006), Caso Gomes Lund y otros Vs. Brasil (2010), Caso Herzog y otros Vs. Brasil (2018), Caso Almonacid Arellano y otros Vs. Chile (2006), Caso Gelman Vs. Uruguay (2011), Caso de las Hermanas Serrano Cruz Vs. El Salvador (2004), Caso Velásquez Rodríguez Vs. Honduras (1988), Caso Blake Vs. Guatemala (1998), Caso Rodríguez Vera y otros (Desaparecidos del Palacio de Justicia) Vs. Colombia (2014), Caso Goiburú y otros Vs. Paraguay (2006), Caso Garrido y Baigorria Vs. Argentina (2008). All the rulings can be consulted in full on the official website of the Inter-American Court of Human Rights (https://www.corteidh.or.cr/). See also M. M. L. Porto, F. Ávila, K.B. Sposato, *Justiça de Transição em julgamentos da Corte Interamericana de Direitos Humanos: monitoramento das sentenças em perspectiva comparada (2009-2018)*, in «RELAC – Revista Latino-Americana de Criminologia», v. 3, n. 2, 2023.

56 See G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, New York and London, The New Press, 2002.

57 On the correlation between non-applicability of statutory limitations and human rights violations perpetrated during World War II, with implications in 20th century literature, see C. Paixão, *Temporalities of Law: Ruins, Urban Palimpsests, and War Crimes in W.G. Sebald's Literary Project*, in «LawArt – Journal of Law, Art, and History», No. 3, 2022.

58 See the International Convention for the Protection of All Persons from Enforced Disappearance adopted by the United Nations General Assembly in 2010, as well as the Inter-American Convention on Forced Disappearance of Persons, adopted in Belém, Brazil, in 1994. See also, at the Inter-American Court of Human Rights, the aforementioned Gomes Lund Vs. Brazil case (2010).

59 S. Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century*, Cambridge (MA) and London, Harvard University Press, 2002, p. 2.

60 P. Ricoeur, *La mémoire, l'histoire, l'oubli*, Paris, Seuil, 2000, p. 435.

61 N. Luhmann, *Law as a Social System*, Oxford, Oxford University Press, 2008, esp. pp. 274-304.

62 P. Costa, *"Dire la verità": una missione impossibile per la storiografia?*, in «Quaderni fiorentini per la Storia del Pensiero Giuridico Moderno», vol. 49, 2020, p. 16.

63 See, on the development of the idea of conciliation as a tool to describe Brazil's re-democratization, C. Paixão, *Autonomia, democracia e poder constituinte no*

Brasil: disputas conceituais na experiência constitucional brasileira (1964-2014), in «Quaderni fiorentini per la Storia del Pensiero Giuridico Moderno», vol. 43, No. 1, 2014. For a critical approach on the idea of transition, see the pioneering work of W. Thayer, *La crisis no moderna de la Universidad moderna (epílogo de El Conflicto de las Facultades)*, Santiago de Chile, Editorial Cuarto Propio, 1996. See also C. Paixão, C. P. Carvalho, *Mudança constitucional, luta política e o caminho para a democracia: uma análise do "emendão" de 1982*, in «História do Direito: Revista do Instituto Brasileiro de História do Direito», Vol. 2, No. 3, 2021 and C. Paixão, M. Meccarelli, *Constituent power and constitution-making process in Brazil: concepts, themes, problems*, in «Giornale di Storia Costituzionale», v. 40, II, 2020.

64 Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental n. 153*, Tribunal Pleno, date of judgment 29/04/2010.

65 Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental n. 153*, cit.

66 Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental n. 153*, cit.

67 Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental n. 320*.

68 *Anistia: Legislação Brasileira (1822-1979)*, Brasília, Câmara dos Deputados, 1980. Regarding amnesty, see A. M. Schneider, *Amnesty in Brazil: recompense after repression (1895-2010)*, Pittsburgh, University of Pittsburgh Press, 2021.

69 A. M. Schneider, *Amnesty in Brazil: recompense after repression (1895-2010)*, cit., R. P. P. Marques, *Entre a impunidade e a repressão: as múltiplas faces da anistia brasileira de 1961*, in A. Martins, C. Roesler, C. Paixão (edited by), *Os tempos do Direito: diacronias, crise e historicidade*, São Paulo, Max Limonad, 2020.

70 A. M. Schneider, *Amnesty in Brazil: recompense after repression (1895-2010)*, cit., C. Rodeghero, *Pela "pacificação da família brasileira": uma breve comparação entre as anistias de 1945 e de 1979*, in «Revista Brasileira de História», v. 34, n. 67, 2014.

71 Ricoeur, *La mémoire, l'histoire, l'oubli*, cit., p. 461.

72 Ricoeur, *La mémoire, l'histoire, l'oubli*, cit., p. 460.

73 Ricoeur, *La mémoire, l'histoire, l'oubli*, cit., p. 462; M. Bettini, *Sul perdono storico. Dono, identità, memoria e oblio*, in M. Flores (edited by), *Storia, verità, giustizia – I crimini del XX secolo*, Milano, Bruno Mondadori, 2009, p. 35; P. Krapp, *Amnesty: between an ethics of forgiveness and the politics of forgetting*, in «German Law Journal», v. 6, n. 1, 2005, pp. 130-131.

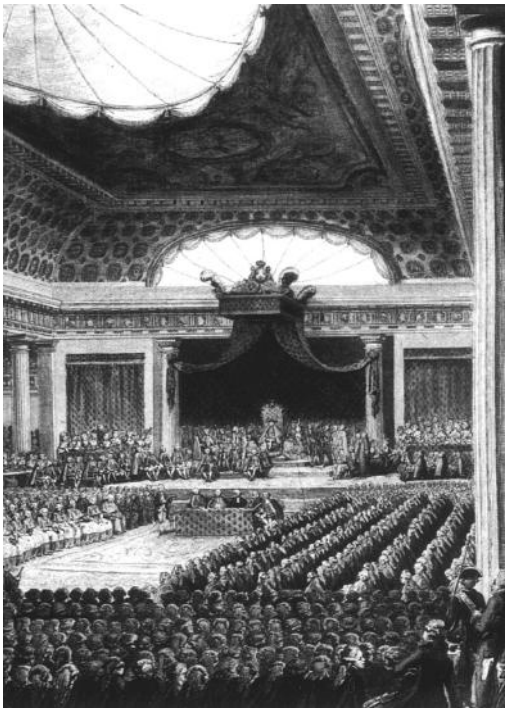
74 See F. Hartog, *Croire en l'histoire*, Paris, Flammarion, 2013; S. Gruzinski, *L'histoire, pour quoi faire?*, Paris, Fayard, 2015; N. Offenstadt, *L'histoire, un combat au présent*, Paris, Textuel, 2014.

75 The landmark work in this debate, which is still relevant today, is that of Carlo Ginzburg, *Il giudice e lo storico – considerazioni in margini al processo Sofri*, Milano, Feltrinelli, 2006.

76 Ricoeur, *La mémoire, l'histoire, l'oubli*, cit., pp. 413-436.

77 Hartog, *Croire en l'histoire*, cit., pp. 61-67.

78 Ricoeur, *La mémoire, l'histoire, l'oubli*, cit., p. 421.



Sistemi elettorali e forme di governo. Il *single transferable vote* di Thomas Hare

STEFANO MAROSTICA

Il *Reform Act* del 1832 segna un punto di svolta nella storia politica britannica e, al contempo, l'innesco di un dibattito – dentro e fuori il Parlamento – che si protrarrà per tutto l'Ottocento inglese, disseminando i propri risultati in gran parte dell'Europa e negli Stati Uniti d'America. Apparentemente centrato su semplici questioni di riforma elettorale, questo dibattito[1], nel Regno Unito, darà luogo – per quanto lateralmente – a inedite immagini e costruzioni teoriche di carattere costituzionale. Nonostante l'autorità e le procedure parlamentari non vengano messe in discussione, si compete per l'appropriazione e la risemantizzazione del concetto di *rappresentanza politica*. La priorità diventa quella di fornire un'immagine veridica del Parlamento, nei riguardi della sua rappresentatività, e dunque di addurre una risposta alla domanda su cosa effettivamente esso rappresenti, in una duplice accezione. Dal versante del rappresentante la questione gravita attorno alla composizione del Parlamento, ovvero all'individuazione degli uomini più adatti a governare. Inscindibilmente connesso a questo obiettivo pragmatico, si pone d'altra parte la necessità di rideterminare il rapporto che i rappresentati intrattengono con i rappresentanti, di una ricognizione sul corretto intendimento della base sociale che autorizza e legittima il potere parlamentare e la sua concreta articolazione. In tal senso, diverse correnti di riforma elettorale rivendicano il possesso di una teoria che restituisca l'immagine del Parlamento come specchio della nazione.

Nonostante la riforma del 1832 avesse lasciato quasi del tutto inalterato il plurisecolare sistema elettorale britannico, nondimeno – di contro alle intenzioni degli stessi *framers* – aveva sortito l'effetto indesiderato di riattivare e di rendere visibile una tendenza che trova le proprie origini nella ricezione inglese della Rivoluzione francese e nei *Rights of Man* di Thomas Paine[2]. Seppur molto limitato, l'allargamento del suffragio indotto dall'emanazione del *Reform Act* lasciava presagire un futuro di governo pienamente popolare. I vittoriani stavano

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effettivamente assistendo alla progressiva democratizzazione delle istituzioni politiche rappresentative, una tendenza – in atto sin dal XIX secolo – che avrebbe trovato dei riscontri legislativi nello stesso secolo mediante l'estensione del suffragio alle classi lavoratrici urbane (*Second Reform Act* del 1867) e rurali (*Third Reform Act* del 1884). Prima di questi eventi, nella fase di sviluppo e di incertezza nei riguardi del futuro delle istituzioni, l'idea della democratizzazione portava con sé, sopra ogni altra cosa, attese e timori verso il ruolo delle *working classes*.

Benché ulteriormente articolabili, le posizioni che si confrontano in questo dibattito sono essenzialmente tre. La prima è quella conservatrice a supporto del modello di rappresentanza tradizionalmente impiegato in Gran Bretagna, chiamata *variety-of-suffrages*[3]. Ciò che condividevano tutti i sostenitori di questa macro-famiglia di teorie era la necessità di una diversificazione territoriale dei requisiti del suffragio, ovvero di una legge elettorale deliberatamente disomogenea, che dunque potesse captare e restituire in Parlamento i differenti tratti salienti della società. La seconda posizione è la corrente *liberal-democratica*[4]. I teorici di questa corrente si trovavano concordi sull'opportunità di uniformare e ampliare la base del suffragio, nonostante le divergenze sui suoi limiti. I requisiti elettorali, per questa corrente, dovevano essere i medesimi per tutti gli aventi diritto, compresi i membri delle *working classes* abilitati al voto. L'allargamento del suffragio a queste classi, sempre nominate al plurale, è l'autentico obiettivo di questo schieramento liberal-riformatore. Contrariamente a ciò che accade nelle teorie tradizionalistiche, nelle quali uno dei fini principali è quello di arginare l'influenza della *working class* alle urne, i liberal-democratici argomentano la necessità dell'abilitazione al voto delle classi lavoratrici in quanto soggetti plurali, non coalizzati in un unico insieme capace di mettere a repentaglio l'ordine costituito[5]. La terza corrente è quella della *minority representation*. I suoi sostenitori accettavano e ammettevano un'estensione del suffragio ma, proprio a causa di questo e del conseguente strapotere della maggioranza che, a loro avviso, ne sarebbe conseguito, proponevano dei meccanismi di salvaguardia rappresentativa delle minoranze, intese non nell'accezione di gruppi marginalizzati o indigenti, ma di classi colte e istruite.

Una delle proposte più diffuse della terza via è stata il *cumulative vote* di James Garth Marshall[6], ideato nel 1853. Modello elettorale inizialmente supportato, tra gli altri, da John Stuart Mill[7], proponeva una diversificazione dell'espressione di voto sulla base della professione degli elettori. I membri della *working class* avrebbero avuto a disposizione un solo voto mentre quelli delle classi istruite (medici, *lawyers*, ufficiali militari, letterati e via dicendo) due, tre o più, da destinarsi a candidati diversi o al medesimo. Uno schema elettorale simile è stato escogitato nello stesso anno dall'anonimo autore di un pamphlet intitolato *The Educational Franchise*[8]. Il meccanismo proposto consisteva nella creazione *ad hoc* di circoscrizioni elettorali a beneficio delle stesse classi privilegiate da Marshall, le quali, in questo contesto, non avrebbero avuto più voti da esprimere, ma una *rappresentanza separata* con la quale eleggere i propri rappresentanti.

Il *pamphlet* è stato successivamente ripubblicato, nel 1857, dalla *National Association for the Promotion of Social Science*.

Gruppo di pressione legislativa prevalentemente *liberal*[9], l'*Association* proponeva un approccio interdisciplinare per il conseguimento della «social knowledge», intesa come «the science of promoting the prosperity, happiness, and welfare of the human race», al fine di emendare la causa dei mali sociali britannici, riconosciuta nella «defective condition of our law»[10]. Il presidente dell'associazione, Lord Henry Brougham, nell'*Inaugural Address* della prima pubblicazione dell'associazione, datata 1858, poneva grande attenzione alla questione della riforma elettorale. Già firmatario della ripubblicazione di *Educational Franchise*, riproponeva l'idea della rappresentanza separata per le minoranze educate. L'obiettivo da conseguire era, da una parte, quello di moderare la predominanza degli interessi locali, i quali sfavorivano le questioni di carattere generale. Dall'altra parte, specularmente, s'intendeva facilitare l'ingresso in Parlamento agli uomini più colti e competenti. Riforma che, nei calcoli di Brougham, avrebbe peraltro permesso alla neonata *Association*, fattasi carico del grande compito della «promotion of social improvement»[11], di diventare un alfiere del progresso della nazione. Nonostante ciò, data la congiuntura storica nella quale Brougham scriveva, è difficile non interpretare questa proposta elettorale come un'azione preventiva nei riguardi del processo di democratizzazione. La «well-balanced constitution» britannica aveva offerto protezione «from arbitrary power», da quel «peculiar despotism» che è il dominio della «irresponsible multitude»[12]; ma il rischio del dispotismo avrebbe potuto riaprirsi a causa dell'allargamento del suffragio. Di questo avviso era un *barrister-at-law*, Thomas Hare, il quale aveva trovato nella *Social Science Association* un terreno fertile di discussione e degli illustri aiutanti per portare avanti la sua idea di riforma elettorale.

Nato nel 1806, sin dalla giovane età Hare intraprende la carriera legale, formandosi tra gli *Inns of Court* e l'ufficio di un *solicitor*. Interessato anche a questioni di economia politica si schiera, contro il protezionismo mercantile dei *Navigation Acts* (promulgati per la prima volta nel 1651), dal versante del *free trade*, avvicinandosi al *liberal Tory* William Huskisson e scrivendo un *pamphlet*[13] in sua difesa nel 1827. A seguito dell'ammissione all'*Inner Temple* l'anno successivo, matura l'idea di cimentarsi nella carriera politica, probabilmente nella speranza di diventare segretario di Huskisson, evento che non si verificherà mai a causa della prematura morte di quest'ultimo. Sfumata la possibilità di una carriera parlamentare, si dedica agli studi giuridici, diventando *barrister* nel 1833 ed esercitando la professione fino al 1853. Trova impiego prima presso la *Court of Chancery* e, successivamente, presso i tribunali come reporter delle decisioni emesse dai *Vice-Chancellors* Wigram, Turner e Wood, assicurandosi, inoltre, una reputazione di autorità tra gli *equity lawyers* con la pubblicazione della casistica equitativa[14]. A partire dagli anni '50, complici una nuova mansione lavorativa e la frequentazione della *Social Science Association*, Hare s'inserisce nel dibattito sulla riforma elettorale, sostenendo i fini, ma non i mezzi, di quest'ultima. La sua opera di riforma, la quale darà luogo alla grande campagna per la *proportional representation*[15], è scavata nel solco della *minority representation*, ma con l'ambizione di porsi come un'autentica terza via rispetto alle teorie progressiste-democratiche e tradizionali-conservatrici.

Ciò che Hare tenta di ottenere è una coniugazione dell'*input* democratico – l'uniformità del suffragio – con l'*output* tradizionale – la designazione di una specifica classe al governo –, ma con la torsione propugnata dalla *minority representation*.

1. *Una macchina perfetta*

Nel 1853, anno dell'istituzione della *Charity Commission*[16] – creata con il *Charitable Trusts Act* dello stesso anno – Hare iniziò a lavorare come *charity inspector*. Il lavoro che lo accompagnò per tutta la vita consisteva, generalmente, nell'indagine dell'amministrazione dei fondi degli enti di beneficenza sulla base degli esiti di una precedente *Charity Commission*, operativa dal 1819 al 1837, guidata da Lord Brougham. Forte critico del sistema di beneficienza britannico, Hare diede avvio a una campagna per riformare i fondi di questi enti, la quale incontrò forti resistenze, in particolar modo a causa della proposta di devolvere buona parte del denaro all'educazione dei poveri. Il sistema di beneficenza, per Hare, non era che un inefficiente palliativo che, ancor peggio, tendeva a perpetuare lo stato di povertà. Per sollevare gli indigenti dalla condizione di miseria, sosteneva la necessità di un rimedio definitivo, «which shall not feed but cure the political or social disease from which they suffer»[17]. Il rimedio proposto s'identificava con la riforma – eminentemente *giuridica* – delle istituzioni preposte all'amministrazione di questi enti. Sul punto proponeva la sottrazione della giurisdizione della *Court of Chancery* da tutte le materie *amministrative*. Dal sistema filantropico di *charitable endowments*, male organizzato e inefficiente nell'allocazione delle risorse finanziarie, si sarebbe dovuto passare a un sistema di *beneficial institutions*. Ciò si sarebbe potuto conseguire abrogando la *cy-près doctrine*[18] e riconoscendo sul piano legislativo una più ampia giurisdizione agli *administrative bodies*, implementando un sistema centralizzato con un regolamento interno deciso dagli stessi, ratificato dalla Corona e dal Parlamento. Per conseguire questo risultato si sarebbe dunque resa necessaria una riforma della legge, riforma sulla quale Hare non riponeva grande fiducia. La consapevolezza della mancanza di considerazione politica da parte della Camera dei Comuni su questi temi fu la prima spinta verso l'interesse di Hare all'ingegneria elettorale. Il Parlamento degli anni '50, così com'era composto, veniva accusato d'aver cessato la sua funzione di captare ed emendare gli autentici problemi della società. Hare, conseguentemente, reclamava un nuovo tipo di Parlamento, immutato nelle procedure interne, ma trasfigurato nella composizione mediante una nuova riforma della rappresentanza politica.

The machinery of representation, il primo *pamphlet* di Hare sulla riforma elettorale, viene pubblicato nella prima metà del 1857, a seguito delle elezioni generali, le quali vedono vittorioso il ministro Whig Palmerston, forte di un'ulteriore estensione della propria maggioranza[19]. Nel giugno dello stesso anno, Robert Cecil presenta una mozione parlamentare[20] su un possibile utilizzo delle *voting papers*, le schede elettorali. Hare, riconoscendo la maggior efficienza di questo supporto materiale, pubblica nell'ottobre dello stesso anno una seconda edizione del *pamphlet*, introducendo le *voting papers* e dunque modificando il *core*

della sua proposta elettorale, l'allocazione dei voti[21]. Nasce così quello che, nei decenni successivi, verrà chiamato *single transferable vote*, ma che il suo inventore denomina *system of individual independence*. Il *pamphlet*, malgrado le speranze dell'autore, avrà un successo molto limitato. Tuttavia, questo nuovo sistema troverà applicazione nella più corposa e fortunata opera successiva, *A treatise on election of representatives, parliamentary and municipal*, pubblicata nel 1859.

Dal 1861 al 1873 vengono pubblicate altre tre edizioni del *Treatise*, ciascuna delle quali apporta delle modifiche e delle aggiunte al testo le quali, benché numerose, non alterano i temi e l'articolazione complessiva della proposta di riforma. Sono tuttavia significative, da una parte, nell'ottica di strategia politica messa in atto da Hare ai fini dell'approvazione del proprio disegno di legge e, dall'altra, per l'ampliamento del fronte di discussione cui lo schema aveva dato adito in quegli anni. In tal senso, dalla 3ª edizione (1865) aggiunge delle *Appendici* sull'avanzamento del *system of individual independence* e dei sistemi proporzionali in generale al di fuori del Regno Unito (in Australia, nella Confederazione tedesca, in Francia, in Olanda, in Belgio e negli Stati Uniti). Inoltre, con la 4ª edizione (1873) un consistente numero di clausole viene emendato e molte altre vengono rimosse a seguito degli eventi legislativi dell'anno precedente, ovvero l'introduzione della segretezza del voto alle urne mediante il *Ballot Act*. Lo sforzo delle modifiche di quest'ultima edizione è teso a dimostrarne la compatibilità con il *system of individual independence*. Nonostante i pesanti rimaneggiamenti della veste giuridica della proposta di riforma e le ampie riscritture del testo, i moventi, i referenti critici e gli obiettivi di Hare rimangono pressoché immutati, così come la logica complessiva del meccanismo elettorale. Il cambiamento più significativo è il contesto. Già nel 1859, John Stuart Mill legge con entusiasmo l'opera di Hare, diventandone uno «zealous apostle»[22] e dando l'impulso più significativo alla lunga campagna intra ed extra-parlamentare per la *proportional representation*.

In generale, il *system of individual independence* o *single transferable vote* è inteso dal suo inventore come un dispositivo tecnologico governato da leggi matematiche e principi scientifici, direttamente ispirato dagli avanzamenti della «science of political economy»[23]. Le clausole che lo articolano – le componenti *meccaniche* – sono formulate con un'ossessione per il dettaglio, seguendo una razionalità meccanica e deterministica di esaurimento e marginalizzazione degli elementi arbitrari e aleatori. Il primo avanzamento tecnico proposto da Hare è il *registro generale* degli elettori redatto da un funzionariato centralizzato[24], un netto miglioramento del sistema allora vigente, sostenuto da registri incerti e disorganizzati compilati dai funzionari locali[25]. La macchina elettorale è concepita come un dispositivo auto-regolantesi e indipendente, nel suo funzionamento, dai sui operatori. Il sogno di Hare è quello di un meccanismo perfetto, efficiente e flessibile, adatto all'implementazione in qualsiasi contesto geografico, indipendente dalle divisioni territoriali e dall'estensione del suffragio.

Nello specifico, il sistema è fondato su unità di preferenze elettorali uniformi. Queste unità, chiamate «quota», sono ottenute dividendo il numero degli elettori votanti per il numero di seggi del Parlamento. Ogni candidato che ottenga un numero di voti pari o superiore alla quota è

dichiarato eletto. Il sistema rende disponibile il voto a partire dalle circoscrizioni, che possono essere localizzate geograficamente o corporativamente. In quest'ultimo caso consistono in gruppi universitari, professionali, legali o d'altro tipo. Tratto peculiare del sistema è la possibilità di creare queste circoscrizioni prima di ogni elezione mediante l'invio, da parte dei membri, di una petizione ufficiale alla Corona, un'incorporazione elettorale totalmente indipendente dalle attività legislative parlamentari. I voti, nonostante la presenza delle circoscrizioni, non sono delimitati al loro interno, ma possono essere assegnati liberamente a qualsiasi candidato della nazione, confluendo nelle rispettive quote. Ciascun elettore ha a disposizione una scheda elettorale con la quale può inserire, numericamente e in ordine decrescente, tutti i nomi dei candidati per i quali intende esprimere una preferenza. Nonostante l'inserimento di una pluralità di nomi nelle schede elettorali, è concesso un solo voto, il quale, alla fine delle elezioni, viene assegnato a un unico candidato. Il provvedimento delle preferenze multiple entra in funzione nel caso in cui il nome del candidato al primo posto nella schede elettorale abbia già ottenuto un numero sufficiente di voti ai fini dell'elezione (o, nel caso contrario, di un numero non sufficiente). Il voto viene così trasferito al candidato successivo nelle preferenze. Le regole di questo procedimento, della corretta computazione dei voti attribuibili ai candidati (ai fini della determinazione dell'assegnazione dei seggi), data la complessità estremamente elevata della gestione del meccanismo, vengono modificate di edizione in edizione, tentando di rimuovere ogni elemento di incertezza che ostacola la piena scientificità e automaticità dello schema elettorale. L'ultimo metodo impiegato da Hare, nella 4ª edizione del *Treatise*, è quello dell'eliminazione successiva, il quale consiste nel ridurre il numero di candidati rimanenti (che non abbiano ottenuto una quota piena al primo conteggio) attraverso l'eliminazione dei nomi di tutti i candidati con il numero minore di voti segnati al primo posto, attribuendo poi ciascuno di questi voti al nome appena successivo nell'ordine di preferenza, fino a quando non si sarà raggiunto il numero corretto di candidati da eleggere come membri del Parlamento[26].

2. *Dall'artificio elettorale all'ordine naturale*

Punto di partenza dell'argomentazione di Hare sull'urgenza di una nuova riforma elettorale è la critica al sistema allora vigente, il quale si basava sul *Reform Act* del 1832. Questo sistema viene detto irrazionale e inefficiente, governato da una *electoral machinery* intrinsecamente difettiva e obsoleta. La grande riforma del '32, per Hare, va letta nei termini di un anacronismo, un maldestro tentativo di risolvere nuovi problemi con vecchie soluzioni. L'errore dei suoi *framers* è stato quello di calare sul XIX secolo un modello originatosi a partire da un tessuto sociale al tramonto, incapace di captare e di restituire rappresentativamente, in primo luogo, l'inurbamento metropolitano e le nuove relazioni industriali. Questo sistema elettorale produce innanzitutto disomogeneità nell'aggregazione sociale alle urne, unendo nei corpi elettorali gli individui incompatibili e separando quelli che potrebbero agire in armonia. È questo il vero punto d'innesco del declino

delle istituzioni politiche. Nonostante la permanenza di un piccolo numero di uomini autorevoli, l'effetto patologico che ne discende consiste nell'abbassamento del livello dei candidati e dei membri della Camera dei Comuni, potendo gli elettori esprimersi nei riguardi di due soli candidati, solitamente dai meriti molto scarsi. Le elezioni manifestano ad Hare l'inesistenza di un criterio razionale e di merito ai fini della determinazione dei seggi. La logica operante è esclusivamente quella del sotterfugio; l'azione di un corpo elettorale così formato è come quella di un «automaton», il cui sforzo principale è quello di celare «the secret strings by which the machine is pulled»[27].

Da un punto di vista tecnico, la macchina elettorale criticata da Hare è essenzialmente una risultante della combinazione di due elementi. Il primo è il *first-past-the-post* (il sistema maggioritario semplice). Ciò faceva sì che, all'interno di ciascuna circoscrizione, venisse dichiarato eletto il candidato con la maggioranza relativa dei voti e scartati tutti gli altri. L'uomo che aveva ottenuto più voti diventava il rappresentante di tutti gli elettori, per quanto questi potessero trovarsi in disaccordo. Il secondo è l'*artificial limitation* insita nelle divisioni territoriali, elemento con cui viene calata sulla nazione una «mystical boundary»[28], una griglia geografica impenetrabile, una mappatura dell'aggregazione elettorale decisa a priori senza possibilità di appello. La tradizione teorica della *variety-of-suffrages*, nonostante l'ammissione di rimaneggiamenti della cartina dei distretti elettorali, poggia precisamente sulle divisioni territoriali, intese come tasselli essenziali al fine di avere in Parlamento i portatori degli interessi locali, speciali o di classe. Lo scopo dell'opera riformatrice di Hare è quello di destrutturare questa credenza, sostituendola con una nuova teoria della rappresentanza.

Il tradizionale sistema elettorale, prosegue l'argomentazione di Hare, era diventato, proprio a causa dell'insistenza sul mantenimento delle divisioni territoriali, obsoleto e anacronistico nell'aggregazione delle classi sociali. Il sistema era stato modellato su *knights*, *citizens*, *burgesses* e sulle rispettive relazioni con contee, città e borghi. Ma queste denominazioni mantenevano un valore puramente nominale: «At this day we almost need the aid of a Fellow of the Society of Antiquaries to explain to us what the words knight, citizen, and burgess mean»[29]. L'avanzamento economico e industriale aveva irreversibilmente mutato la fisionomia sociale e la distribuzione della popolazione, i suoi equilibri e le nuove egemonie di classe, svuotando di significato e di pregnanza rappresentativa i borghi e le contee, compartimentazioni territoriali con le quali si perpetuavano circostanze di corruzione e irregolarità. Eppure, la preoccupazione principale di Hare non era la lotta alla corruzione, ma alle «demoralizing habits»[30]. Queste sono frutto dell'esistenza stessa delle divisioni territoriali, incapaci di catturare l'autentica distribuzione e ampiezza dei diversi interessi sociali. La *demoralizzazione*, in primo luogo, sembra significare per Hare la sostituzione dei genuini interessi degli elettori con quelli che i benthamiani avevano chiamato *sinister interests* e che per l'autore del *Treatise* non sono nemmeno interessi, ma «sinister influences»[31].

Concettualmente, secondo Hare, l'errore del sistema elettorale inglese risiede in una contraddizione, nella compresen-

za di due principi inconciliabili: la *representation of interests* e la *representation of persons*. Secondo la sua lettura del *Reform Act*, alcune circoscrizioni erano state mantenute, modificate o create a partire dalla supposizione che rappresentassero degli interessi speciali. Gli esiti elettorali, tuttavia, più dell'emersione dell'interesse collettivo, rivelavano una divisione demografica su linee di ostilità, fatto imputabile al funzionamento stesso della legge elettorale. All'interno di queste circoscrizioni la rappresentanza degli interessi tendeva sistematicamente a escludere e ostacolare gli elettori indipendenti non vincolati ai presunti interessi speciali del territorio, una minoranza di «intruders» intesa come «antagonistic class»[32]. Con ciò si escludeva di fatto la *representation of persons*, ovvero, la rappresentanza di *tutti* i singoli elettori, impedendo l'elezione dei candidati votati dalle minoranze. Il desiderio di Hare, di conseguenza, è quello di ridurre l'iniquità della distribuzione dei seggi in Parlamento, permettendo di includere tra i suoi membri *tutti gli interessi e tutte le opinioni* presenti nella nazione.

Sulla spinosa questione delle divisioni territoriali l'inventore del *system of individual independence* afferma di proporre un principio definitivo sulle modalità di separazione, costituzione o ricostruzione delle divisioni locali. Storicamente, il diritto di nominare rappresentanti in Parlamento era conferito alle comunità dei territori a motivo della loro esistenza anteriore. Con il *Reform Act* del 1832 il procedimento viene invece invertito mediante l'introduzione di circoscrizioni create *ad hoc*, «arbitrary divisions» da cui ne risulta una «artificial basis of representation»[33]. L'insofferenza di Hare è data della mancanza di considerazione degli elementi *naturali* di aggregazione elettorale. Conseguentemente, l'intento è quello di capovolgere nuovamente il processo di conferimento del diritto all'elezione di un rappresentante. Per conseguire questo risultato, propone il modello – sul calco delle associazioni e delle gilde della storia britannica – delle *forme politiche volontarie*, fondato sulla «voluntary and natural disposition to associate»[34] del popolo britannico. La riforma elettorale più razionale e più aderente alla tradizione costituzionale britannica sarebbe così quella che abilita al voto ogni comunità, ogni località, ogni associazione *già presente*, accordando un peso relativo mediante una legge generale. Restaurando il tradizionale processo autorizzativo pre-*Reform Act*, Hare mette a capo dell'approvazione di nuove circoscrizioni elettorali – proposte dalle comunità stesse, *dal basso* – l'autorità della Corona, perpetuo sorvegliante delle fluttuazioni demografiche. Con il pretesto della prerogativa regia del conferimento di *corporate powers*, viene così squalificato il potere centrale del Parlamento su queste questioni, temuto, in quanto forza inappellabile della maggioranza, per l'ineliminabile possibilità di abuso (come accadeva con il *gerrymandering* americano)[35].

Il principio corporativo, unito alla razionalità specifica della macchina – il trasferimento dei voti e l'elezione mediante *quota* – avrebbe permesso ad ogni elettore di rivolgersi direttamente all'intera nazione, conferendogli il potere di votare per qualsiasi candidato qualificato e svincolandolo dai gangli delle inique divisioni territoriali. Spalancando la libertà di scelta ed eliminando ogni controllo esterno, l'elettorato sarebbe diventato una volta per tutte responsabile, moralmente maturo. A

tutti gli elettori (meno un numero frazionario) sarebbe stato permesso di partecipare direttamente alla scelta di un qualche rappresentante. È questo il significato di *personal representation*, l'architrave concettuale dell'opera di riforma elettorale di Hare, implicitamente contrapposto alla *virtual representation*.

Quest'ultima formulazione, frutto di una serie di rideterminazioni storiche, era originariamente appaiata a un differente antonimo, la *real* o *actual representation*. Il concetto di *virtual representation* inizia ad essere discusso negli anni '70 del '700 nei riguardi delle colonie americane, le quali, pur non votando direttamente dei rappresentanti, vengono dette virtualmente rappresentate dai parlamentari eletti in Gran Bretagna[36]. Successivamente, a partire dagli anni '20 dell'800, i termini della discussione si spostano sulle circoscrizioni britanniche, soprattutto per merito della polemica di James Mill con James Mackintosh e con Thomas Babington Macaulay, teorici della tradizione della *variety-of-suffrages*[37]. Il dibattito si disloca così sui territori che non eleggono nessun rappresentante. I sostenitori del modello tradizionale sostengono che gli interessi di questi territori siano rappresentati virtualmente da altri rappresentanti provenienti da circoscrizioni con potere d'elezione. James Mill e i *radicals*, al contrario, sostengono che non esista una tale rappresentanza virtuale; la rappresentanza o è reale, effettiva, o non è.

Hare risemantizza i termini della disputa. *Virtual representation* diventa la rappresentanza prodotta dal sistema maggioritario semplice, in cui l'individuo che ottiene la maggioranza relativa nella circoscrizione in cui è candidato, rappresenta virtualmente anche gli elettori che non abbiano espresso per esso la preferenza. Essendo l'errore, a detta di Hare, radicato nell'intendimento stesso della rappresentanza come fondata sulle divisioni territoriali, l'antonimo non è più *real representation*. Parlare di «virtual» in opposizione a «actual» *representation* significa ammettere che «we have not had representation», ma un suo «substitute»[38]. Con la *personal representation*, la rappresentanza correttamente intesa, al contrario, il legame formato tra elettore e candidato è individuale, libero da delimitazioni territoriali e privo di dissipazione di voti. Il *system of individual independence* si pone come un'inedita teoria sul corretto rapporto tra rappresentante e rappresentato e, dunque, su ciò che autenticamente rappresenta il Parlamento. Sebbene l'obiettivo di costruire un Parlamento *specchio* della nazione sia condiviso con il sistema tradizionale, il Parlamento immaginato da Hare, frutto del rispetto della *natura* sociale, non rappresenta *classi*, *gruppi* o *interessi*, ma *singoli individui*.

La categoria di *natura*, nonostante l'assetto macchinico del piano di riforma, è piuttosto ricorrente nei testi di Hare, tanto che, insieme al suo antonimo *artificiale*, viene impiegata per valutare l'*output* dei meccanismi elettorali. Per entrare in funzione, la macchina progettata nel *Treatise* deve attivare il motore, ciò che viene fatto immettendo energia, ovvero l'aggregato delle preferenze dei votanti impresse sulle schede elettorali. Nonostante l'elettorato sia parte integrante del processo meccanico, elemento puramente artificiale, lo stesso non può essere detto dei suoi prerequisiti e dei suoi esiti, di ciò che viene *prima* e *dopo* l'operazione della macchina. A differenza di quanto accadeva con il sistema elettorale del *Reform Act*, il quale produceva

esiti artificiali unendo e disgiungendo arbitrariamente gli elettori, Hare pensava che il proprio sistema di riforma impiegasse sì uno «artificial stimulus» nell'atto del voto, ma con il fine di permettere all'elettorato «spontaneously and without any arbitrary rule, to recover its natural subdivisions»[39]. È con un oggetto tecnologico, artificiale, che si fa ritorno al piano naturale: ogni sistema elettorale non è che una macchina, uno strumento più o meno adatto a questo scopo. Hare credeva che il suo schema potesse rivelare l'ordine naturale della nazione, fornendo un atlante delle autentiche divisioni di simpatie, idee e interessi. Naturali, perché rinvenute *laddove già sono*, senza adulterazione.

3. *Una sana competizione per un'autentica democrazia*

L'assunto basilare dal quale si sviluppa l'intero edificio giuridico di riforma concerne quello che dovrebbe essere il corretto rapporto tra maggioranza e minoranza degli elettori. Nonostante il progetto si inscriva nel solco della *minority representation*, Hare non intende impedire la libera azione della maggioranza della società. Al contrario, viene detto, questa azione deve rimanere libera e, nella sua attività, irresistibile. Ma il potere decisionale della maggioranza non esiste prima dell'elezione, essendo il prodotto di quest'ultima. Dunque, tutti (gli aventi diritto) possono e devono partecipare alla composizione del corpo rappresentativo. Ognuno deve potersi vedere rappresentato a seguito di un processo di autorizzazione politica a cui ha preso parte. È per questo motivo che Hare insiste sul conferimento ad ogni elettore della libertà di aggregazione indipendente da vincoli geografici. Il difetto principale di una suddivisione territoriale è quello di dividere la nazione in due parti, una numerosa e una meno numerosa, con la quale si dissipano le opinioni di quest'ultima parte, la minoranza. Supponendo una «community of sentiment»[40] tra i membri delle minoranze – un'uniformità di scelta nelle circoscrizioni da loro e per loro create – lo scopo diventa quello di fornire i mezzi per l'elezione dei propri rappresentanti, restituendo loro il dovuto peso politico.

System of individual independence è una denominazione che rimarca gli obiettivi pragmatici e morali del suo ideatore. Molto più di un semplice schema progettato per restituire una rappresentanza parlamentare proporzionalmente esatta rispetto alla popolazione votante, il sistema di Hare stravolge il modello rappresentativo britannico, rideterminando i concetti e la relazione di maggioranza e minoranza. Lunga parte della sua opera di riforma, inoltre, è tesa a dimostrare gli effetti morali del proprio schema, i quali, non di rado, si intrecciano a motivi e discorsi di ordine teologico. In un passo del *Treatise* si legge nitidamente la volontà di trasformare l'atto del voto (anche) in un momento di rinnovamento della fede cristiana, rappresentando ciò che di divino c'è nell'uomo e restaurando la fede nella religione civile che dovrebbe permeare le istituzioni. Il voto deve essere una meditazione eminentemente individuale e solitaria perché l'ispirazione divina non guida e non ha mai guidato i governanti, i quali, al contrario, inseguono i vizi e le passioni selvagge delle masse. La falsa rappresentanza politica è parimenti un ostacolo alla dimensione provvidenziale di Dio. Così Hare può

statuire: «no imperishable cement for the edifice of the state, or any other institution of man, is to be found that does not dwell in the individual conscience. All goodness, all religion is personal, or it is nothing»[41]. Qui si può scorgere l'ascendenza protestante dell'etica che muove il progetto di sacralizzazione elettorale. Così come sul piano religioso si rifiuta categoricamente ogni forma di coercizione e si concede ad ogni singolo il ruolo di giudice e direttore della propria coscienza, così deve accadere su quello elettorale. In una nazione cristiana si prescrive la stessa libertà individuale nei riguardi del voto, il quale dev'essere vincolato esclusivamente alla coscienza morale del singolo. Se riformato adeguatamente, dunque, l'atto del voto sarebbe diventato un punto d'unione tra i doveri del buon cittadino e quelli del buon cristiano.

Il tratto rilevante in questo contesto è il termine che emerge in opposizione alla coscienza individuale, ovvero la moralità di partito. Principale obiettivo polemico è propriamente la forma di organizzazione politica moderna incarnata dal partito politico, considerato da Hare causa preminente delle «infirmities of representative institutions»[42] in quanto attore connivente all'iniquo sistema delle divisioni territoriali dalla capacità adulterante. È la stessa necessità di ottenere una maggioranza che richiede la necessità di creare un partito con un nome, dei capi e dei dogmi. L'unica domanda che la maggioranza così formata può porsi non è inerente al «what they ought to do», ma al «what will be successful?»[43], in termini meramente strumentali. Il sistema vigente tende ad organizzare il corpo elettorale in partiti contrapposti, coordinati in nomi e programmi del tutto formali, con l'unico scopo di produrre artificialmente ostilità e schieramenti rivali, i quali, nella realtà dei singoli elettori, *non esistono*. La presenza di partiti così operanti ha l'effetto di impedire l'espressione autentica dei membri che li compongono. Le conseguenze sono l'esclusione delle minoranze e il rigetto dell'individualità, ciò che conduce in definitiva alla paralizzazione del pluralismo politico presente nella società.

Non solo. Il riconoscimento delle differenti forze sociali è, per Hare, una condizione fondamentale ai fini dell'unità della costituzione e del corretto bilanciamento dei suoi poteri. La sicurezza delle istituzioni deve perciò passare attraverso un corpo rappresentativo composto da «every distinct variety and combination of thought, of sentiment, of feeling, of opinion, and of interest which exist in the constituent multitude»[44]. Se la maggioranza sopprime le minoranze, il governo diventa una tirannia dal potere illimitato. Ciò che si deve fare è costituire un'assemblea in cui la maggioranza sia *antagonista* rispetto ad altre forze, inserirla in una *sana competizione*, di modo che non si avviluppi nel circolo vizioso degli interessi sezionali o di partito. Il sano antagonismo concorrerebbe alla cooperazione dei singoli sentimenti individuali nei riguardi dell'interesse dell'intero, il «common good». A parere di Hare, ciò sarebbe il «greatest possible achievement of the science of government»[45]: la sostituzione della forza della *numerical majority* con, riprendendo il lessico del Calhoun di *A disquisition on government*, la *concurrent majority*. Per la concezione elettorale dell'epoca vittoriana andava riconosciuto l'ordine naturale delle gerarchie sociali mediante logiche comunitarie localistiche (il trambusto delle elezioni per alzata di mano ne è la massima espressione[46]), pri-

vando la coscienza individuale di qualsiasi influenza[47]. Hare, polemizzando con questa impostazione, s'inserisce nel processo di razionalizzazione della vita pubblica e di avanzamento della dimensione dell'efficienza amministrativa, pur con alcune eccentricità. Ciò che si sforza di produrre e di dimostrare nella sua liceità è un individualismo che si apre alla cooperazione nella società civile, un capitolo di *aggregazione politica*, per sua stessa natura – formandosi *dal basso* – opposto all'associazionismo di partito.

Riconoscendo una situazione sociale di fatto dominata dal pluralismo, Hare asserisce che lo scopo del Parlamento non dovrebbe essere quello di guardare con nostalgia al passato, ricreando una frattura sociale inesistente, ma di accettare le spinte popolari per l'ottenimento di un bene pubblico fondato sul consenso, il compromesso e la cooperazione. Come Mill[48], ammette che la nuova forma di governo da osservare sia quella del *popular government*, in cui la *public opinion* ha assunto un ruolo di primo piano. È quest'ultima l'autentico «new political element»[49] emerso nell'800, veicolato dalla stampa e generatosi dal progresso tecnologico degli ultimi due secoli, strettamente legato alla civilizzazione e a un progresso – materiale e intellettuale – senza precedenti. Nonostante ciò, il futuro rimane incerto. Hare percepisce nitidamente di vivere in un'età di transizione nella quale le tendenze epocali individuate devono ancora produrre il loro pieno effetto. Riconosce che il loro sviluppo comporterà uno sconvolgimento e una riorganizzazione a livello politico e sociale ma, non potendo prevedere il loro andamento, l'unico punto su cui sembra essere certo è che miglioreranno la condizione dell'uomo, ma solo se i governi sapranno disporsi all'ascolto della vera opinione pubblica.

I lemmi portanti di questa argomentazione – civilizzazione e progresso – sono costantemente utilizzati nell'opera di Hare, ma trovano maggiore incisività a partire dagli anni '60 con la conoscenza diretta di Mill, in particolar modo del saggio *Civilization*[50]. La civilizzazione è intesa come una forza inarrestabile e mutagena, ma non per questo indisponibile all'umano. Le tendenze vanno imbrigliate e governate per il bene del «social progress»[51], possibile solo nella cura delle patologie sociali e politiche. Similmente al Mill del saggio summenzionato, Hare vede una civilizzazione progressiva che complica la vita sociale nei tempi moderni. Questo inevitabile processo storico porta con sé un fenomeno di tipo nuovo, ovvero la crescente prevalenza di sentimenti e opinioni generali e uniformi, i quali vanno sedimentandosi in una nuova fisionomia del potere, quella democratica. Tratto caratteristico è l'inevitabile e progressivo passaggio di potere dagli individui alle masse, con un'acquisizione d'importanza crescente delle seconde a discapito dei primi. L'atteggiamento ambiguo di Hare nei riguardi del governo popolare è dovuto all'aderenza a questa immagine del progresso. I governi devono sì captare e disporre lungo i canali legali l'opinione pubblica e le opinioni delle masse, ma devono allo stesso tempo moderarle.

Assumendo l'esistenza di questa tendenza, ne deriva che le minoranze, schiacciate dalla maggioranza, non possano trovare uno spazio a loro dedicato in Parlamento. Hare, argomentando in questa direzione, tende a sovrapporre il futuro al presente, scivolando costantemente in un piano discorsivo in cui la democrazia sem-

bra già pienamente dispiegata. Il *Reform Act* del 1832 aveva sì allargato il suffragio e rideterminato il peso di alcune circoscrizioni, ma non aveva totalmente stravolto la fisionomia del Parlamento. Non per caso il Gabinetto, il quale proprio in quegli anni iniziava ad affermarsi come autentico centro legislativo, continuava ad essere presidiato dall'aristocrazia. Hare prevede correttamente l'andamento delle istituzioni rappresentative dei decenni successivi – l'estensione del suffragio alle *working classes* – ma non riuscirà mai a spogliarsi di un timore figlio dei pregiudizi dell'epoca, verbalizzato con una retorica oscillante tra l'apocalisse e la salvezza.

Il grande problema, tra presente e futuro, della composizione della Camera dei Comuni («the democratic branch of our constitution»[52]) è la sistematica tendenza ad allontanare gli elementi maggiormente qualificati, le minoranze colte disposte alla mediazione e alla sutura rappresentativa degli interessi sociali, con il conseguente abbassamento del livello d'istruzione della maggioranza dei rappresentanti. Così, minoranza e maggioranza entrano in conflitto. Le loro posizioni relative si traducono in un rapporto patologico di antagonismo (*unhealthy antagonism*), in cui la prima, soffocata com'è dalla controparte numericamente superiore, viene defraudata dei propri naturali compiti istituzionali, ovvero la rettifica della maggioranza e l'orientamento legislativo. Dal versante elettorale, specularmente, gli aventi diritto più poveri e meno istruiti si vedono costretti ad esprimere il voto per uno dei soli due partiti in lizza e a schierarsi dalla parte (apparentemente) più popolare, temendo di essere giudicati come traditori degli interessi della propria classe. Un'opposizione che Hare dice falsa. Le classi non sono dei gruppi rigidamente già dati e ben definiti, ma composizioni miste con uno spettro di variabilità di esperienze, desideri e preferenze. La base aggregativa dovrebbe essere, di conseguenza, eminentemente *individuale*. Abbandonando questo agonismo patologico in favore di un'associazione libera e svincolata da costrizioni di ingegneria territoriale, le linee artificiali di divisione delle classi verrebbero a saltare. Si assisterebbe così all'autentica e *naturale* composizione sociale, quella *mista*, formata dall'associazione di elettori indipendentemente dal reddito.

Hare è convinto che, adottando il proprio schema, liberando l'individualità degli elettori e disinnescando l'antagonismo partitico, la tendenza democratica verrebbe alla fine governata, conseguendo il tanto ambito *social good*. Ribaltando il piano del discorso, designa questa forma di governo come *autentica democrazia*, quella adatta alla propria epoca, smussata delle asperità corruttrici. «Every democrat, true to his principles» dovrebbe contribuire a fare dell'assemblea rappresentativa «the accurate reflection»[53], non solo di una parte, ma di tutta l'intelligenza e la virtù presenti all'interno dei confini nazionali. Hare si appropria così del tema classico, tanto caro alla tradizione della *variety-of-suffrages*, del Parlamento come specchio della nazione, implementandolo nell'eccentrica figura di democrazia che immagina o, meglio, del processo storico di democratizzazione cui sta assistendo, il quale, essendo un processo di ri-socializzazione delle classi, apre al problema della produzione di un nuovo ceto governativo.

4. *Le latent forces e la potenza residuale*

L'obiettivo dichiarato di Hare, tuttavia, non è democratico[54]. Per quanto la sua proposta sia tesa all'attivazione di tutta l'energia potenziale presente nella società, il suo appello è rivolto in primo luogo agli elettori delle «more educated and intelligent classes»[55]. È proprio l'immagine che Hare ha delle classi a fornire la giustificazione di questa preferenza. In un passo di *The machinery of representation* si propone un gioco mentale: se si prendessero «the most intelligent of each class» permettendo loro di discutere, con l'aiuto di un «modern manual of the phenomena of industrial life», di diverse questioni politiche, probabilmente questi si separerebbero «with a conviction that there were marvellously few things in which their interests [...] are not precisely the same»[56]. I conflitti di classe sono causati da un fraintendimento o da una scarsa conoscenza delle materie politiche; le divergenze d'interessi sono più immaginarie che reali. Il contributo ultimo del sistema elettorale, nei piani di Hare, è quello di porre le basi per il riconoscimento di questo nodo.

La libera composizione di gruppi sulla base dell'aggregazione di preferenze individuali non mediate da fattori esogeni ha sì la funzione di mettere in relazione i cittadini di tutte le estrazioni sociali, ma questo non si traduce in una comprensione omogenea e neutrale della totalità degli individui. Esistono una differenza qualitativa e una gerarchia naturale che aspettano solamente di essere liberamente manifestate. Ciò che Hare intende produrre è una ricomposizione sociale filtrata dai dispositivi elettorali, in cui l'altra faccia della libera scelta dell'elettorato è la creazione di un corpo aristocratico composto dai «natural leaders of the people»[57]. L'unione delle migliori menti sparse nella nazione, l'*élite*[58], avrebbe reso perspicui i veri interessi della nazione a tutti gli elettori di qualsiasi classe, governando così le nuove tendenze del secolo.

Il fine ultimo dello schema elettorale è, dunque, quello di dotare l'assemblea rappresentativa degli uomini più intelligenti e competenti della nazione – o, almeno, di assicurarne una frazione. Gli esempi del passato, dei tempi dei «leading men» della «higher aristocracy» feudale, non possono essere importati nel presente. La forma del rapporto sociale è cambiata, non essendo più quella della «personal responsability [...] to the party»[59]. È il progresso a portare la necessità della ricerca di una «different class of men». Il passato non può essere restaurato: «the middle classes which grew up were not prepared to yield unreasoning obedience to hereditary leaders or ancient names»[60]. Con il mutamento della società avanza parallelamente la necessità di raccogliere una classe dirigente di tipo nuovo, fondata sul talento. L'ostacolo a questa trasformazione è il sistema elettorale vigente, il quale espunge i potenziali *leading men* e, con essi, il senso di responsabilità. Lo schema Hare diventa così un modo per raccogliere e attivare le «latent forces existing in each community»[61], i migliori membri della società, istruiti, educati, disciplinarmente formati, tendenzialmente provenienti dalla classe media delle grandi città. Queste, perfettamente individuabili ma incatenate a un sistema iniquo, avrebbero dovuto prendere il posto della nobiltà nell'esecutivo. È questa la fisionomia del nuovo ceto governativo immaginato da Hare. Silenziosamente, nelle righe del *Treatise* si fa strada l'idea di una trasformazione epocale della classe

dirigente. I prerequisiti del governo non sono più i titoli nobiliari, ma le *competenze*. Alla vecchia aristocrazia Hare ne sostituisce una nuova, fondata sull'intelligenza e sulla padronanza delle discipline scientifiche. Da questa necessità di rinnovamento della classe dirigente, tuttavia, ne è collegata un'altra, perfettamente speculare.

È guardando il lato dei governati, in particolar modo delle classi inferiori, che si completano le motivazioni alla base del nuovo meccanismo elettorale proposto da Hare. Nonostante si ribadisca spesso che l'impostazione corretta nel formare un'assemblea rappresentativa sia quella di rilevare e impiegare tutte le forze della società, non viene nascosto l'obiettivo di favorire alcune classi a discapito di altre, tradendo così l'immagine di un Parlamento come perfetto specchio del pluralismo sociale. Sono prioritariamente i membri istruiti delle classi agiate a dover emergere grazie al sistema elettorale. L'introduzione di questi in Parlamento ne innalzerebbe gradualmente il «character by the constant operation of the process of comparison», con la sana competizione, selezionando un livello medio dei rappresentanti sempre più alto mediante la «elimination of the inferior»[62]. Trattando dell'equa rappresentanza di tutti gli interessi della nazione, nella 1ª edizione del *Treatise*, si dice di dover esaminare la questione delle classi inferiori considerando «what is likely to become the progress of democratic institutions»[63]. A partire dalla 3ª edizione – edita nel 1865, due anni prima del secondo *Reform Act* – Hare specifica a cosa si stia riferendo. Il probabile corso delle istituzioni democratiche è l'aumento del corpo elettorale, l'estensione di voto agli elettori delle classi più basse e meno istruite; evento che potrebbe, con ogni probabilità, oscurare l'espressione delle classi colte e mettere a repentaglio gli interessi legati a «property and industry», così come quelli delle «landed and commercial classes»[64], i quali, essendo gli interessi più vasti, devono essere salvaguardati. L'interesse *residuale* è quello delle *working* o *wage classes*.

L'elemento aristocratico è una necessità per tentare di disinnescare la carica eversiva di questo residuo, per esorcizzare la tragedia annunciata. È palpabile una forte angoscia nei riguardi della configurazione patologica dell'estensione del suffragio: la tirannia della maggioranza, il governo delle classi inferiori. Nonostante Hare tenti di porsi come un paladino delle classi lavoratrici, sostenendo la liceità, ai fini del *social improvement*, dell'emancipazione di queste classi da tutti i partiti mediante l'elezione di rappresentanti dediti esclusivamente alla loro causa, il tono moraleggiante del discorso tradisce un certo grado di turbamento. L'*élite* dovrebbe preoccuparsi della loro educazione, del miglioramento delle loro abitazioni e, con questo, dello sviluppo della loro moralità, poiché tutto ciò è nel loro interesse: il benessere e la felicità delle classi inferiori renderebbe chiaro «the interest of the highest classes to instruct, and cultivate the affection of, those who possess smaller advantages». Questi ultimi troverebbero invece del conforto, un motivo «for hoping that their labour would not be in vain, nor even without its reward»[65]. Non sorprende che l'opera di Hare si inscriva nella tradizione della *minority representation*. La maggioranza della popolazione, le classi lavoratrici, hanno sì diritto ad essere rappresentate, ma le minoranze – intelligenti – devono essere salvaguardate ai fini della governabilità delle prime.

Interrogandosi sul futuro delle istituzioni rappresentative e della libertà costituzionale, Hare traccia questa considerazione: «Essentially democratic, they are rolling onwards, gathering strength as they proceed, and impatient of restraint – threaten to sweep before them all the pillars and landmarks of the elder and parent institutions from which they sprung»[66]. Le istituzioni britanniche, dette, nella sovrapposizione di presente e futuro, essenzialmente democratiche, sono minacciate da una forza in ascesa che, se non imbrigliata in meccanismi di moderazione, rischia di distruggere le istituzioni e la loro tradizionale capacità di buon governo. Questa forza irresistibile, per quanto mai direttamente nominata, è la *working class*, la quale procedeva acquisendo consapevolezza delle proprie possibilità e avanzando le sue richieste. Un male incarnato dalla configurazione del potere sociale più inefficiente e meno disposto alla corretta suddivisione del potere dell'autorità, ovvero la forma corrotta della democrazia, il *popular government*. La soluzione è quella di ammettere la rappresentanza di questa classe turbolenta, ma *limitatamente* rispetto a tutte le altre. Hare, infatti, guarda con timore l'associazione dei lavoratori manuali: essendo stati esclusi dall'esercizio del potere politico, ora cercano di costruire un suffragio e delle divisioni elettorali che mettano direttamente «all power into their hands» a discapito di tutte le altre classi. «In mercy to themselves – scrive –, it may be hoped that such a consequence may yet be averted»[67].

5. *Conclusione*

Dopo oltre un secolo e mezzo, il voto singolo trasferibile continua a sopravvivere, come testimoniano, ad esempio, le esperienze elettorali della Repubblica di Malta e della Repubblica d'Irlanda[68], nelle quali il sistema escogitato da Hare è tuttora operativo. Privato di velleità di rigenerazione morale, lo schema elettorale è stato cooptato da alcune compagini democratiche e reso operativo su una base organizzativa partitica[69], contrariamente alle ambizioni del suo autore. Del *system of individual independence* non rimane che lo scheletro tecnico, solitamente impiegato, sul piano delle intenzioni, per concedere a tutte le minoranze politiche una rappresentanza parlamentare. Lo schema Hare, nel tempo, è stato slegato dal suo autore e svuotato dell'immagine costituzionale elaborata nelle opere di riforma. Non si tratta, ovviamente, di discorso costituzionale in senso stretto, in quanto il dibattito sulla dottrina giuridica della costituzione britannica troverà il primo impulso successivamente, nel 1885, con *The Law of the Constitution* di Dicey. Quel che si può rilevare in Hare è un'immaginazione costituzionale, un tentativo di pensare e modificare la costituzione *lateralmente*, a partire dai dispositivi elettorali. L'opera pragmatica di riforma può così essere letta anche come un'antropologia giuridica dei sistemi elettorali, incentrata sul problematico rapporto tra rappresentazione del sociale e rappresentanza politica, nel periodo dei timori nei riguardi dell'avvento della democrazia, intesa come *popular government*.

Ad un livello di articolazione del quadro istituzionale, come già notato da Moisej Ostrogorski[70], il progetto di Hare appare troppo debole. La causa è legata alle

intenzioni stesse dell'autore: l'obiettivo di riforma riguardava testardamente ed esclusivamente la composizione del Parlamento. Così come gli altri apostoli britannici della *personal representation*, egli era persuaso della possibilità di arginare l'avvento della democrazia senza metter mano all'articolazione e alle procedure delle istituzioni. Si trattava della riconfigurazione della rappresentanza politica in funzione del processo deliberativo-decisionale già esistente. L'associazione dal basso, la composizione elettorale individualistica, si rivelava puramente strumentale al *tipo* di uomini desiderati in Parlamento. Con il meccanismo elettorale si intendeva assicurare la rappresentanza della frazione naturalmente indicata al governo della società, l'*élite*. Tuttavia, così come si legge in *Considerations on Representative Government* di Mill, alla minoranza parlamentare il progetto di riforma non intendeva concedere poteri speciali, né una prevalenza gerarchica sugli altri gruppi. Il fragile strumento nelle loro mani era la *moral suasion*[71].

La procedura costituzionale che Hare immagina è tenuta in equilibrio dalla supposizione che l'intelligenza, laddove presente, sia sempre riconosciuta. Compito dell'*élite* è quello di manifestarla, persuadendo la maggioranza a seguire i propri dettami. In definitiva, sarebbe bastato il nuovo sistema elettorale; la superiorità morale delle minoranze intelligenti, riconosciuta dalle classi inferiori, avrebbe fatto il resto, fornendo, nel quadro di un Parlamento popolarizzato dall'estensione del suffragio, una costante e paterna guida (e rettifica) della maggioranza. Nonostante l'instabilità di questa azzardata immagine costituzionale, la nuova classe dirigente delineata da Hare si rivela un indicatore storico di rilievo. Diverse affermazioni di Hare portano alla conclusione che questo nuovo ceto governativo vada ricercato nella classe media, negli uomini dalla buona educazione, disciplinarmente formati nello studio delle nuove scienze sociali, in particolar modo l'economia politica. Dai testi di Hare e Mill appare che il consono spazio costituzionale in cui inserire questa inedita classe sia la sede del potere esecutivo, il Gabinetto. Il sogno dei due inglesi è una sostituzione epocale: dall'aristocrazia di stirpe all'aristocrazia del *merito*.

Il progetto di Hare, per quanto mai approvato dal Parlamento, si inserisce nella trasformazione costituzionale britannica dell'800, la quale è stata chiamata *rivoluzione del governo*[72]. La marginalizzazione dell'assemblea parlamentare, del potere del numero, che Hare si augurava, era in realtà un processo già in atto nei decenni della campagna di riforma elettorale. Specularmente, ciò si accompagnava all'altro obiettivo perseguito dall'autore del *Treatise* (così come da John Stuart Mill e dall'Henry Grey di *Parliamentary Government*, ad esempio): il rafforzamento dell'autorità dell'esecutivo[73]. Nonostante non sia stata l'unica causa, il timore della democratizzazione e dell'instaurazione del governo popolare ha certamente contribuito alla formazione della nuova fisionomia delle istituzioni britanniche del XIX secolo. Gran parte del potere legislativo è passato dalle mani dei Comuni a quelle dei ministri del Gabinetto, svuotando parzialmente di significato l'operato della Camera. L'esecutivo, anche per motivi di stabilità politica e di consenso, ha escogitato nuove procedure legislative, tra le quali spiccava in primo piano l'utilizzo massiccio delle indagini sociali corredate dalle scritture minute, dettagliate e dal ta-

glio scientifico delle *Royal Commissions of Inquiry*[74]. L'*élite* immaginata da Hare è stata molto probabilmente delineata anche sul calco di ciò che poteva apprezzare nell'attività della *Charity Commission*. Nonostante il desiderio di un Parlamento eletto mediante il proprio dispositivo non si sia mai avverato, parte degli esiti sperati si sono storicamente realizzati. Il grande sogno di Hare della competenza e della conoscenza disciplinare al governo sarebbe stato esaudito con l'affermarsi del potere neutro – dal punto di vista della legittimazione politica – dell'amministrazione pubblica[75].

[1] Cfr. G. Conti, *Parliament the mirror of the nation. Representation, deliberation, and democracy in Victorian Britain*, Cambridge, Cambridge University Press, 2019.

[2] Cfr. E.P. Thompson, *The Making of the English Working Class* (1963), tr. it. *Rivoluzione industriale e classe operaia in Inghilterra*, Milano, Mondadori, 1969, pp. 19-178.

[3] Un testo esemplare di questa tradizione è la recensione di Mackintosh a *Plan of Parliamentary Reform, in the Form of a Catechism* di Bentham, J. Mackintosh, *Universal Suffrage*, in «Edinburgh Review», n. 31, 1818, pp. 165-203.

[4] *Essays on Reform* è il documento di teoria liberal-democratica più rilevante dell'età medio-vittoriana, un testo che presenta, tra gli altri, i contributi di G. C. Brodrick, J. B. Kinnear, L. Stephen e A.V. Dicey; *Essays on Reform*, Londra, Macmillan, 1867.

[5] Cfr. Dicey, *The balance of classes*, in *Essays on Reform*, cit., pp. 67-84.

[6] G. Marshall, *Minorities and Majorities. Their Relative Rights. A Letter to Lord John Russell, M.P. on Parliamentary Reform*, Londra, James Ridgway, 1854.

[7] Cfr. J.S. Mill, *Thoughts on Parliamentary Reform* (1859), in *Essays on Politics and Society Part 2*, *The Collected Works of John Stuart Mill*, Volume XIX, Toronto, University of Toronto Press, 1977.

[8] *The Educational Franchise*, Londra, T. Hatchard, 1853.

[9] «Its governing Council, elected annually, numbered approximately 250 of whom about a third were M.P.s; and of these M.P.s a steady three-quarters or more were Liberal», L. Goldman, *The Social Science Association, 1817-1886: A context for mid-Victorian Liberalism*, in «The English Historical Review», Vol. 101, n. 398, 1986, pp. 101. Con molti membri impegnati a vario titolo in diverse *Royal Commission of Inquiry*, le pressioni dell'*Association* assicurarono l'istituzione dalla *Schools Commission* (1864) e della *Sanitary Laws Commission* (1868, base delle riforme degli anni '70 culminanti nel *Public Health Act* del 1875), ambedue largamente composte da suoi membri, ivi, pp. 99. Cfr. L. Goldman, *Science, Reform, and Politics in Victorian Britain: The Social Science Association 1857-1886*, Cambridge, Cambridge University Press, 2004.

[10] Sono le parole del *General Secretary* Hastings nell'*Introduction* del primo volume pubblicato dall'associazione, *Transactions of the National Association for the Promotion of Social Science* (1857), Londra, John W. Parker and son, 1858, pp. xxi-xxiii.

[11] Ivi, pp. 25.

[12] Ivi, pp. 24.

[13] T. Hare, *The Maritime Policy of Great Britain, Or, An Inquiry into the Real Merits of the Late, and the Objections to the Present, Navigation System*, Liverpool, T. Kaye, 1827.

[14] T. Hare, *Reports of Cases Adjudged in the High Court of Chancery*, 11 Vol., Londra, 1843-1858. Sulla biografia di Hare, cfr. F.D. Parsons, *Thomas Hare and Political Representation in Victorian Britain*, Basingstoke, A. Maxwell & Son, 2009, pp. 10-17.

[15] Sulla storia della perorazione dello schema Hare nel Regno Unito, Parsons, *Thomas Hare*, cit., pp. 111-185.

[16] Cfr. R. Tompson, *The Charity Commission and the age of reform*, Londra, Routledge & K. Paul, 1979.

[17] T. Hare, *A Letter to the Mayor of the City of Salisbury* (1856), in *Education Commission. Minutes of Evidence taken before the Commissioners*, vol. VI, Londra, George E. Eyre and William Spottiswoode, 1861, pp. 480.

[18] Si tratta di una dottrina dei *courts of equity* applicabile esclusivamente nel contesto della gestione dei fondi delle *charities*. Nel caso in cui lo scopo di un *trust* di beneficenza sia impossibile o impraticabile, la dottrina prevede una modifica dello strumento legale, regolamentando l'erogazione dei fondi «as near as possible» alla volontà originariamente specificata del disponente del *trust*, R. Edwards, N. Stockwell, *Trusts and Equity*, 9ª ed., Londra, Pearson Education Limited, 2009, pp. 221-222.

[19] Cfr. H.C. Bell, *Palmerston and Parliamentary Representation*, in «The Journal of Modern Histo-

ry», n. 2, 1932, pp. 186-213.

[20] Hansard HC Deb. (4 giugno 1857), vol. 145, col. 1104-1122.

[21] Nella 1ª edizione di *The machinery of representation* il supporto materiale previsto da Hare per il concreto funzionamento del meccanismo elettorale è il *poll book*, un registro nel quale l'elettorato avrebbe espresso direttamente il voto. La scelta di utilizzare i *poll books* spinge Hare alla formulazione di un sistema di trasferimento dei voti in surplus complesso e dispendioso, basato sulla consultazione diretta tra candidati ed elettori e con un rinvio alle urne per due ulteriori giornate, T. Hare, *The machinery of representation*, Londra, W. Maxwell, 1857[1], pp. 18-22. Per l'introduzione delle *voting papers* e la descrizione del loro funzionamento, T. Hare, *The machinery of representation*, Londra, W. Maxwell, 1857[2], pp. 18.

[22] John Stuart Mill to Thomas Hare, March 3, 1859, in *Collected Works of John Stuart Mill*, *The Later Letters 1849-1873 Part 2*, vol. XV, Toronto, University of Toronto Press, pp. 599. Mill, inoltre, acclama il lavoro di Hare in un articolo dell'aprile dello stesso anno, sostenendo che il *Treatise* sia il «most important work ever written on the practical part of the subject», J.S. Mill, *Recent Writers on Reform*, in *Essays on Politics and Society Part 2*, *Collected Works of John Stuart Mill*, Vol. XIX, Toronto, University of Toronto Press, 1977, pp. 343.

[23] T. Hare, *The Election of Representatives, Parliamentary and Municipal. A Treatise*, Londra, Longman, Green, Longman, Roberts & Green, 1865[3], pp. xviii.

[24] Il registro generale (*general register*) viene introdotto sin dalla 1ª edizione di *The machinery of representation*, Hare, *The machinery*, 1ª ed., cit., pp. 16-17. Nello stesso luogo testuale Hare presenta le principali figure del funzionariato elettorale, che sono due: il *returning officer* e il *general registrar of electors*. Mentre per i *returning officers* si tratta di funzionari già operativi nel Regno Unito, la cui istituzione è antecedente al *Great Reform Act*, il *general registrar* è un'invenzione di Hare, delineata sul calco del *Registrar general*, figura nata con il *General Register Office for England and Wales* (per mezzo del *Births and Deaths Registration Act 1836*), concernente il censimento della popolazione.

[25] Cfr. F. Cammarano, *Rappresentanza e sistema elettorale in Gran Bretagna (1832-1867)*, in P. Adamo, A. Chiavistelli, P. Soddu (a cura di), *Forme e metamorfosi della rappresentanza politica. 1848 1948 1968*, Torino, Accademia University Press, 2019, pp. 35-43; sulla compilazione dei registri nel sistema implementato dal *Reform Act* del 1832, pp. 39-40.

[26] T. Hare, *The Election of Representatives, Parliamentary and Municipal. A Treatise*, Londra, Longmans, Green, Reader, and Dyer, 1873[4], pp. 189. Il metodo di eliminazione successiva, pur con regole computazionali differenti, è utilizzato anche nella 2ª edizione di *The machinery of representation* (Hare, *The machinery*, 2ª ed., cit., pp. 21-22) e nella 1ª edizione del *Treatise* (T. Hare, *A Treatise on Election of Representatives, Parliamentary and Municipal*, Londra, Longman, Brown, Green, Longmans, & Roberts, 1859[1], pp. 214), mentre nella 2ª e 3ª è impiegato il metodo di selezione, basato sul calcolo di nuove sub-quote – chiamate *comparative majorities* – per i candidati rimanenti (Hare, *Treatise*, 3ª ed., cit., pp. 191-192).

[27] Hare, *The machinery*, 1ª ed., cit., pp. 5.

[28] Ivi, pp. 12.

[29] Ivi, pp. 28.

[30] Ivi, pp. 29.

[31] Hare, *Treatise*, 4ª ed., cit., pp. XXXVI.

[32] Ivi, pp. XXVI-XXVII.

[33] Ivi, pp. 41.

[34] Ivi, pp. 47.

[35] Simon Sterne, membro americano della *Representative Reform Association* di Hare, ne dà una definizione concisa: «Gerrymandering is the redistricting of States, so that the political majorities of contiguous districts not specially required for success therein, are made available by being added to the bordering districts to outweigh majorities theretofore given in such manipulated districts against the party having the power to gerrymander», S. Sterne, *On representative government and personal representation*, Philadelphia, J.B. Lippincott & Co., 1871, pp. 96.

[36] Cfr. T. Whately, *The regulations lately made concerning the colonies and the taxes imposed upon them, considered*, Londra, J. Wilkie, 1765, p. 109.

[37] Parsons, *Thomas Hare*, cit., pp. 50-53.

[38] Hare, *Treatise*, 4ª ed., cit., pp. 128.

[39] Ivi, pp. xii.

[40] Ivi, pp. 24.

[41] Ivi, pp. 371.

[42] Ivi, pp. XXXIII.

[43] Ivi, pp. XXXII.

[44] Ivi, pp. 233.

[45] Ivi, pp. 234.

[46] Cfr. E. Biagini, *Rappresentanza virtuale e democrazia di massa: i paradossi della Gran Bretagna vittoriana*, in «Quaderni storici», n. 69 (3), 1988, pp. 809-838; sulle forme di espressione del voto nella Gran Bretagna post-*Reform Act* 1832, pp. 810-813.

[47] Cfr. F. Cammarano, *Logiche comunitarie ed associazionismo politico nella Gran Bretagna tardovittoriana: procedure elettorali e "corruzione"*, in «Quaderni Storici», n. 69, 1988, pp. 839-856.

[48] Cfr. J.S. Mill, *Considerations on Representative Government* (1861); tr. it. *Considerazioni sul governo rappresentativo*, Roma, Editori Riuniti, 1999.

[49] Hare, *Treatise*, 4ª ed., cit., pp. 244.

[50] J.S. Mill, *Civilization* (1836), in *Essays on Politics and Society Part I*, *Collected Works of John Stuart Mill*, Vol. XVIII, Toronto, University of Toronto Press, 1977, pp. 119-147.

[51] Hare, *Treatise*, 4ª ed., cit., pp. XXXV.

[52] Hare, *The machinery*, 1ª ed., cit.,

pp. 42.

53 Ivi, pp. 52.

54 Cfr. P.B. Kern, *Universal Suffrage without Democracy: Thomas Hare and John Stuart Mill*, in «The Review of Politics», n. 3, 1972, pp. 306-322.

55 Hare, *Treatise*, 4ª ed., cit., pp. XXXIV.

56 Hare, *The machinery*, 1ª ed., cit., pp. 35.

57 Ivi, pp. 51.

58 Il termine *élite* è utilizzato, in riferimento agli effetti dello schema Hare, da Mill, Mill, *Considerazioni*, cit., pp. 115. Sulle teorizzazioni di *élite* intellettuale nell'Inghilterra di metà '800, cfr. C. Kent, *Brains and Numbers: Elitism, Comtism, and Democracy in Mid-Victorian England*, Toronto, University of Toronto Press, 1978.

59 Hare, *Treatise*, 4ª ed., cit., pp. 77.

60 Ivi, pp. 78-79.

61 Ivi, pp. 278.

62 Ivi, pp. 134.

63 Hare, *Treatise*, 1ª ed., cit., pp. 38.

64 Hare, *Treatise*, 4ª ed., cit., pp. 33.

65 Hare, *The machinery*, 1ª ed., cit., pp. 37.

66 *Ibidem*.

67 Hare, *Treatise*, 1ª ed., cit., pp. 44. Questo passo è stato rimosso a partire dalla 3ª edizione.

68 L'utilizzo del *single transferable vote* (STV), pur con diverse variazioni, si è diffuso, a partire dalla fine dell'800, in molti territori dell'Impero britannico, tra i quali figurano Australia, Malta, Irlanda e India. Cfr. S. Bowler, B. Grofman, *Elections in Australia, Ireland, and Malta under the Single Transferable Vote: Reflections on an Embedded Institution*, Ann Arbor, University of Michigan Press, 2000.

69 Che lo schema di riforma elettorale di Hare potesse essere compatibile con la *party politics* era già chiaro al giovane John Commons, J.R. Commons, *Proportional Representation*, New York, The Macmillan Company, 1907², pp. 100-110, 243-245.

70 «La reazione psicologica, che il nuovo sistema elettorale avrebbe prodotto sugli elettori, per quanto probabile e benefica, non poteva essere che molto indiretta, e di conseguenza molto limitata, troppo limitata in ogni caso per condizionare da sola tutta la vita politica», M. Ostrogorski, *La démocratie et les partis politiques* (1903), tr. it. *La democrazia e i partiti politici*, Milano, Rusconi, 1991, pp. 137.

71 In *Recent Writers on Reform*, in riferimento al ruolo delle classi colte nello schema Hare, Mill utilizza la locuzione *moral authority*, Mill, *Recent Writers on Reform*, cit., pp. 364; cfr. Mill, *Considerazioni*, cit., pp. 117.

72 O. MacDonagh, *The Nineteenth-Century Revolution in Government: A Reappraisal*, in «The Historical Journal», n. 1, 1958, pp. 52-67.

73 Un riconoscimento risalente di questo fenomeno è presente in una *lecture* del 1888 di Maitland: F.W. Maitland, *The Constitutional History of England*, Cambridge, Cambridge University Press, 1908, pp. 501.

74 Cfr. H.M. Clockie, J. W. Robinson, *Royal commissions of inquiry: the significance of investigations in British politics*, Stanford, Stanford University Press, 1937.

75 Sulla nascita dell'amministrazione pubblica in Gran Bretagna, cfr. H. Parris, *Constitutional bureaucracy. The development of British central administration since the eighteenth century* (1968), tr. it. *Una burocrazia costituzionale*, Torino, Edizioni di Comunità, 1979; cfr. D.N. Chester, *The English administrative system, 1780-1870*, Oxford, Clarendon Press, 1981.

Laboulaye e il senso della storia

ALESSANDRA PETRONE

Premessa

Édouard Laboulaye viene generalmente ricordato per essere stato l'ispiratore della realizzazione della Statua della libertà, monumento fra i più conosciuti e visitati al mondo, simbolo dell'amicizia e della cooperazione tra Francia e Stati Uniti. Questa circostanza per molti anni ne ha offuscato l'importante ruolo, nella vita politica e intellettuale della Francia, nel periodo che va dal 1848 e arriva fino al 1883 anno della sua morte. Il percorso intellettuale e politico di Laboulaye, che si sostanzia attraverso l'ammirazione per il modello istituzionale americano fino alla definizione di un proprio modello di Stato liberale, ha il suo culmine con l'apporto da lui dato alle leggi costituzionali del 1875. La nascita della III Repubblica è un momento cruciale della storia francese, che sancisce la chiusura di quella fase, durata poco meno di un secolo, d'instabilità costituzionale apertasi con la Rivoluzione del 1789, un lungo periodo che vede la Francia adottare una molteplicità di tipologie di regimi politici. In particolare il periodo che va dal 1848 al 1879, rileva una tendenza costituzionale univoca, vale a dire, quella di realizzare una sintesi politica durevole. Sintesi che porta all'adozione definitiva in Francia della forma di governo repubblicana attraverso le tre leggi costituzionali del 1875, elaborate con difficoltà e adottate dall'Assemblea nazionale eletta nel 1871 dopo la disfatta di Sedan. Laboulaye, attraversa questo arco temporale e ne diviene protagonista sia dal punto di vista intellettuale sia come uomo politico. L'origine, la prima direttrice del percorso intellettuale e politico di Laboulaye, le fondamenta di tutte le sue successive teorizzazioni, traggono linfa dalla sua adesione ai principi della scuola storica del diritto tedesca, dalla sua ammirazione per la dottrina giuridica tedesca. Scuola storica del diritto, dalla quale acquisisce quel senso della storia inteso come preservazione del patrimonio di una nazione, fatto di consuetudini, tradizioni

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poiché il diritto non risponde a una regola assoluta, che non tiene conto dei luoghi, al contrario, esso è parte dello spirito nazionale, è parte del corpo sociale di una nazione. Vale la pena quindi, analizzare l'avvicinamento di Laboulaye alla scuola storica del diritto e valutare quanto e se questa abbia influenzato le sue idee successive, e nello stesso contesto capire perché fu la lettura di uno scritto di Henri Klimrath, il giovane studioso alsaziano morto prematuramente nel 1837, a porlo su questa direttrice. È lo stesso Laboulaye, infatti, in una lettera del 6 febbraio 1864, indirizzata a Leopold-Auguste Warnkoenig, a rivelare: «ho fatto degli studi mediocri [...] Mi dispiace di non aver imparato niente alla Scuola di diritto. Fu il piccolo opuscolo di Klimrath sullo studio del diritto francese che mi aprì gli occhi intorno al 1831 o 1832»[1]. Leggendo quella *brochure* di Klimrath era rimasto colpito dal metodo e dal progresso della cultura giuridica tedesca rispetto a quella francese. D'altronde gli anni universitari passati all'*École de droit* di Parigi dal 1829 al 1833, non gli avevano lasciato sensazioni positive, Laboulaye sentiva che le aspettative maturate erano state disattese, non avendo ricevuto quella visione di insieme, quel metodo di indagine e di comprensione del corso degli eventi, che degli studi giuridici superiori dovevano conferire. Le scuole di diritto francesi non reggevano minimamente il paragone con quelle tedesche e questo nonostante la creazione di nuove cattedre, come pure l'istituzione di un concorso specifico per l'insegnamento del diritto nelle università[2]. Da dove scaturiva l'apatia nella quale giaceva l'insegnamento del diritto in Francia? Un insegnamento confinato all'esegesi, incapace di esplorare strade nuove. Laboulaye individua la risposta al quesito nella rottura con il passato che nel XVIII secolo aveva portato all'affermazione dell'illuminismo: «non più nella storia, ma nella filosofia l'uomo doveva trovare le regole di condotta applicabili a se stesso come alla nazione»[3]. I giureconsulti del XVI secolo furono considerati come dei praticanti noiosi o dei sognatori inutili, e con loro lo studio delle antiche istituzioni. Era nel diritto naturale, quindi, nella legge di ragione, che andavano cercati i miglioramenti delle leggi civili e politiche, in questo modo si poteva dire che la filosofia aveva vinto, non così la storia come parte essenziale degli studi giuridici. Testimonianza di ciò, fu la perdita d'importanza dello studio del diritto romano e dell'antico diritto nazionale. I punti di riferimento non erano più Dumoulin e Cujas, ma Thomasius, Burlamaqui e Wolf[4]. Se in Germania i sistemi filosofici subivano continui rivolgimenti, rinnovando in qualche modo anche il loro apporto alle scienze giuridiche, in Francia, constata Laboulaye, dove non vi fu uno sviluppo filosofico paragonabile a quello tedesco, il diritto andò in completa sofferenza avendo perso la sua base storica. Quindi senza né storia né filosofia rimaneva solo l'esegesi, cioè «l'interpretazione logica e in qualche modo materiale della legge»[5]. In tal senso si spiega la stima di Laboulaye per Savigny, da lui considerato come avversario di questa impostazione e di questo metodo di insegnamento[6].

1. *La lezione di Klimrath*

Chi era Henri Klimrath, l'autore che Laboulaye cita per essere colui che lo aveva indirizzato in un determinato filone della

cultura giuridica?[7] Nato a Strasburgo il 1° febbraio 1807 in una famiglia di commercianti, Henri Klimrath studia a Parigi al Collège Louis Le Grand, qualche anno più tardi inizia i suoi studi accademici presso la Facoltà di diritto di Strasburgo e ottiene la licenza in diritto nel novembre 1828. Si recò per un anno a Heidelberg (1832-1833) dove ebbe modo di seguire i corsi di Thibaut, Zachariae, Schlosser e Mittermaier, con quest'ultimo rimarrà in contatto attraverso una assidua corrispondenza epistolare. Ritorna in Alsazia per sostenere la sua tesi di dottorato, *Essai sur l'étude historique du droit et son utilité pour l'interprétation du Code civil* (1833). Il progetto di Klimrath è soprattutto quello di proporre in maniera articolata la storia e l'esegesi. Non a caso così si esprime sulle differenti scuole di diritto in Germania: «Se è utile che prevalgano tendenze esclusive, al fine di produrre tutto ciò che possono produrre, fino ad esaurire la scienza in ciascuna delle sue direzioni principali, è bene anche che ci siano periodi di eclettismo, di conciliazione, di imparzialità. Così la facoltà di diritto di Heidelberg, la più importante della Germania, insieme a quella di Berlino, non si collega a nessuna scuola determinata. La tendenza predominante è quella di riunire in una combinazione ampia ed equa tutte le teorie incomplete; questo lascia ad ogni insegnante il proprio carattere e la propria individualità, secondo l'elemento che prevale sugli altri e la regola in virtù della quale i diversi elementi si coordinano o si subordinano fra loro. Generalmente è l'utilità pratica che decide»[8]. Una tale analisi si spiega sia con i dubbi che il giurista nutre nei confronti dei metodi tradizionali delle facoltà di diritto, sia con l'entusiasmo che suscitano in lui i lavori di giuristi tedeschi e di intellettuali francesi impegnati nella promozione delle scienze morali e politiche[9]. Durante tutto questo periodo di formazione intellettuale, Klimrath si appassiona infatti al movimento delle idee e alle questioni politiche. Come altri giovani della sua generazione, si sentirà parte di quella giovane Francia liberale che sosteneva la monarchia di Luglio, con speranze e aspettative successivamente deluse. Durante il suo viaggio in Germania, riferisce ai suoi interlocutori del difficile progresso dei valori del costituzionalismo liberale durante il periodo del Vörmaz. Non esita ad indicare nella gioventù universitaria e nei funzionari dell'amministrazione gli elementi più vitali ed illuminati del Paese[10]. In una situazione di immobilità «che cosa possono, nelle lotte politiche, i *lumières*, se non sono accompagnati da energia? Cosa può l'energia di alcuni uomini illuminati, se le masse non li sostengono? Le masse, a loro volta, sono paralizzate quando l'intelligenza le combatte o almeno si rifiuta di guidarle. Questa è esattamente la situazione attuale della Germania»[11]. Allo stesso modo, con lo stesso spirito critico, giudica il ruolo della Scuola storica di diritto: «Fu come reazione contro un dogmatismo arido che assorbiva tutta la scienza nelle sottigliezze di una classificazione, e contro una pretesa anarchia filosofica che erigeva in principi di diritto naturale ciò che sembrava giusto e obbligatorio secondo qualunque regola comune o scientifica, che la Scuola storica nacque»[12]. Tuttavia secondo Klimrath essa sembra affetta da due difetti: si perde sovente nella ricerca di minuziosi dettagli, in delle curiosità giuridiche senza utilità e applicazione attuale; preoccupata del passato, non dà alcuna regola per il presente e il futuro, condannando la scienza e la vita

all'immobilità[13]. Egli giudica parimenti i suoi professori attraverso la lente politica, così gli insegnanti più raccomandabili sono quelli con una chiara inclinazione liberale, come Mittermaier e Thibaut[14]. Klimrath, infatti, si rifiuta in tutta la sua opera di separare la scienza giuridica dalle sue implicazioni politiche e sociali. Fare da cerniera fra teoria e pratica, è in qualche modo il ruolo del giurista che deve prendere parte attiva nell'organizzazione e nel progresso della società[15]. Non a caso, infatti, Klimrath così si esprime: «positiva e concreta per sua natura la vera scienza sociale adatta i suoi precetti ad una determinata situazione, e li modifica secondo i fatti che è chiamata a disciplinare. Per una stessa circostanza esiste una sola ricetta possibile, ma la stessa ricetta non sarà adatta indifferentemente a due circostanze diverse. La storia e in particolare la storia delle istituzioni, la storia del diritto che illumina lo stato presente con la deduzione del passato, è quindi l'ausilio indispensabile alla scienza sociale; senza di essa non c'è più un punto di partenza sicuro, perché solo essa può farci capire quale è veramente la cosa necessaria»[16]. Per lo studioso alsaziano anche se non si vuole riconoscere il legame che lega il presente al passato e il presente al futuro, si può guardare alla storia come una raccolta di esperienze e di esempi utile da consultare[17]. In definitiva anche per una questione politica, per allora attuale e di fondamentale importanza, come quella della rappresentanza nazionale, Klimrath afferma che non si può comprendere la vera natura dei sistemi rappresentativi se non si approfondiscono le forme che gli ha assegnato il Medio Evo[18]. Il testo che viene citato da Laboulaye, per essere stato per lui una sorta di spartiacque dal punto di vista intellettuale, è l'*Essai sur l'étude historique du droit et son utilité pour l'interprétation du Code civil*, la tesi di dottorato di Klimrath. Nel testo, Klimrath evidenzia il ruolo fondamentale svolto dalla storia: «abbiamo compreso che essa offre dei punti di comparazione che era importante studiare. È apparsa come una vasta raccolta di esperienze fatte dagli uomini, dove si potevano trarre utili insegnamenti su quello che occorre fare o non fare nelle situazioni analoghe del presente. L'uomo è sempre e ovunque lo stesso, e cause simili producono effetti simili»[19], questo è da considerare agli occhi dell'autore un modo pragmatico, e quindi utile, di apprezzare lo studio della storia. Tutto si tiene e si concatena nella storia, questo meccanismo di causa ed effetto non serve solo per dedurre i piccoli dettagli da cui si possono acquisire solo i piccoli precetti della politica volgare ma è presente anche nei movimenti delle grandi masse storiche, rendendo unitario lo sviluppo, progressivo e provvidenziale, dell'umanità intera[20]. Queste stesse considerazioni si potevano applicare, sempre secondo Klimrath, allo studio del diritto, rendendolo così più chiaro[21]. Il merito della scuola storica tedesca è stato quello di aver mostrato l'utilità della storia politica nonché della storia del diritto. Ha dimostrato che la storia ha valore e importanza, quando rileva come si sono generati gli elementi di una data civiltà, la loro natura, il loro progresso, la loro influenza reciproca, andando a prendere ogni istituzione nella culla e seguendola passo dopo passo attraverso tutte le vicissitudini che l'hanno resa com'è nel presente. Questo ha portato a comprendere come il diritto si stabilisce e cambia nel corso nel tempo[22]. Cambiamenti che avvengono non in maniera brusca, ma attra-

verso una successione di stadi intermedi in cui lo stadio precedente si lega sempre allo stadio successivo. Così il diritto che una determinata società produce si trasforma in un tempo molto lungo, il cambiamento avviene poco a poco con trasformazioni impercettibili o comunque non percepite. L'elemento nuovo che ogni generazione di individui, ogni epoca, apporta è infinitamente più piccolo della massa di idee e abitudini che legano il presente al passato[23]. Per incontrare i grandi contrasti e risultati occorre guardare epoche fra loro molto lontane, seguire il lento sviluppo che porta da l'una all'altra[24]. Klimrath, quindi aggiunge:

> In una parola il diritto civile come il diritto politico, come i costumi, come le scienze e le arti, come tutto ciò che ha a che fare con la storia dell'umanità, comprende due elementi inseparabili, uno storico, tradizionale, conservatore, l'altro innovatore, razionale, filosofico. Riconoscere la funzione legittima di entrambi e l'unità che ne deriva, questa è la condizione della saggezza nella conduzione della vita come negli affari pubblici, come il principio di ogni scienza vera. Solo in questo modo, in particolare la scienza del diritto, può essere strappata dal solco della routine e dalle discussioni sottili e superficiali[25].

La catena del tempo non può essere interrotta nemmeno dalle rivoluzioni o dalle restaurazioni, secondo Klimrath, in tal modo nel diritto vigente rientra sia il passato più prossimo che quello più remoto. Tanto che il legislatore è obbligato a tenere conto dei costumi preesistenti al punto di ammettere che i costumi e le consuetudini convivano con la legge. Man mano che lo Stato si organizza e un potere si instaura, e le relazione diventano molteplici e più complicate, tanto da non poter essere regolate più solo dalla consuetudine, interviene il diritto scritto, che però si associa ai costumi, restringendo il loro campo di azione, non soppiantandoli mai[26].

2. *Laboulaye e la scuola storica del diritto*

I tratti essenziali del ragionamento di Klimrath, in effetti, si ritroveranno qualche anno dopo, negli scritti che Laboulaye dedica alla Scuola storica del diritto, in particolare nella *brochure* dedicata a Savigny e la sua dottrina, pubblicata nel 1842, *Essai sur la vie et les doctrines de Frédéric Charles de Savigny*. Anche Laboulaye, come Klimrath, compie un viaggio in Germania nel 1840, durante il quale egli ha modo di incontrare importanti personalità del mondo accademico tedesco come Savigny, Mittermaïer, Warnkoenig con i quali manterrà i rapporti nel corso degli anni[27]. Il viaggio permetterà a Laboulaye di approfondire le sue conoscenze sulla dottrina storica e poi di metterle a frutto in una serie di scritti di approfondimento, che culmineranno proprio nella *brochure* dedicata a Savigny. Fondamentalmente Laboulaye vede, nel grande giurista tedesco, quell'impostazione che aveva già assunto da Klimrath. Il diritto di ogni popolo ha sempre il suo carattere determinato e particolare, come le abitudini, i costumi, la stessa costituzione. Mantiene un rapporto essenziale con la natura e il carattere del popolo che governa. Si potrebbe paragonare al linguaggio, per entrambi, infatti, non esiste un momento in cui si possono cristallizzare; entrambi crescono, soffrono e prosperano con la nazione, muoiono quando essa muore. Insomma il diritto nasce e si sviluppa sempre in modo consuetudinario, nel senso che esso esiste latente, nel costume e nell'opinione pubblica, prima di rendersi

concreto nella legislazione. La sua forza è interiore, non deriva dall'arbitrio del legislatore, in definitiva: «scriviamo le leggi non le inventiamo»[28]. Quindi Laboulaye, riprendendo Savigny, afferma che il ruolo del legislatore è secondario, esso deve solo rimuovere gli ostacoli che impediscono la marcia delle istituzioni verso il progresso, dare con la sanzione legislativa la vita giuridica alle istituzioni che sono costituite, tagliare tutti i rami secchi o parassitari. In altre parole, il legislatore deve comportarsi come i pretori a Roma o gli antichi parlamenti francesi, vale a dire, emettere delle sentenze in base ai regolamenti già stabiliti, e non mettere le proprie idee al posto di quelle della nazione[29]. Attraverso la storia si può acquisire ciò che ancora vive organicamente nella nazione e quindi va preservato, e ciò che è diventato desueto e quindi va rimosso, lasciato alla storia. In questo modo, attraverso il riconoscimento dei diritti legittimi già affermati, il presente è chiamato a dare il proprio apporto al progresso della civiltà per non essere ricordato senza gloria nel futuro[30]. Nella stessa maniera, la scienza politica può trarre dal metodo adottato dalle scienze giuridiche in Germania dei benefici, contestualizzando le teorie politiche senza trarre da esse delle verità assolute applicabili ovunque. Quando si studia la politica nella storia, non c'è più quella uniformità di parole e pensieri derivata dalla mano di un teorico, ma prevale invece l'attività umana nella varietà dei suoi sviluppi, ogni popolo è come un laboratorio con uno scopo specifico, un metodo, per realizzare un interesse proprio. Il legislatore deve seguire, quindi, lo specifico percorso del proprio popolo e assecondarlo[31]. Laboulaye non dimentica l'ispirazione ricevuta da Klimrath nemmeno successivamente, infatti, quando nel 1855, fonda insieme a Dareste, Giraud e Nozière, la *Revue historique de droit français et étranger*, nella prefazione al primo numero, si pone sotto il patronato di Jourdan e Klimrath[32]. D'altra parte la rivista nasceva dalle idee verso le quali Laboulaye era diventato devoto ormai da anni, il metodo storico in giurisprudenza e il suo avvenire. Egli così scrive nella prefazione del primo numero:

> Studiare il passato non è un lavoro che spegne lo spirito, di portata esclusivamente filosofica; al contrario la vera filosofia del diritto, come quella della storia, è quella alla quale è stato fatto il dono dell'intelligenza di sapere ciò che deve essere fatto […] Non è una scienza di chimere, non è il sogno di un uomo ingegnoso che con lo sforzo del suo pensiero ricostruisce il mondo: la filosofia del diritto, come quella delle scienze naturali, è la scienza che generalizza, dopo le osservazioni fatte e classificate, e risale, quindi, dai fenomeni ai principi che li governano, e dai fatti alla legge[33].

D'altro canto come è stato fatto notare, far valere i diritti che si erano affermati nel corso della storia era una manifestazione di spirito liberale, come mostra l'azione dei giuristi liberali francesi preoccupati di arginare gli eccessi di uno Stato onnipresente[34]. Una lotta sicuramente che vide Laboulaye in prima linea, d'altra parte il suo interesse per il diritto si mosse sempre su questa direttrice, prima da studioso e poi successivamente nella sua attività politica. In qualche modo si potrebbe dire che l'impostazione teorica della scuola storica del diritto diviene funzionale all'impostazione liberale di Laboulaye. Questo spirito si nota in molti dei contributi di Laboulaye alla *Revue de législation et de jurisprudence*, rivista con la quale inizierà a collaborare nel 1839. Quando difende le libertà gallicane affermando: «le nuove generazioni ricche e felici di queste scoperte della scienza si ac-

contentano di onorare da lontano la memoria di questi filosofi pratici, senza studiare nelle opere di questi grandi uomini ciò che c'è voluto di talento e di coraggio, per fondare su basi incrollabili le libertà del genere umano. È quindi un doveroso ossequio che fa bene ai giovani giuristi, quello di scuotere di tanto in tanto la polvere che minaccia di non svelare queste venerabili vestigia e di rianimare il culto, pronto a spegnersi, di questi vecchi monumenti che sono parte della nostra gloria nazionale»[35]. Il tema della scuola storica del diritto emerge in maniera marcata nel carteggio con Ledru-Rollin, sempre pubblicato sulla medesima rivista nel 1845. Uno dei difetti maggiori della scuola storica del diritto secondo Ledru-Rollin *è che per essa il* diritto è indipendente dalla volontà umana, quindi l'uomo si vede a dover accettare fatalmente il diritto[36]. Il concetto, quindi, fatto proprio da Savigny, è proprio quello della fatalità del diritto, dei diversi elementi che costituiscono la vita politica della nazione. Savigny non vede, secondo Ledru-Rollin, che gli interessi pregressi, già protetti dalla legge, che esistono e si sviluppano sotto l'impero della vecchia e nuova legislazione. Alla fine, per Savigny il diritto è un assoluto che si sviluppa, quindi, secondo Ledru-Rollin, una assurdità in termini[37]. Laboulaye non fa mancare la sua risposta, evidenziando come i concetti affibbiati a Savigny fossero una chiara distorsione della evidenza invece dei suoi concetti, completamente opposti, all'idea di un diritto come assoluto, anzi il diritto viene considerato come un tutto contingente e variabile[38]. Da menzionare anche quando nel 1848, sulla scia della Rivoluzione di febbraio, Laboulaye entra nel merito del dibattito sul nuovo testo costituzionale, ravvisando i pericoli derivanti dal fare una completa *tabula rasa* del passato, senza salvare ciò che di buono poteva esserci, della Costituzione del 1830. La storia, insegna che tutte le costituzioni nate di getto dalla testa del legislatore sono morte[39]. Emerge, quindi, anche nei ragionamenti più politici di Laboulaye, quel senso della storia come punto fermo, base di sviluppo per nuovi ragionamenti, che in maniera così pervasiva è presente nel suo modello di riferimento di dottrina giuridica. Alle soglie della II Repubblica, non a caso, più volte nel corso della sua disamina del momento che viveva la Francia in vista dell'emanazione di una nuova costituzione, ribadisce lo stesso concetto, vale a dire, il rispetto del passato, che diventava più che mai necessario, quando teorie, dal suo punto di vista disastrose, minacciano sia la proprietà che la libertà. Un rispetto, da non intendersi come immobilismo, anzi senza precludere innovazioni e ampi margini di miglioramento. Il ragionamento di Laboulaye, sull'importanza degli studi storici, si dispiega negli articoli della *Revue de législation et de jurisprudence*, anche quando egli elabora tutta una serie di ragionamenti filosofici, che fotografano il momento storico, propedeutici alla comprensione della nuova costituzione francese. Lo Stato, per il giurista parigino, comprende tutti i settori dell'attività umana, ma agisce esclusivamente per garantire un ordine fra tutte le sfere di azione dell'uomo. Quest'ordine è garantito attraverso il diritto, che per tale motivo diviene l'elemento essenziale dello Stato. Se il diritto è elemento essenziale, in posizione moralmente inferiore bisogna porre l'utilità generale o ricchezza, quella che viene definita economia politica. Il diritto e l'economia politica sono elementi inseparabili, poiché il giusto e l'utile sono

il fondamento della legislazione, la trama stessa del tessuto sociale. Separarli è follia, solo riuniti permettono di cogliere la completezza della scienza politica[40]. Quindi, si può dire che per Laboulaye, il diritto, sulla scia delle tesi di Klimrath, attraverso la sua stratificazione storica, diviene l'elemento cruciale, il collante di tutto il resto, l'elemento che attraverso la tutela progressiva delle libertà permette il dispiegarsi di tutte le forze presenti nella società. Solo la storia, la memoria delle situazioni già vissute dal proprio paese, l'analisi politico-istituzionale degli eventi trascorsi, permette di costituire un patrimonio genetico di conoscenze da cui attingere per non commettere gli stessi errori e per non farne di nuovi, per questo Laboulaye insiste su questo punto affermando:

> L'ultimo secolo ha visto nascere migliaia di costituzioni immaginate in un solo attimo, o prese in prestito dai paesi vicini; Carte con cui, come con la bacchetta magica, dovevamo cambiare senza resistenza, non solo le leggi e le istituzioni, ma i costumi, il carattere, il genio stesso delle nazioni […] invano da mezzo secolo Burke, de Maistre, Ancillon, Savigny hanno dimostrato fino allo sfinimento che questi governi di carta sono inevitabilmente sterili, se non addirittura malevoli; la nostra illusione dura ancora, corriamo di fronte a questa panacea universale che, da sessant'anni, lungi dal curare i mali di cui ci lamentiamo li ha sempre inaspriti […] Sembra che giudichiamo le costituzioni, non politicamente, ma come opere artistiche: il progetto per noi è l'edificio; ci diviene impossibile credere che linee così pomposamente tracciate, che articoli così ben allineati, questo sistema così geometricamente disposto, sia inevitabilmente chimerico nell'applicazione[41].

Quindi attraverso il metodo storico è come se non ci fosse soluzione di continuità fra diritto e politica ed infatti egli afferma: «quello che stiamo cercando è come in ogni epoca l'umanità ha compreso e applicato l'idea eterna di giustizia e diritto, se seguiamo nella storia la legge di questo sviluppo, è per chiedere al passato il segreto del futuro»[42].

3. *Le fondamenta della libertà nella storia*

In Laboulaye perciò emerge questo senso della storia anche come bacino da cui trarre l'origine e il percorso di quelle libertà e garanzie individuali che possono sempre essere meglio definite, ampliate nel loro campo di azione, ma non disconosciute o rese impraticabili. La libertà, infatti, per il giurista parigino passa attraverso la realtà tangibile, la libertà anzi le libertà, s'insinuano in tutti gli strati della vita quotidiana degli individui a livello personale e sociale, sono presenti nei dettagli dei codici, nelle procedure giudiziarie, nelle istituzioni politiche. Si potrebbe presentarle come le facoltà di cui dispone l'individuo, il cittadino, in tutti gli attimi della sua vita ogni volta che intende agire, muoversi, pensare ed esprimersi senza essere esposto all'arbitrio del potere o del legislatore liberticida[43]. Non a caso, anche nel suo avvicinamento allo studio e analisi del modello costituzionale americano, durante gli anni del II Impero, Laboulaye approfondisce, con numerose letture, per prima cosa la storia degli Stati Uniti attraverso molteplici aspetti, istituzionali, economici e sociali[44]. Infatti nella prefazione al testo che raccoglie in maniera organizzata la maggior parte di tutte le sue riflessioni sugli Stati Uniti, vale a dire, l'*Histoire des États-Unis*, egli così si esprime: «chi parla agli uomini, deve prima entrare nelle loro opinioni, se vuole essere ascolta-

to; è suo dovere buttarsi nel presente non per seguire vilmente la folla, ma per combattere l'errore e difendere la verità»[45], proseguendo, aggiunge, che solo cercando nella chiara imparzialità della storia, si possono trovare le condizioni durature che garantiscono la libertà e che consentono a un paese di riformare le proprie istituzioni senza sospendere la legalità[46]. Lo Stato di Laboulaye, quindi, sfugge a definizioni eccessivamente teoriche, che non trovano conferma nell'osservazione della realtà o nel legame con la tradizione e i costumi. Infatti, egli a differenza dei professori di diritto della III Repubblica, non farà propria una definizione di Stato rigorosamente giuridica. Lo Stato di Laboulaye è la risultante di un cammino storico, diviene espressione politica della società con il suo bagaglio pregresso e con le innovazioni che ogni fase storica porta con sé. Lo Stato, quindi, come sinonimo di società, che è politica per la sua stessa natura[47]. Partendo, inoltre, dalla sua concezione di liberalismo, Laboulaye difende l'idea di uno Stato dove si dispiegano pienamente quelle libertà che costituiscono i veri diritti naturali di ogni individuo, lo Stato anzi compie la sua azione fondamentale proprio nel porre in essere le garanzie a questa libertà che agiscono nella società, si tratta di un modello che chiaramente il giurista francese acquisisce dalla sua analisi del modello americano. Egli definisce chiaramente questo concetto:

> Per i liberali della vecchia scuola, indebolire il potere è fortificare la libertà; per i partigiani dell'ordine ad ogni costo, annientare la libertà, è fortificare il potere; doppia fatale illusione che non genera altro che non sia l'anarchia o il dispotismo. Quando l'autorità è disarmata, la libertà degenera in licenza, e si perde nei propri eccessi […] Al contrario, quando la libertà è sacrificata, hai un potere che non è né sostenuto né contenuto; è il regno dell'intrigo e dell'ambizione […] Dov'è dunque la conciliazione del potere e della libertà? In una giusta visione delle cose. Si deve arrivare a comprendere che l'autorità e la libertà non sono due potenze nemiche fatte per divorarsi a vicenda in eterno; sono due elementi distinti che fanno parte di uno stesso organismo; la libertà rappresenta la vita individuale; lo Stato rappresenta gli interessi comuni della società. Sono due sfere di azione che non hanno lo stesso centro, né la stessa circonferenza; esse si toccano in più punti; ma non devono mai confondersi[48].

Per questo, l'unica soluzione è delimitare la sfera d'azione dello Stato, che deve essere un tutt'uno con i suoi limiti, «allo Stato gli interessi generali o politici, la pace e la giustizia; all'associazione gli interessi sociali; all'individuo la cura e la responsabilità della sua persona e della sua vita»[49].

Ecco, quindi perché il diritto non può considerarsi una scienza esclusivamente professionale, ma deve coniugarsi con la storia e la filosofia, solo marciando insieme può giungere allo scopo ultimo di tutte le scienze vale a dire il miglioramento della condizione umana, dallo studio del passato delle istituzioni si possono trarre lezioni che non possono che arricchire la giurisprudenza[50]. In questo modo, possiamo dire che nell'ottica di Laboulaye, il ruolo del giurista diviene fondamentale anche per la declinazione dello Stato in senso liberale. Un credo questo, testimoniato dalla scelta stessa di Laboulaye di perseguire l'impegno politico attivo che si concretizza con le elezioni all'Assemblea nazionale nel 1871 dove svolse un ruolo non di secondo piano nella elaborazione delle tre leggi costituzionali del 1875. D'altra parte, come egli stesso afferma, se la «scienza della legislazione, la scienza sociale per eccellenza», si configura come istruzione alla politica e in quanto tale come lo strumento fondamentale per

l'esistenza di una democrazia, essa deve essere intesa non come una «scienza speculativa, ma come una conoscenza solida, pratica delle istituzioni e della loro ragion di essere»[51]. L'azione di Laboulaye all'interno dell'Assemblea nazionale si mosse secondo due direttrici per lui inseparabili, quella della Repubblica costituzionale e quella delle garanzie dei diritti individuali. Tuttavia l'esito finale del lungo dibattito che porta al 1875, allontana la Francia sia dal modello americano che da quello inglese[52]. Il parlamentarismo francese, uscito dalle leggi del 1875, ha come centro di gravità il Parlamento[53]. A questo esito finale Laboulaye diede un contributo notevole, con il suo operato nelle Commissioni e con i suoi interventi nell'Assemblea nazionale. Un contributo, che non va letto nel senso di concretizzare il proprio modello di costituzione ideale, ma piuttosto di porre in essere la migliore soluzione possibile, per pacificare il paese e dargli stabilità. Il giurista parigino, infatti, con un notevole pragmatismo politico, che gli fa mettere a tratti da parte anche le proprie convinzioni personali, ritiene che la condizione imprescindibile per realizzare ciò fosse la salvaguardia della forma di governo repubblicana, base sulla quale si poteva, attraverso un compromesso fra le differenti anime politiche dell'Assemblea nazionale, costruire il quadro di riferimento dell'organizzazione dei poteri pubblici. Egli stesso in un discorso del 3 agosto 1875, così si pronuncia:

> L'instaurazione della Repubblica è stata decisa dal voto della Costituzione del 25 febbraio. Questa Costituzione è stata una opera di mediazione; noi abbiamo dovuto cedere su più di un punto, non siamo stati i soli a cedere. Organizzando una Repubblica parlamentare, i monarchici costituzionali sono venuti con fiducia verso un regime che hanno sempre rifiutato, i repubblicani, dal loro canto, hanno dato a questo regime una forma democratica attraverso l'istituzione di una presidenza e il mantenimento del suffragio universale. L'avvenire ci dirà se ci si è sbagliati o se si è scelto il miglior modo per assicurare il governo del paese senza sacrificare le garanzie della libertà[54].

Non il suo governo ideale, ma come egli aveva saputo apprendere dalla scuola storica del diritto, il giusto compromesso che non interrompe il corso della storia, facendo *tabula rasa* del passato, consentendo finalmente però la stabilità istituzionale in Francia dopo la frattura della Rivoluzione del 1789.

[1] La lettera è tratta da A. Dauteribes, *Laboulaye et la reforme des etude de droit*, in «Revue d'histoire des facultés de droit et de la science juridique», 1990, p. 14. Laboulaye fa riferimento alla tesi di dottorato di Klimrath *Essai sur l'étude historique du droit et son utilité pour l'interprétation du Code civil*.

[2] Cfr. É. Laboulaye, *De l'enseignement du droit en France et des réformes dont il a besoin*, Paris, 1839, p. II, pp. 2-3. Tutte le traduzioni dal francese sono nostre.

[3] Ivi, p. 5.

[4] Cfr. Ivi, p. 5.

[5] Ivi, p. 6.

[6] A tal proposito, come sottolinea Legendre, l'importante questione politica delle relazioni tra Francia e Germania, per la storia della scienza giuridica, dipendeva in larga misura dalla diffusione in Francia delle idee di Savigny e il principale missionario della scuola tedesca in Francia sarebbe diventato, a partire dal 1840, proprio Laboulaye. Cfr. P. Legendre, *Lettres de Savigny a Laboulaye,* in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung», vol. 88, issue 1, 1971, p. 322. Sulla stessa questione cfr. O. Motte, *Savigny et la France*, Perne, Lang, 1983.

[7] Su Henri Klimrath cfr. O. Motte, *Lettres inédites de juristes français au XIX^e siècle conservées dans les archives et bibliothèques allemandes*, Bonn, Bouvier Verlag Edition Röhrscheid, tome 2, 1990, p. 1005-1107.

[8] H. Klimrath, *Lettre au directeur de la Revue Encyclopédique sur l'Université de Heidelberg-Cours de droit de M. Thibaut*, in «Revue encyclopédique», tome LV, juillet-septembre 1832, p. 111.

[9] Cfr. F. Audren, *Écrire l'histoire du droit français: science du politique, histoire et géographie chez Klimrath (1807-1837)*, in J. Poumarède, *Histoire de l'histoire du droit, «Étude de histoire du droit et des idées politique»*, Toulouse, Presses de l'Université Toulouse Capitole, 10/2006. p. 114.

[10] Cfr. H. Klimrath, *Lettres écrites de l'Allemagne-deuxième lettre*, in «Nouvelle revue germanique», novembre 1832, pp. 203-205.

[11] Ivi, p. 205.

[12] H. Klimrath, *Lettre au directeur de la Revue Encyclopédique sur l'Université de Heidelberg-Cours de droit de M. Thibaut*, cit., p. 110.

[13] Cfr. Ivi, pp. 110-111.

[14] Cfr. F. Audren, *Écrire l'histoire du droit français*, cit., p. 115.

[15] Cfr. *Ibid*.

[16] H. Klimrath, *Importance scientifique et sociale d'une histoire du droit français* (1834), in *Travaux sur l'histoire du droit français par feu Henri Klimrath*, de L. A. Warnkönig, Paris-Strasbourg, 1843, tome 1, p. 82.

[17] Cfr. Ivi, p. 83.

[18] Cfr. *Ibid*.

[19] H. Klimrath, *Essai sur l'étude historique du droit et son utilité pour l'interprétation du Code civil* (1833), in *Travaux sur l'histoire du droit français par feu Henri Klimrath*, cit., tome 1, p. 4.

[20] Cfr. Ivi, p. 6.

[21] Cfr. *Ibid*.

[22] Cfr. Ivi, p. 9.

[23] Cfr. Ivi, p. 11.

[24] Cfr. Ivi, p. 12.

[25] *Ibid*.

[26] Cfr. Ivi, pp. 13-14.

[27] In tutte le lettere che egli indirizza ai suoi corrispondenti oltre il Reno, Laboulaye enfatizza sempre la circostanza che solo attraverso l'esempio tedesco poteva esserci il rinnovamento della scienza giuridica francese. Cfr. A. Dauteribes, *Les relations entre juristes européens au XIX^e siècle: la correspondance Laboulaye-Warnkoenig, 1839-1866*, in «Revue d'histoire des facultés de droit et de la science juridique», 1992, p. 167. Sulla questione se, si trattava di una mera acquisizione della dottrina tedesca da parte dei giuristi francesi o di una riproposizione originale, tanto da poter parlare di una scuola storica del diritto francese cfr. O. Motte, *Sur la genèse allemande d'un nouveau paradigme de l'histoire du droit, Berne,* Lang, 1986, pp. 221-300; P. Sturmel, *L'école historique française du droit a-t-elle existé?*, in «Rechtsgeschichte», 1, 2002, pp. 90-121.

[28] É. Laboulaye, *Essai sur la vie et les doctrines de Frédéric Charles de Savigny,* Paris, Durand et Joubert, 1842, p. 44.

[29] Cfr. *Ibid.*

[30] Cfr. Ivi, p. 47.

[31] Cfr. Ivi, p. 51.

[32] Cfr. J. Bonnecase, *La Thémis, 1819-1831, son fondateur, Athanase Jourdan,* Paris, Tenin, 1914, p. 378.

[33] É. Laboulaye, *Méthode historique en jurisprudence*, in «Revue historique de droit français et étranger», tome premier, 1855, pp. 22-23.

[34] Cfr. P. Legendre, *Lettres de Savigny a Laboulaye,* cit., p. 323.

[35] É. Laboulaye, *Le Songe du verger*, in «Revue de législation et de jurisprudence», tome troisième, janvier-juin, 1841, p. 7.

[36] Cfr. A. Ledru-Rollin, *Lettera del 11 gennaio 1845*, in «Revue de législation et de jurisprudence», tome premiere, janvier-avril, 1845, p. 152.

[37] Cfr. Ivi, p. 153.

[38] Cfr. É. Laboulaye, *Risposta a Ledru-Rollin*, in Ivi, p. 157.

[39] Cfr. É. Laboulaye, *Considérations sur la Constitution*, in «Revue de législation et de jurisprudence», tome deuxième, mai-août, 1848, pp. 238-243.

[40] Cfr. É. Laboulaye, *Cours de législations comparée*, in «Revue de législation et de jurisprudence», tome deuxième, mai-août, 1849, pp. 24-37.

[41] É. Laboulaye, *Locke législateur de la Caroline*, in «Revue de législation et de jurisprudence», tome premiere, janvier-avril, 1850, pp. 225-226.

[42] É. Laboulaye, *De la méthode historique en jurisprudence et de son avenir*, in «Revue Historique de droit Français et étranger», vol.1, 1855, p. 23. Come ha evidenziato Halpérin, si rimane stupiti della pertinenza di questo articolo di

Laboulaye. I differenti domini della storia del diritto che egli prende in considerazione, seppur guardando essenzialmente alla Francia, sono anche quelli attuali e quindi si può seguire il piano del giurista parigino per fare un bilancio provvisorio delle principali questioni che possono porsi agli storici del diritto del XXI secolo. Cfr. J-L. Halpérin, *De la méthode historique en jurisprudence et de son avenir*, Paris, Dalloz, 2013, p. 4.

43 Cfr. F. Saint-Bonnet, *Les libertés chez Laboulaye : une architectonique*, in «Revue Française d'Histoire des Idées Politiques», n. 47, 1° sem 2018, pp. 142-143.

44 Fra i tanti, gli scritti di George Bancroft, Edward Everett, Richard Hildreth,Joseph Tuckerman e William Ellery Channing, Joseph Story, James Kent, James Bayard, George Tricknor Curtis, Furman Sheppard, Horace Mann. W.D. Gray, *Interpreting American Democracy in France-The career of Édouard Laboulaye, 1811-1883*, Newark, University Delaware Press, 1994, p. 55-70.

45 É. Laboulaye, *Histoire des États-Unis*, Paris, Durand et Guillaumin, 1855, tome I, p. I.

46 Cfr. Ivi, p. II.

47 Cfr. G. Bigot, *La conception de l'État dans l'œuvre d'Édouard Laboulaye*, in «Revue Française d'Histoire des Idées Politiques», n. 47, 1° sem 2018, p. 62.

48 É. Laboulaye, *L'État et ses limites*, Paris, Paris, Charpentier, 1863, pp. V-VI.

49 Ivi, p. VII.

50 Cfr. É. Laboulaye, *Essai sur la vie et les doctrines de Frédéric Charles de Savigny*, cit., pp. 7-9.

51 É. Laboulaye, *Trente ans d'enseignement au Collège de France 1849-1882*, Paris, Larose et Forcel, 1888, p. 4 e p. 6.

52 Alla fine la Francia si allontana dal modello americano, inserendo la figura di un premier il cui incarico non derivava da una maggioranza parlamentare ma dal Presidente. Ufficio del premier, completamente estraneo al modello politico americano, di cui i francesi acquisiscono solo il ruolo del Presidente con forti prerogative e il sistema bicamerale peraltro non ricalcato su quello americano. La Francia si allontana anche dal modello inglese, non configurandosi quel governo di gabinetto così ben descritto da Bagehot. Cfr. W.D. Gray, *op.cit., p. 119;* L. de Thy, *L'écriture des lois constitutionnelles de 1875. La fondation de l'ordre constitutionnel de la IIIe République*, These de doctorat en droit public, 2017, p. 326 ; cfr. M. Calamo Specchia, *Leggi costituzionali della III Repubblica di Francia [1875]*, Macerata, Liberilibri, 2008.

53 Cfr. L. de Thy, *op.cit.*, pp. 185-186.

54 É. Laboulaye, *Discours prononcé par M. Laboulaye President du Centre-gauche*, Versailles, 1875, p. 2.

25 luglio 1943: ma fu un colpo di Stato?[1]

ROMANO FERRARI ZUMBINI

Il 25 luglio può esser osservato da una pluralità di prospettive. Ma in questo intervento ci si atterrà invece ad una unica: quella della Storia costituzionale, ossia al profilo squisitamente istituzionale. Questo non esclude, ovviamente, che si terrà conto, pur se sullo sfondo, delle vicende politiche, militari, diplomatiche, socio-economiche e sindacali.

La letteratura sul tema è sterminata. Ci si atterrà, in coerenza con quanto dianzi perimetrato, agli atti e alle deliberazioni, pur non omettendo di considerare la documentazione fornita dai protagonisti delle vicende *de quibus*.

Per mettere a fuoco il problema – quale la lettura da dare agli avvenimenti di quel giorno – è necessario assumere a paratie concettuali quattro domande:

a) cos'era il Gran consiglio del fascismo?

b) perché fu convocato?

c) cosa fu deliberato?

d) cosa significa costituzionalmente l'avvicendamento fra Mussolini e Badoglio?

Le risposte ai quattro quesiti, fra loro concatenati, possono auspicabilmente fornire una chiave di lettura costituzionalmente corretta per inquadrare quel giorno, che segnò il trapasso dal mondo statutario del Regno alla nuova Italia attraverso il cd. 'ordinamento provvisorio', anticamera della Repubblica.

Sub a): il Gran consiglio esprimeva la proiezione del partito fascista nelle istituzioni. Era stato istituito nel 1923 dal neopresidente del Consiglio, Mussolini attraverso un atto scritto pubblicato *motu proprio* sul "Popolo d'Italia". Fu inserito nel novero degli organi apicali dell'ordinamento alla fine degli anni '20 attraverso le leggi del 1928 (n. 2693) e del 1929 (n. 2049).

Sarebbe riduttivo leggere lo statuto albertino attraverso il suo *testo*; al contrario, esso può e deve esser inteso attraverso il contesto nel quale operò; *contesto*, che lo aveva portato ad esser tessera, ancorché

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centrale, all'interno dell'ampio *mosaico costituzionale*, ossia di quella pluralità di atti e fatti, normativi e non, a rilevanza costituzionale, che avevano favorito il formarsi e il diffondersi di una tavola di valori condivisi. Come negare, ad esempio, rilevanza costituzionale alla nascita della rivista "Giurisprudenza degli Stati sardi", fondata dall'avvocato F.Bettini, che in via di fatto introdusse il controllo diffuso sulla magistratura?

Quel *mosaico costituzionale* era connotato da mobilità. Mobilità, da intendersi come sommatoria di tre requisiti: duttilità (attitudine del testo a non porsi come dato fisso, attivando costantemente fenomeni mutativi); elasticità (suscettibilità del testo costituzionale ad essere modificato nei fatti dai soggetti costituzionali senza cambiamenti formali) e flessibilità (idoneità del testo ad essere innovato con legge ordinaria). Era quello un ordinamento connotato fortemente dalla *spontaneità*, ossia da una fonte generativa di istituti sorti in assenza di atti di produzione e fondati su base consensuale. Si pensi ad es., limitandosi al 1848, al sorgere, appunto su base condivisa, del Consiglio dei ministri, del presidente del Consiglio, dell'*interim* ministeriale, del voto di fiducia (preventiva e non solo) al governo, della mozione di sfiducia individuale a ministro, dell'inchiesta parlamentare *et cetera*. Ebbene, in tale contesto mobile non deve stupire il rango che – supportato da dottrina adesiva – aveva raggiunto il Gran consiglio del fascismo, qualificato organo costituzionale ed espressione di un momento di 'rappresentanza' (quella partitica), in parallelo alla 'rappresentanza' delle *élites* (espressa dal Senato) e alla 'rappresentanza' della realtà produttiva (espressa dalla Camera dei fasci e delle corporazioni). Per un'ironia della Storia quell'organo mai aveva votato formalmente – a parte acclamazioni generiche e unanimismi amorfi – e la prima volta che si espresse attraverso un voto, lo fu per determinare la fine del fascismo quale forza politica alla guida d'Italia.

Sub b): Tra il 5 e il 17 marzo 1943 vi furono scioperi a Torino e Milano, ispirati sotterraneamente dal partito comunista. Mussolini tenne il 5 maggio l'ultimo discorso dal balcone, tardo simulacro dei tempi che furono. Nel frattempo, lo sbarco alleato in Sicilia del 9-10 luglio aveva sanzionato la fase recessiva della guerra. Il Paese era scoraggiato e il partito fascista, tramite il segretario Scorza, si illuse di dare una sferzata rinvigorente, ipotizzando una convocazione del Gran consiglio. Anche Farinacci il 16 luglio invitò Mussolini a convocarlo. Dal 18 al 24 luglio, presso il monastero di Camaldoli, un gruppo di giovani intellettuali cattolici elaborava un documento programmatico che avrebbe costituito la linea d'azione politica della Democrazia cristiana nel dopoguerra.

Hitler volle l'incontro, che si tenne a Feltre (Belluno) il 19 luglio. Mussolini partì dopo aver fatto balenare al generale Ambrosio, capo di stato maggiore generale, lo sganciamento dell'Italia, ossia l'uscita dalla guerra. I 'colloqui' si ridussero però all'ennesimo monologo di Hitler, come già nell'incontro di Klessheim, vicino Salisburgo, il 7 aprile. Verso le 12 della mattina di quel 19 si apprese con sgomento dei bombardamenti Usa su Roma. Non stupisce, quindi, che, al rientro a Roma, sceso dal treno, Mussolini abbia dato disposizione a Scorza di convocare il Gran consiglio. Esprimeva il velleitario desiderio di riprender in mano la situazione.

Sub c): convocato il Gran consiglio con

un ordine del giorno altamente evanescente, D. Grandi, presidente della Camera, si attivò. Sin dalla primavera egli aveva – al pari di altri (Ambrosio stesso, il senatore Baistrocchi, l'ammiraglio Zuppelli ed altri) – sollecitato il re ad attivarsi per salvare il salvabile. A tutti il re aveva risposto enigmaticamente: "sono re costituzionale". L'unico a decifrare il messaggio fu Grandi, che legò quelle tre parole al *mosaico costituzionale*, quale formatosi dai tempi del bisnonno, Carlo Alberto.

Il potere regio, che il *testo* statutario riconosceva al sovrano, era stato sempre inteso, da prim'ancora dell'entrata in vigore (8 maggio 1848), ossia sin dal 5 marzo 1848, come potere duale, da esercitare cioè in sintonia con i *players* istituzionali. Il governo Balbo, ad esempio (insediatosi tra il 15 e il 17 marzo 1848), includeva i democratici genovesi, dal latente retrosapore repubblicano, proprio perché il re non voleva escludere quelle voci dalla vita dello Stato. Alla fine di quell'anno il re, proprio in rispetto a quella visione duale, non impose chi egli avrebbe voluto come presidente del Consiglio, ma sopportò la nomina di Gioberti, perché così gli chiedeva la Camera. Lo stesso Vittorio Emanuele III nulla fece nell'estate 1924 perché non aveva ricevuto dalla 'rappresentanza' parlamentare segnali concreti di dissociazione dal fascismo all'indomani del delitto Matteotti: alla Camera, infatti, era stata votata il 13 giugno una proposta a firma del deputato De Capitani per aggiornare i lavori *sine die*, inibendo le opposizioni; la Camera sarebbe tornata a riunirsi appena il 12 novembre. Inoltre il 26 giugno il Senato aveva approvato a larga maggioranza un ordine del giorno che "udite le dichiarazioni del Presidente del Consiglio, approvando i propositi manifestati di voler procedere […] alla integrale restaurazione dell'impero della legge" esprimeva "la fiducia nell'azione del governo". Era a firma del senatore Melodia: la prima parte fu approvata a larghissima maggioranza (248 sì e 4 astenuti); del pari, con analoga maggioranza, fu confermata la fiducia al Governo.

Se lecita un'osservazione psicologica, non pare storicamente proficuo valutare la condotta di Mussolini nella notte fra il 24 e il 25 luglio con criteri di razionalità politica. Egli indubbiamente commise molti errori tattici nella gestione della seduta del Gran consiglio, ma non era più un uomo lucido: gli anni di guerra, disastrosi e distruttivi, lo avevano chiaramente provato, reso incerto e poco incisivo. Il testo votato, l'ordine del giorno Grandi, invitava il Capo del governo "a pregare la maestà del Re […] affinché egli voglia per l'onore e la salvezza della Patria assumere l'effettivo comando delle Forze armate di terra, di mare, dell'aria, secondo l'articolo 5 dello statuto del Regno".

Il re, ricevuto il testo nella mattinata del 25 tramite il ministro della Real casa, Acquarone, si attivò immediatamente per l'avvicendamento. In sintesi, il decreto che rimosse Mussolini esprime la tessera finale del *mosaico*. Fu il 'canto del cigno' della costituzionalità, le cui radici affondano anche a prima dello statuto. Come negare, ad esempio, che il costituzionale aleggiasse nell'aria già dal 1846 in quel Regno di Sardegna, allorché furono istituiti, a Torino e a Genova, i primi corsi universitari di diritto costituzionale e di politica economica, ispirati ai canoni del liberalismo e del liberismo.

Sub d): l'ulteriore decreto – quello che nominò Badoglio, al di la di ogni valutazione umana e politica sul personaggio – espresse la cesura con il *mosaico*. Per la prima vol-

ta, infatti, il potere di nomina fu esercitato conformemente non al *contesto*, bensì al *testo* (art. 65 dello statuto: "il re nomina e revoca i suoi ministri"; integrato dalla legge n. 2263 del 1925: "[…] Il Capo del Governo Primo Ministro Segretario di Stato è nominato e revocato dal Re"), quindi in modo monocratico. Certo, all'indomani della sconfitta di Novara il nonno Vittorio Emanuele II aveva nominato de Launay di sua iniziativa (marzo 1849), senza recepire gli umori della Camera; ma pochi mesi dopo – resosi conto dell'insostenibilità della situazione – ne aveva disposto rapidamente la sostituzione con d'Azeglio.

Nella nomina di Badoglio, invece, la rottura del *mosaico* fu irreversibile: il re non tenne conto di alcuna delle voci che gli giungevano dalla militarità e da Grandi in favore di Caviglia e dai partiti anti-fascisti per Bonomi; invece, tentò in solitudine di uscire dal vicolo cieco con una soluzione di compromesso che scontentava tutti, cioè ricorrendo a un uomo che avrebbe dovuto rappresentare il punto archimedico fra fascismo, anti-fascismo e militarità, essendo Badoglio un maresciallo compromesso, ma non troppo, con il regime.

Il primo decreto – quello nel quale Mussolini "è revocato, a sua domanda, dalla carica" – espresse lucidità, perché attuò un meccanismo collaudato di avvicendamento al potere fra presidenti del Consiglio: il secondo, invece, testimonia scarsa sensibilità e determinò l'irrevocabile frantumazione del *mosaico*, la fine di quel diritto costituzionale e l'inizio del cosiddetto 'ordinamento provvisorio'.

Per completezza è il caso di accennare a una iniziativa similare che il Senato aveva tentato di attivare parallelamente il 22 luglio. Su iniziativa del senatore Grazioli erano state infatti raccolte 63 firme per un ordine del giorno volto a convocare "con fede immutabile nei destini della Patria sotto la egida della Dinastia Sabauda" il Senato in seduta plenaria. Ma il presidente Suardo, in senso letterale, lo cestinò. Non avrebbe avuto la stessa determinazione due giorni dopo, a palazzo Venezia, allorché firmò dapprima l'ordine del giorno Grandi, salvo ritirare nel cuore della notte la sua adesione e quindi astenersi al momento del voto. Quale presidente del Senato sarebbe stato avvicendato dal nuovo governo il 28 con il grande ammiraglio Thaon di Revel, al quale il Badoglio avrebbe potuto ipotizzare la convocazione del Senato, ma quella delle (mancate assunzioni di) responsabilità di Badoglio è un'altra vicenda…

1 Intervento tenuto il 25 luglio 2023 alla giornata di studi "25 Luglio 1943. Un problema di diritto statutario o di diritto costituzionale?" organizzato dal prof. G.L.Conti presso l'Università degli studi di Pisa.

Primo piano:
Massimo Meccarelli, Paolo Palchetti, Carlo Sotis (Eds.)

Die Schattenseite der Menschenrechte. Emanzipationsforderungen und Herrschaftslogik beim Schutz der Einzelperson

(ed. originale Madrid, Universidad Carlos III, 2014)
Münster, LIT-Verlag 2018, ISBN 9783643802804, Euro 59,90, pp. 395

ULRIKE MÜßIG

This ambitious volume on «the dark side of human rights» is dedicated to the contrast between the universal claim, and the only relative, sometimes even counteracting effects of human rights guarantees as nationally or internationally codified in our times. The editorial team of Massimo Meccarelli, Paolo Palchetti, Carlo Sotis took up the challenge with the help of Pietro Costa, Domenico Pulitanò, Tullio Scovazzi, Roberto Bartoli, Pietro Sullo, Francescomaria Tedesco, Sergio Labate, Ombretta Di Giovine, Stefano Manacorda, Luca Scuccimarra to analyze the complex interplay between the ontologically idealizing legal discourse and discriminatory human rights violations. It is the great attainment of the volume not to have hided away from the controversies of and about human rights. As their formulated guarantees, constitutional jurisprudence and international codification touch the lawyers' pride 'to be on the right side of the justice sun'[1], there is the risk of a lack of critical awareness of the human rights' pitfalls among legal professionals. Fully convincing the volume starts from Domenico Pulitanò's finding that addresses the different layers of deficiences: «Controversial is the catalogue of human rights; controversies burden the manners according to which they are weighed up and protected.» (cit. in: Introduction, p. 2). Three conceptual dichotomies – universality/ineffectiveness; generality/distinctiveness; multiplication/contradiction – account for the controversies concerning the definition of human rights (and of their beneficiaries), their enforcement and the conflicts between human conflicting rights. There are unsolved questions of 'clashing' human rights (police threat of torture to save the life of an abducted child; targeted shooting down of a hijacked plane that terrorists threaten to bring down over a nuclear reactor) or of 'challenged' rights (dying with

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dignity and biopolitics debates of medically assisted suicide). Moreover, there is neither an adjustment of the visible inequality with the invisible equality of all human beings (as addressees of their legally formulated 'guarantees') nor of the contradiction between the human rights' universalism and their protective status depending on a national-based democratic citizenship. These dark sides of human rights fade away when facing the legal prominence of human rights, both internationally and nationally. It is the great strength of the volume edited by Meccarelli, Palchetti, and Sotis bring the dark sides to light.

The comprehensive historical report by Pietro Costa (pp. 21-76) stands pars pro toto for the excellent contributions of the reviewed volume. The author's familiarity with the transition from medieval theocentrism to the western modern anthropocentrism triggered by the Spanish conquest of the 'New World' keeps up with the editors' renommee in this field. Only few historical arguments do not find the attention they would have deserved (which might easily due to length limits). The *dominium*-aspect of late scholastic reading of rational self-determination (pp. 27-30) is different from the later property-focus of the American 18th century discourse due to Locke's influences. Costa does not mention that six American states had declared their own bills of rights before 1791 (ed. Thorpe 1909, Chafee 1951), and their innovative cataloguing signified the use of universalism to justify cutting feudal ties with the English crown. His contribution does not explain exactly, that de las Casas' plea for the indigenous people's 'gift of reason', their 'freedom of choice' (1550-1/1994 Disputation, 8th response; a.1552/1995. Apologética Historia Sumaria, chap. 48) used not only Italian humanist topoi, but argued with the reciprocity that 'The Indians were … to obey the Spanish crown in the same way that all other free peoples … owe their universal king and lord' (Octavo Remedio 1542, 1st, 2nd Rationale).

The 18th century French discourse with its coinage by the struggle for national sovereignty sits comfortably within the learned argumentation of Costa's contribution. Of utmost importance is the author's reference to the 20th century turning away from etatism in the name of the central importance of the individual (p. 62), in a post-war legal discourse that was inextricably linked to the experiences of totalitarianism and the traumas of war. Facing the indescribable (but also in an Arendtian reading 'bureaucratised') atrocities, like the *Shoah* by the Nazi Regime, human rights as one of the 'finest products' of legal theory were deemed to be the instrument to eradicate the horrors of war and to prevent any ignorance of personal responsibility not to resist. It is no coincidence, that the most prominent defeated nations (Japan, Italy and Germany) had been eager to be at the forefront of human rights constitutionalization after 1945. There is a particular strength in Costa's historical reasoning that the interest in continuities with the famous 1789-text may result in a dark side of the human rights application. The national sovereignty focus of the French revolutionary discourse (esp. Sieyès) and the philosophical (but not legal!) character of the enlightened claim to universalism[2] are no precursors of the post-1945 positivist claims for human rights' universalism. These comprehensive derivations prepared the ground for Bartoli's contribution on «Human Rights and the juridification of the legal system (*Verrichterlichung des Rechts*)», Tedesco's reasoning on the «Break lines: human rights, sovereignty and death penalty», and for Manacorda's theses about the politicisation of the jurisprudence, when dealing with «the obligation to protect by criminal law in times of internationalisation of the law» (Bartoli pp. 139-159; Tedesco pp. 209-242; and Manacorda pp. 319-360).

Together with Pulitanò (pp. 77-114) and Di Giovine

(pp. 271-318) all these contributors on Human Rights and Criminal Law focus on the (risk of) politicisation of jurisprudence dealing with human rights. Their overdue admonitions correspond to Roberto Bartoli's observation that human rights have an effect on the juridification of the legal lystem (*Verrichterlichung des Rechts*). Criminal law and human rights cannot only clash uneasily – as freedom and security prefer different protective measures –; rather there is a «dramatically open … ambivalen[cy]» (p. 113) that human rights are both the preferred object of protection by means of criminal law and of protection against criminal law (p. 89). If the liberal understanding of minimalizing criminal law is taken seriously, the criminal law protection of legal interests should follow the ultima ratio-understanding of criminal responsability, even if the legal interests, protected by criminal law, are human rights of the victim. It is quite rightly attributed to the dark side of human rights that criminal liability gets extended with reference to alleged protective gaps, often in the understandable fears how to deal with fanatic terrorism (pp. 98 ff.). This ambivalence of human rights in the face of unfair asymmetries between rightful positions of victims and offenders also touches the pioneering considerations of Pietro Sullo on the truth seeking reconciliation process in Marroko's way into independence (pp. 161-208) and the «Break lines», addressed by Francesomaria Tedesco, in his innovative analysis of the 1948-constitutionalization of human rights on the internal UDHR-stage (pp. 209-240). The criminalisation of refugees is certainly one of the darkest sides of expanding criminal law codification by piggybacking on human rights, and leads to the pitfalls of human rights on the international codification stages, as addressed by Tullio Scovazzi.

The complex considerations on the international law challenges on human rights by Tullio Scovazzi (pp. 115-138) cover the burden of rhetoric and the particular paradox of international human rights guarantees being negotiated by state representatives, while the very same rights concern the privileges and impunity of state representatives (p. 117). Human rights have always provided a basis or only haze of legitimacy for those who proclaim them, and this legitimising function provokes a delegitimising effect on those unable to adorn themselves with these rights using a comparable rhetoric. Added to this (dark side) is the late codification since 1945, the unenforceability on the international stage due to national sovereignty theories, and the fluctuation of protection standards, even in established democracies, whose discourses are sometimes drawn into discussing the legality of torture (p. 120). In the formulation of human rights, the author observes asymmetrical human rights: for example, the right to emigrate guaranteed by international treaties is not accompanied by any right to immigrate into a country other than one's own. A similar asymmetry exists in the regulation of the status of refugees (p. 121). The misinterpretation of the jurisdiction of the courts in charge or formal legal excuses (as the lack of ratification) are a particularly dark areas of human rights protection (pp. 123 ff.). Finally, Scovazzi addresses most convincingly the perplexities of third-party effects of human rights, including labour and employment relationships under private law (pp. 134 ff.).

The human rights' relevance for due process is particular responsible for effect on juridification of the legal system. Focusing on the conflict of rights Bartoli observes a particular downside of rights in their absolutisation at the expense of others, and in reverse the relativisation of some rights (as the ones of alleged terrorists within ciminal procedures) to be granted on an absolute scale. Bartoli manages to add to the argumentative agenda of Pulitanò (pp. 77-

114), Tedesco (pp. 209-242), and Manacorda (pp. 319-360) the most noteworthy transition from the citizen in 19th century constitutionalism to the human being in post WWII-codifications (cf. the Albertine Statute 1848/61 and the Italian Constitution of 1948, p. 156). It is the convincing consensus of all authors of the edited volumen, that the dark side of constitutionalizing human rights results from the paradoxy that the human being as addressee of modern human rights guarantees is said to be protected on the universal scale due to human existence in general, whereas the reference to the human beings as codified addressees also comprises the connectedness of the single particular human being in his/her/its historical, social, and material context (p. 157).

Sergio Labate's survey on Ernst Bloch's Natural Law and Human Dignity (pp. 243-270) completes the comprehensive sum of contributions carefully differentiating the dark sides of human rights from their brights sides. It was Bloch's attempt to surpass the usual oppositions between the natural law and social utopian traditions, by arguing that revolution and law, rather than being antagonistic, are fundamentally interconnected. In his effort to wed the demands of law to the agenda of a social revolution, Bloch offered a radical restructuring of the understanding of the social world. His approach and its learned analysis within the reviewed volume thereby offer insights in the mere philosophical and moral origins of human rights. This is an irreplaceable stand to free modern discourses on human rights from any ontological parternalism, – an argument all the more needed in the debate about the «responsibility to protect» (Luca Scuccimarra, pp. 361-395).

The book is well worth reading and should be a companion to any lawyer dealing with human rights. The lack of both a complete bibliography and specific lists of references might result in a formal burden on the quick (or superficial?) accessibility for readers unfamiliar with the indicated short titles. The academic community though will not be hindered in the volume's well-deserved interested and wide reception.

[1] The sun of justice is a metaphorical reference to the title of the reviewed volume. Cf. also prophet Malachi (Mal 3:20) and the 16th century currency among the Bohemian brothers; Otto Riethmüller, a leading figure in the Confessing Church from 1933 onwards, transformed this into a song for the protestant youth, as a wake-up call to deal with the rise of the National Socialists.

[2] True for Voltaire and others; true for the philosophical intentional declaration of 1789 which needed legally binding rephrasing 1791, 1946 and 1958. Also true, though in a different context for Kant's reasoning.

Primo piano: Pietro Costa

Il progetto giuridico. Ricerche sulla giurisprudenza del liberalismo classico, a cura di Filippo Del Lucchese e Marco Fioravanti (con un'intervista inedita all'Autore)

Bologna, Derive Approdi, 2024, ISBN 9788865485101, Euro 25, pp. 432

FRANCESCA GREGORI

La prima edizione de *Il progetto giuridico* di Pietro Costa, risalente alla metà degli anni Settanta – un momento di dinamismo sociale e di esuberanza storico-politica – ha segnato uno spartiacque per la storia e la filosofia del diritto e, in più in generale, per le scienze sociali.

Attraverso una ricostruzione sia della semantica dei concetti giuridici sia della formazione dei nuovi termini sociologici, sviluppatisi tra il XVI e il XIX secolo, l'Autore ha voluto sottolineare l'importanza di un solco storico preciso al fine di definire e promuovere una visione critica della formazione del mondo moderno.

La premessa e l'intervista all'autore svolta da parte dei curatori di questo testo, che possiamo considerare ormai un classico, forniscono una chiave di lettura per il volume che rappresenterà senz'altro un punto di riferimento per le nuove generazioni. Lo scheletro di questa analisi, la sua diagnosi e i suoi risultati (intesi come spunti per una nuova riflessione) si edificano su due dei tre maestri del sospetto, ossia (tralasciando il pensiero di Friedrich Nietzsche) Karl Marx e Sigmund Freud, attraverso le cui categorie viene letto il percorso della modernità, dalla figura di Hobbes a quella di Bentham.

Questa ricostruzione storica offre un chiaro riferimento a un *liberalismo classico* che, nel corso della sua evoluzione, è stato ravvisato dallo storico come un *ponte penale*, passando da una concezione del diritto naturale dell'uomo ad un diritto *determinato* o, se vogliamo, *situato*.

Va sottolineato che il *progetto giudico*, nel senso terminologico, rappresenta uno studio attento al contributo degli autori borghesi della modernità, all'affermazione dei caratteri culturali ed ideologici, in cui viviamo ancora oggi. Ma in esso è forte anche un'eredità di studi antropologici, sociali ed economici che hanno reso vivo il carattere di una costituzione materiale, incentrata su un'impostazione positiva e «determinata» del diritto.

La prima demistificazione che Costa attua, e che avrebbe caratterizzato la sua ricerca degli anni successivi, è sicuramente quella semantica: solo scindendo l'ossatura del discorso, si può arrivare a concepire l'importanza del testo.

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In primis, è interessante vedere fin da subito che per *progetto* Costa intende e definisce, attraverso una *archeologia storica delle fonti*, un «progetto di società», il quale trova un'impostazione embrionale a partire da Hobbes. Questo progetto giuridico scandito, ripensato e migliorato nel periodo della tarda modernità, si evolve fino ad assumere un carattere utilitaristico pensato nei termini benthamiani. *In secundis*, la dimensione del termine *diritto* e della sua spiegazione risulta fondamentale, per poter rendere chiaro in che direzione si stesse orientando il suo progetto giuridico. Costa procede da una concezione «aperta» di diritto, mettendo in rilievo che la sua natura polisemica trova una effettiva e (potenzialmente) definita realizzazione solo in un ambito pratico.

La decostruzione di questo carattere *aperto* viene svolta attraverso l'esplicazione di elementi giusnaturalistici presenti all'interno della tradizione moderna, laddove la nozione stessa del diritto non deve essere intesa in termini «costruttivi» o predeterminati, al contrario, Costa la definisce in quanto «elemento generativo di questa teoria sociale complessiva», ossia come un *riferimento sempre presente* nello spazio giuridico di fondazione e ripensamento del diritto positivo stesso.

Grazie a ciò, il lettore è in grado di comprendere la specifica del termine *giusnaturalismo,* inteso all'interno di quest'opera. Norberto Bobbio, al cui magistero il libro è in una certa misura debitore, nel suo testo *Giusnaturalismo e Giuspositivismo giuridico* affermava che l'approccio giusnaturalistico, pienamente legittimo, «ha svolto e può continuare a svolgere, una *funzione storica* innegabile nella trasformazione e nella progettazione del diritto positivo esistente». In linea con il pensiero di Costa, il giusnaturalismo non deve essere inteso come un qualcosa che riguarda gli aspetti reconditi del nostro passato e fissato all'interno solo di uno schema tradizionalista e prettamente formale, bensì come una condizione ipotetica e teorica di partenza. In maniera opposta, è il porsi della società civile in quanto tale, la formazione del *progetto* stesso di società civile, senza il quale il comune sentire degli uomini (quella rousseauniana *empatia*) non avrebbe avuto luogo.

Per di più, ciò che aiuta a mantenere il concetto di giusnaturalismo come «generativo» è il carattere *metaforico* (p. 287) che gli viene attribuito. Sebbene lo stato di natura venga posto come una ipotesi normativa (che sia o meno prescrittiva a seconda degli autori), ciò non toglie che esso colga gli snodi essenziali di una società che nasce da un *soggetto-di-bisogni*. I caratteri dell'atomismo hobbesiano, la sfera della libertà di pensiero e di parola spinozista, il diritto alla proprietà privata di Locke, pongono in luce il fatto che la riforma socio-culturale della modernità faccia leva su «l'idea di una società retta 'strutturalmente' dalle norme (e dai valori) del 'giuridico'» (p. 234), anche grazie all'esplicitazione del «diritto di natura».

La speculazione relativa al *dibattito sull'eredità lockiana: 'lavoro' e 'proprietà'*, ha una conseguenza, che definirei, obbligata. La tesi di Locke, attraverso cui dal lavoro (nello stato naturale) si arrivava a ottenere effettivamente una proprietà privata (anche in uno stadio pre-politico), viene rovesciata da Costa (con l'ausilio non solo di Hume, ma della tradizione successiva a Locke) come non-possibile, dato che essa poteva rendersi *effettiva*, solo in una condizione politica e positiva. Questo perché «separare 'lavoro' da proprietà è un'operazione che si cumula perfettamente con l'altra, già esaminata, di trasformazione del 'giuridico' in 'diritto'» e in cui «la proprietà è sottratta alla natura […] economica del 'lavoro', al sicuro dai suoi possibili attacchi» (p. 215).

Dunque una separazione tra diritto naturale (della proprietà) e livello economico (del lavoro), sulla scorta della nascita del positivismo giuridico, ha favorito lo sviluppo di posizioni ideologico-politiche

che hanno avuto vita «da sinistra» con Godwin (il quale vedeva *un* tipo di proprietà come «sostentamento strettamente necessario per la sopravvivenza di un soggetto» p. 217), e da «destra» con le teorie e le pratiche strettamente più *utilitaristiche* riconducibili alle posizioni smithiane o benthamiane.

L'individualismo, l'atomismo e la distruttività del sistema hobbesiano tornano sulla scena, sottolineando ancora come l'auto-conservazione e la sicurezza della propria vita siano più importanti di qualunque altra cosa. Ed è in questa chiave che il passaggio ad un elemento pragmatico del diritto acquista il suo significato più alto, a partire da un carattere «generativo» sia di contraddizioni interne che di realtà dell'essenza naturale umana disvelata.

In più ne *Il fondamento del 'diritto di punire': l'eliminazione del 'cattivo' 'altro'* è certo ravvisabile come Costa abbia anticipato la concettualizzazione dei termini di «tortura», «pena», «carcere» e «controllo sociale», elaborati poi compiutamente nell'opera di Michel Foucault *Sorvegliare e Punire*, pubblicata un anno dopo *Il progetto giuridico*. Costa, anticipando proprio l'elaborazione del filosofo di Poitiers, dimostra come «il progetto giuridico getti sul 'delinquente' l'immagine di una pericolosa, distruttiva estraneità» (p. 352). Da un lato la pena di morte come pena esemplare, dall'altro la tortura come strumento giudiziario: entrambe sottoposte alla critica borghese non solo (e non tanto) per la loro natura violenta e disumana, ma per la loro incompatibilità proprio con il progetto (di dominio) borghese.

A cui va aggiunto il riferimento al carattere *educativo* della pena per gli «spettatori», non certo per il reo. Si sono, dunque, creati quei caratteri di semplificazione e razionalizzazione dell'ordinamento giuridico che i riformatori auspicavano, ma è sorto anche il carattere di «nemico interno allo Stato». Locke nel *II trattato* afferma che il trasgressore è «lui stesso che sceglie di abbandonare i principi della natura umana e d'essere una creatura nociva» e che «ha dichiarato guerra all'intero genere umano» (p. 352), ponendosi fuori dalle condizioni giuridiche, e di conseguenza anche umane. Questo prototipo di *delinquente-belva*, dice Costa, ha prodotto una società che non può essere sicura completamente, finché non lo avrà eliminato.

Il cambio di paradigma lo si avverte con l'*ideologia dell'eguaglianza borghese* di fronte alla legge penale, la quale contro le impostazioni secolari dell'assolutismo ha posto le basi per l'azzeramento delle differenze circa le condizioni giuridiche di appartenenza. Questo aveva prodotto un affievolimento delle torture pubbliche e la nascita – in chiave benthamiana – di una struttura di detenzione, che avesse come fine il «contenimento sistematico», concretizzato con l'idea del *Panopticon* e producendo quei sistemi che Foucault ha definito *dispositivi disciplinari* per il controllo comportamentale del prigioniero (e del cittadino). Coerentemente al sistema proposto, risulta dunque che per Costa la tortura non svanisce ma muta di forma.

Da ciò, in *La razionalizzazione del terrore: certezza del diritto e riforma del diritto penale*, si delinea un apparato penalistico-repressivo, che non alimenta l'autoconsapevolezza del detenuto; al contrario, giocando sull'ambito psicologico, la violenza centralizzata dell'istituzione detentiva rende limpido «un altro capitolo del progetto di egemonia» (p. 358). Il mirato carattere rieducativo che dovrebbe essere presente nelle nostre istituzioni, assume un'importanza ancora più rilevante, soprattutto rispetto agli sviluppi storici dei nostri giorni.

La genealogia storica del diritto tracciata da Costa in quest'opera prende piede dall'elaborazione della nascita «dell'armatura ideologica borghese», in riferimento al modello inglese, il quale resta centrale per la comprensione di questa *nuova* apertura

teorica, rispetto agli schemi rinascimentali e dell'*ancien régime*, proponendosi verso un modello di società che lo stesso autore definisce *tendenzialmente globale*.

Il chiaro riferimento a filosofi come Locke o Smith, esplicita una egemonia borghese che si muove dal terreno economico a quello giuridico e che definisce una *totalità statutaria* in cui tutto convergeva (e doveva convergere) nella sfera borghese stessa.

La proposta di Costa e dei curatori ambisce, dunque, ad una lettura realistica del mondo e della società, fornendo «un corredo di conoscenze metodologiche» e ponendo al centro tematiche come la tortura, il *soggetto-di-bisogni* e l'economia borghese del passato, e ci fornisce un solido armamentario per orientarci nelle sfide del presente.

Ventiquattro proposte di lettura

A CURA DI ANDREA RAFFAELE AMATO, NINFA CONTIGIANI, SAVERIO GENTILE, ROCCO GIURATO, LUIGI LACCHÈ, STEFANO MALPASSI, GIUSEPPE MECCA, GIACOMO MENEGUS, ULRIKE MÜSSIG, PIERPAOLO NASO, MONICA STRONATI

A

Alessandro AGRÌ
La Costituzione della Reggenza italiana del Carnaro (1920)

Torino, Giappichelli, 2023, pp. 352
ISBN 9791221100150, Euro 46

Come scrisse il giornalista e poeta futurista Mario Carli (1888-1935) il 12 settembre 1920, sulle colonne de *La Testa di Ferro*, giornale fiumano dell'indipendenza, la Carta costituzionale del Carnaro (1920) rappresenta «una delle vittorie più tangibili della grande guerra. Forse il fatto più radicalmente rivoluzionario che essa abbia creato», e questo è tanto più evidente se si considera che l'esperienza della Reggenza italiana di Fiume (1919-1920) fu davvero l'esempio più riuscito di quel sindacalismo liberal-socialista che aveva permeato i dibattiti di una parte considerevole della scienza giuridica italiana dall'ultimo scorcio del XIX secolo fino all'armistizio del Primo conflitto mondiale. Della grande rilevanza storica di questa breve ma intensa esperienza – di cui la Costituzione fiumana è lo specchio fedele, insieme alla coeva Costituzione di Weimar (1919) nel *Reich* tedesco – si era dimostrato particolarmente consapevole lo storico del diritto Carlo Ghisalberti (1929-2019) tanto che, negli anni Novanta del secolo scorso, aveva consacrato alla Carta del Carnaro un intero capitolo del suo volume *Stato Nazione e Costituzione nell'Italia contemporanea*. Da quel momento – come spesso accade – il tema è caduto nel dimenticatoio, e lì è rimasto fino ad anni piuttosto recenti quando «l'avvicinarsi del centenario ha contribuito ad avviare una nuova stagione di studi particolarmente prolifica e ricca di suggestioni storico-giuridiche», con il proliferare di numerosi contributi che, con taglio più o meno monografico, si sono concentrati prevalentemente sulla struttura, sul contenuto e sulla genesi di questa Costituzione, tra gli altri si possono ricordare Davide Rossi, Carlo Ricotti, Renato Lombardo, Alberto Sciumè, Federico Lorenzo Ramaioli, Giuseppe De Vergottini, Giovani Cazzetta.

Con questo ultimo lavoro – particolarmente attento alla letteratura storico-giuridica più recente ma, allo stesso tempo, contraddistinto da una non comune sensibilità critica – Alessandro Agrì, giovane

GIORNALE DI STORIA COSTITUZIONALE / *JOURNAL OF CONSTITUTIONAL HISTORY* 47 / I 2024, pp. 273-298
ISSN 1593-0793 / ISBN 978-88-6056-925-7 (print) / ISBN 978-88-6056-926-4 (online) / eum - Edizioni Università di Macerata
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storico del diritto dell'Università degli Studi di Modena e Reggio Emilia, cerca di andare «oltre la mera analisi dei sessantacinque articoli della Costituzione» fiumana (II capitolo), mirando a scandagliare più attentamente ed «in profondità tra le 'pieghe' della società nella quale la Carta affonda le radici e trae linfa» (I capitolo), analizzando con rigore «la s(fortuna) del testo stesso» nella brevità della sua tragica vicenda storica (III capitolo), per «ricostruire infine il dibattito dottrinale, ordinando e confrontando le diverse opinioni dei giuristi italiani sulla Costituzione fiumana nel ventennio 1920-1940» (IV capitolo). Una scommessa certamente molto ambiziosa, che però l'Autore ci sembra riuscire a vincere con una trattazione piuttosto avvincente e dall'architettura solida, che analizza e confronta un ampio ed eterogeneo corredo di fonti documentarie dell'epoca, con particolare riferimento agli scritti dei due più eccentrici protagonisti della Reggenza italiana del Carnaro: il «poeta-soldato» Gabriele d'Annunzio (1863-1938), comandante dell'Impresa di Fiume, ed il sindacalista Alceste De Ambris (1874-1934), vero «D'Artagnan della politica» italiana e autore materiale della Costituzione, almeno quanto ai suoi principi comunitaristi.

Questa cifra stilistica della monografia di Agrì contribuisce, a sua volta, a restituire al lettore l'immagine autentica dei fermenti sociali, politici e culturali causati dall'avvento della seconda rivoluzione industriale e dalla crisi del modello di Stato liberal-borghese, che attraversano l'Italia (ma si potrebbe dire l'Europa continentale), dagli anni che precedono la Grande guerra e fino agli albori del Secondo conflitto mondiale, contribuendo ad arricchire la narrazione storico-giuridica del Novecento con «una liquida analisi delle esigenze, delle speranze e delle sofferenze che provengono dal profondo del corpo sociale» in quegli anni tormentati.

Condividendo in pieno le conclusioni che l'Autore traccia, nelle ultime pagine della sua trattazione, non si può che considerare la Costituzione della Reggenza italiana del Carnaro, ancora oggi, come un monito, «un invito, uno sprone, per il giurista a vivere intensamente il proprio tempo, a scrutare nel "burrascoso orizzonte" degli angoscianti periodi di crisi e di transizione le tracce del rinnovamento futuro con le quali dare impulso e forma alle trasformazioni della società».

Andrea Raffaele Amato

B

Marie Bassano, Luisa Brunori, Cristina Ciancio e Florent Garnier (a cura di)
La volonté Italie-France Allers-Retours

Tolouse, Presses de l'Université Toulouse Capitole, 2023, pp. 532
ISBN 9782361702502, Euro 25

Dopo il successo del primo volume *Italia-Francia. Allers-retours: influenze, adattamenti, porosità* (a cura di L. Brunori e C. Ciancio, Roma, Historia et ius, 2021) – che raccoglie gli atti del convegno internazionale, tenuto nel settembre del 2018 all'Università degli studi del Sannio – Marie Bassano, Luisa Brunori, Cristina Ciancio e Florent Garnier ritornano a coordinare una nuova raccolta di studi italo-francesi, accolti, questa volta, nella collana degli *Etudes d'Histoire du Droit et des Idées Politiques* della *Presses de l'Université Toulouse Capitole*, e frutto del secondo *colloque Italie-France Allers-Retours*, svoltosi presso il prestigioso Ateneo tolosano nel settembre del 2021. Il tema intorno al quale ruota la riflessione è quello della volontà, «croce e delizia» dei giuristi di ogni tempo, e viene affrontato, attraverso l'esperienza italiana e francese, dall'Età giustinianea fino alla più recente contemporaneità, non soltanto trasversalmente,

diacronicamente o comparativamente – come ci si aspetterebbe da un gruppo internazionale, e ben assortito, di storici del diritto e del pensiero giuridico – ma anche, e forse soprattutto, nella sua intrinseca dinamicità concettuale, anche oltre quegli angusti confini tra i quali normalmente si racchiude il dibattito giuridico positivo.

Come rileva con grande lucidità Luisa Brunori, fin dalle pagine della sua *Introduction* (pp. 9-15), riprendendo un'espressione cara a Norberto Bobbio (1909-2004): «*Tout phénomène juridique se qualifie comme tel sur la base d'un substrat volontariste, plus ou moins explicite, plus ou moins conscient, plus ou moins collectif. Ce substrat volontariste est nécessaire pour que le droit ne soit pas "désarmé"*» di quella sua funzione fondamentale di tutela e disciplina del libero arbitrio degli uomini in società. E pure, nonostante questa centralità indiscutibile nell'architettura di qualsiasi sistema giuridico, dal più elementare al più complesso, dal più remoto al più recente, non si può fare a meno di notare come sia impossibile giungere ad una «*définition monosémique*» di volontà, valevole per ogni tempo e per ogni luogo. «*Il ne s'agit pas, évidemment, d'une abdication devant une tâche des plus épineuses, mais de constater*» – come sottolinea Alain Wijffels – «*que la volonté ne correspond ni à une notion univoque, ni à un principe universel dans notre culture juridique*», ammettendo, invece, che essa «*se décline, dans le passé mais encore au temps présent, de manière différenciée, parfois intermittente, presque contradictoire, dans la culture juridique occidentale*».

Questa premessa che, mai come oggi, appare tanto rilevante quanto poco recepita dalla dottrina giuridica positiva, permea l'intero volume e rappresenta la bussola indispensabile che consente di orientarsi agevolmente attraverso le tappe successive dell'itinerario tracciato, sulla rotta storico-giuridica della volontà, dai ventitré contributi di cui si compone la ricchissima raccolta. E non sorprende che il punto di partenza della riflessione sia proprio quell'«*histoire du Temps Présent*», di cui siamo "testimoni inconsapevoli", così ricca di metamorfosi inaspettate per la nozione civilistica di volontà. A partire dalla controversa possibilità, a fini ambientali e di tutela culturale, di riconoscere la capacità giuridica ad un fiume – come avvenuto per il Whanganu con una legge neozelandese del 2017 – fino ai più recenti orientamenti del *Bundesverfassungsgericht* tedesco in materia di volontaria autodeterminazione dell'identità di genere (A. Wijffels, pp. 17-41). Tuttavia, le declinazioni odierne della volontà non possono trascendere dalla sua tradizionale sistematica nell'antico *Corpus iuris* giustinianeo (E. Giannozzi, pp. 43-63), e, allo stesso tempo, devono fare i conti con gli oltre dieci secoli di trasformazioni e ridefinizioni di cui questo concetto giuridico è stato oggetto dal Medioevo cristiano (M. Bassano, pp. 111-125) all'Età moderna e contemporanea (A. Barbagli, pp. 271-290; L. Sinisi, pp. 105-110), attraverso le molteplici branche del diritto nelle quali assume rilevanza.

Il pensiero corre veloce al testamento (G. Rossi, pp. 65-104), che rappresenta il più «formidabile strumento di affermazione della volontà […] messo a disposizione del *civis* dall'ordinamento», ma non si sottrae al problema della volontarietà della scelta l'istituto del matrimonio (O. Condorelli, pp. 127-165), così come le sue patologie più scandalose: l'incesto (T. Le Marc'hadour, pp. 485-512) e l'adulterio (D. Hoxha, pp. 513-525). Affine al tema della volontà, in diritto civile, è quello della rappresentanza, intesa come volontaria delegazione di poteri e facoltà, che in Età moderna e contemporanea assume connotati particolari, tali dai incidere fortemente sulla disciplina odierna del mandato (D. Deroussin, pp. 167-202; G. Chiodi, pp. 203-250). A sua volta la volontaria rappre-

sentanza può intendersi, in diritto pubblico, tanto come rappresentanza politica, così come venne ricostruita nella sua dottrina giusnaturalista da Jean-Jacques Rousseau (1712-1778), poi ridefinita dalla scienza giuspubblicistica dei secoli XIX e XX (G. Richard, pp. 353-390; F. Mastroberti, pp. 391-399); tanto come volontarietà dell'imposizione tributaria da parte dello Stato, e come altrettanto volontaria sottomissione del cittadino alla pretesa fiscale (K. Weidenfeld, pp. 401-404; F. Garnier, pp. 405-421; C. Ciancio, pp. 423-454). Tendenzialmente poi, è sempre frutto di una scelta volontaria, la decisione di commettere un'azione criminosa (M. Cavina, pp. 471-479), ed in questo caso la volontà può intendersi tanto come unità di misura della colpevolezza (E. Tavilla, pp. 481-484), tanto come prova dell'incorreggibilità del criminale, nell'ipotesi di reiterazione del reato (N. Derasse, pp. 455-470). In fine, la metamorfosi contemporanea della nozione giuridica di volontà può essere letta come segnale della crisi del modello ottocentesco di Stato liberale (P. Alvazzi Del Frate, pp. 341-351), successivamente all'avvento nel secolo XX delle dottrine socialiste e solidariste, che segnano definitivamente il passaggio dall'individualismo borghese al collettivismo sociale (V. Simon, pp. 291-304; F. Mazzarella, pp. 305-339).

Tutte queste trasformazioni, metamorfosi e ridefinizioni della nozione di volontà attraverso i secoli, considerate complessivamente – pur nella loro innegabile eterogeneità – non fanno che confermare l'assunto di partenza sull'impossibilità di trovare una definizione universale di volontà, convalidando però, allo stesso tempo, quel monito con cui Alain Wijffels conclude il suo contributo, riflettendo sulla funzione ermeneutica della storia giuridica: «*L'une des tâches fondamentales de l'histoire du droit consiste à rappeler aux juristes que les principes et concepts généraux n'ont pas une signification absolue ou intemporelle, même si les textes juridiques normatifs les charrient et les récupèrent de siècle en siècle. Le contexte économique, social, culturel évolue et modifie ainsi le sens même du langage juridique. C'est à l'historien du droit d'analyser ces mutations afin que le juriste ne s'imagine pas opérer dans une discipline excessivement stable*».

Andrea Raffaele Amato

Francesco Bonini, Vera Capperucci, Paola Carlucci (a cura di)
La Costituzione nella storia della Repubblica. Sette decennali: 1957-2018

Roma, Carocci, 2020, pp. 208
ISBN 9788829001767, Euro 23

La Costituzione italiana del 1948 rappresenta non solo il fondamento giuridico della Repubblica, ma anche un documento "vivo", che ha attraversato e influenzato la storia italiana ed europea. L'opera in esame propone un'analisi critica e inedita di questo processo storico, attraverso lo studio delle sette celebrazioni decennali della Costituzione, offrendo così un punto di vista originale sulla sua evoluzione nel contesto politico, sociale e istituzionale dell'Italia.

Gli autori, Giuseppe Parlato, Ester Capuzzo, Francesco Soddu, Mauro Moretti, Paolo Soddu, Daniela Novarese e Giovanni Orsina, analizzano gli anniversari della Costituzione non solo come momenti di riflessione rituale ma come occasioni che hanno effettivamente inciso sulla storia italiana. Queste ricorrenze diventano, dunque, lenti attraverso le quali osservare i cambiamenti, le sfide e le contraddizioni che hanno caratterizzato l'Italia repubblicana.

Gli anniversari della Costituzione hanno segnato dei veri e propri nodi storici, influenzando le dinamiche politiche, sociali e istituzionali del Paese. I partiti politici, in particolare, emergono come attori principali in questo scenario, dimostrando come la politica sia stata centrale nell'interpretazione e nell'applicazione della Carta costituzionale.

Uno degli aspetti più interessanti del libro è l'analisi dei cosiddetti "cortocircuiti" tra le aspirazioni costituzionali e la realtà politica e sociale italiana. Questi cortocircuiti riflettono le tensioni e le contraddizioni di un Paese che, pur avendo una Costituzione che promuove ideali di uguaglianza e giustizia, ha dovuto confrontarsi con la complessità di una società plurale e con i vincoli imposti dal contesto europeo e internazionale. Il testo affronta anche il tema della riforma costituzionale, un processo continuo che riflette l'evoluzione della società italiana e le sue esigenze. La cesura degli anni Novanta, con i suoi profondi cambiamenti politici e sociali, viene analizzata come un momento chiave per comprendere le dinamiche attuali di riforma e attuazione della Costituzione.

In conclusione, l'opera offre un contributo significativo alla comprensione della Costituzione italiana come elemento dinamico e influente nella storia del Paese. Attraverso un'analisi dettagliata e sensibile delle celebrazioni decennali, gli autori riescono a disegnare un quadro complesso e sfaccettato dell'impatto della Carta costituzionale sulla vita politica, sociale e istituzionale dell'Italia.

Giuseppe Mecca

Francesco Bonini, Sandro Guerrieri, Simona Mori,
Marco Olivetti (a cura di)
Il Settennato presidenziale: percorsi transnazionali e Italia Repubblicana

Bologna, il Mulino, 2022, pp. 331
ISBN 9788815294548, Euro 26

Tra una vasta letteratura che ha esplorato le dinamiche istituzionali e costituzionali correlate alla Presidenza della Repubblica italiana questo volume collettaneo si distingue per affrontare con profondità la peculiarità del mandato presidenziale settennale.

La durata del mandato, fissata in sette anni, è una scelta istituzionale di rilievo che il libro esamina nel contesto di una tradizione che affonda le sue radici nel dibattito settecentesco e nell'invenzione francese del settennato. Attraverso un confronto serrato tra storici e costituzionalisti, gli autori riescono a offrire una panoramica complessa che va oltre il semplice dato temporale per abbracciare le implicazioni politiche, sociali e culturali di tale scelta.

Il volume si compone di due parti. La prima sezione si immerge nelle origini e nelle variazioni del termine settennale attraverso una serie di capitoli dedicati alle esperienze di diversi paesi. Dall'analisi delle prime declinazioni angloamericane, passando per la Francia, la Germania della Costituzione di Weimar, fino alle esperienze della Cecoslovacchia del 1920, della Polonia tra le due guerre, della Lituania, del Portogallo e dell'Irlanda, gli autori ci restituiscono un quadro ricco e variegato. Ogni capitolo, approfondendo una specifica realtà nazionale, mette in luce come il settennato si sia configurato in modi diversi, influenzato da contesti storici, politici e culturali unici.

La seconda parte del libro si focalizza sul settennato italiano, esaminando la sua genesi, le sue dinamiche e le pratiche attraverso un'analisi dettagliata che parte dalla decisione dell'Assemblea costituente di adottare il modello francese. Questa sezione offre, inoltre, una comprensione profonda del ruolo e dell'importanza del settennato nella vita politica e costituzionale italiana, spaziando dall'analisi delle prassi del settennato come garanzia della Costituzione e rappresentanza dell'unità nazionale alle rappresentazioni e percezioni del Quirinale nell'Italia democratica.

In sintesi, la struttura bifocale non solo facilita la comprensione del concetto di settennato da una prospettiva globale ma consente anche di apprezzare la specificità e l'unicità dell'esperienza italiana.

Giuseppe Mecca

Pierangelo Buongiorno
Imperatori mancati. Diritto e potere nelle trame della dinastia giulio-claudia

Roma, Castelvecchi, 2023, pp. 232
ISBN 9788868268596, Euro 20

Questo saggio, dalla narrazione avvincente e dallo stile agile e colto – come suggerisce l'autore fin dalle prime righe dell'introduzione – non vuole essere una «raccolta di profili biografici», «ritratti più o meno brevi di taluni» *Imperatori mancati*, protagonisti dimenticati o sottovalutati della vicenda politica della *gens* giulio-claudia, durante i suoi quasi cento anni di egemonia su Roma – dalla battaglia di Azio del 31 a.C., che incoronò Ottaviano come primo Imperatore romano, fino alla guerra civile del 69 d.C. che segnò la sua dissoluzione, con il cd. "anno dei quattro imperatori" dopo il suicidio di Nerone. Non è neanche, troppo semplicisticamente, «un'esposizione rapsodica sui rami collaterali di una dinastia» imperiale, attraverso le controverse vicende familiari, le congiure e gli intrighi di palazzo, gli accidenti personali dei primi cinque *princeps* romani, e dei loro discendenti, affini e collaterali, poiché anche quest'approccio alla questione risulterebbe se non noioso, quantomeno privo di una reale utilità storiografica e scientifica.

Molto più audacemente, la prospettiva dell'autore – che fornisce in questo una prova tangibile di notevole sensibilità storica e senso critico, non comune tra gli storici-giuristi dell'antichità – è piuttosto quella «di raccontare la costruzione, e soprattutto la distruzione, delle alternative di successione "dinastica" al potere imperiale lungo l'arco di un secolo» particolarmente ricco di colpi di scena imprevedibili e bivi inaspettati della storia romana. La famiglia dei Giulii e dei Claudii, con tutte le sue alterne vicende, «si viene infatti a costruire su una complessa ed accorta politica di strategie matrimoniali», la cui origine affonda le sue radici nella legislazione etico-matrimoniale augustea, e che diede «l'avvio al costruirsi di un articolato coacervo di relazioni familiari prima ancora che politiche, il cui quadro si complicò a seguito dei numerosi divorzi e successivi matrimoni e del ripetersi, lungo più generazioni, di tali pratiche endogamiche», le quali finirono, a loro volta, per intrecciarsi inevitabilmente con la questione spinosa, e ricchissima di contraddizioni giuridiche, della successione al trono imperiale. Ed è qui che si rivela il contributo davvero innovativo di questo lavoro, che pone l'attenzione del lettore, non tanto, o non soltanto, su un insieme eterogeneo di uomini destinati ad essere dei «vinti della storia di Roma» – «ossia coloro che, all'interno della dinastia giulio-claudia, *non* raggiunsero il principato» – ma su quella ben più complessa «intersezione tra logica dinastica e anticamere del potere, sulle aspettative successorie dei singoli (talora di alcuni gruppi), e ancora, forse soprattutto, sulle difficili relazioni tra le regole del diritto romano e un potere che, per sua natura, era non soltanto intrasmissibile ma per certi versi quasi impalpabile».

Tutto questo spiega, allora, l'angolo di osservazione prospettica scelto dall'autore che, non a caso, quando si sofferma su elementi biografici della vita di questi *Imperatori mancati*, non lo fa per sfoggio di superba erudizione, ma per far emergere con chiarezza l'«identità giuridica di questi personaggi, prima ancora della valutazione politica delle vicende che li interessarono», privilegiando «i profili giuridici delle loro vite e delle loro carriere», e combinando sapientemente quella prospettiva esterna, relativa ai rapporti con il potere pubblico, più attinente alla sfera pubblicistica della loro esperienza, con quella interna, relativa alle relazioni familiari ed ai rapporti interpersonali, più tipicamente privatistici delle loro vicende personali, fino a cogliere le ragioni profonde di taluni dei loro più tragici epiloghi. Diventa molto meno casuale, ad esempio, che la vicenda dell'accesso alla corona imperiale dello stesso Augusto (figlio adottivo di Giulio Cesare) – colui che con il suo operato getterà le basi di quel «motore sotterraneo nella costruzione delle successioni

al potere "nuovo"» legato alle *ragioni del sangue* come vessillo – si tinga, fin dall'inizio, del sangue innocente del giovane Cesarione, erede biologico di Cesare e ultimo faraone d'Egitto, fatto uccidere dai sicari dello stesso Ottaviano, secondo le parole lungimiranti del filosofo romano Ario Didimo, semplicemente perché «non è bene vi siano molti Cesari», ma tramutatosi in una «chimera» che perseguiterà il primo *princeps* «per tutto il corso della sua vita».

A loro volta, tra complessi giochi di potere, attentati violenti, morti accidentali o avvelenamenti, le dipartite premature e i destini personali di molti di questi *Imperatori mancati* – come nel caso di Druso e del figlio Germanico, discendenti diretti di Augusto – contribuirono a cambiare inesorabilmente il corso della storia romana, «condizionando gli eventi anche sul medio e lungo periodo» in maniera del tutto inaspettata. Un esempio paradigmatico, in una prospettiva squisitamente giuridica, appare quello di Tiberio Gemello – figlio adulterino dell'Imperatore Tiberio – la cui ascesa al trono imperiale fu impedita dall'annullamento del testamento redatto dal *princeps*, poiché questi, secondo Cassio Dione, «era stato redatto da una persona che non era in possesso delle proprie facoltà mentali» perché affetto da insonnia, quando in realtà l'unica ragione dell'annullamento da parte del Senato era quella di garantire strategicamente la stabilità del potere nelle mani del più affidabile Caligola – nipote dell'Imperatore – riequilibrando politicamente «il peso dei componenti, vivi e defunti, della famiglia imperiale». Ultimo per tempo, in quanto la sua vicenda chiude la narrazione, è il destino infausto di Britannico – figlio dell'Imperatore Claudio – «cenere lieve e triste ombra» dell'intera dinastia giulio-claudia, che fu vittima delle macchinazioni della sua matrigna Agrippina e del nipote del *princeps* Nerone – l'ultimo Imperatore della *gens* – che dopo essersi impadronito del potere con un'autentica lesione del diritto successorio imperiale, lo fece avvelenare davanti agli occhi attoniti dei suoi commensali, per liberarsi definitivamente di uno scomodo concorrente al suo potere.

Per dirla con le parole di Tacito, l'«ultimo sangue dei Claudii […] era stato versato in sordina», come se oramai quelle *ragioni del sangue* non avessero quasi più alcuna rilevanza determinante nella lotta per il potere. Con il successivo suicidio di Nerone nel '68 si chiuse nel sangue, com'era cominciata, l'«eredità di un'intera famiglia», consegnandosi definitivamente la sua vicenda alle tradizioni storiche romane della prima età imperiale. E se naturalmente «non è possibile tornare indietro ai bivi della storia, ove il futuro per forza di cose si biforca», e non è neanche «troppo legittimo provare a immaginare quale sarebbe stata – di volta in volta – la scelta migliore», l'autore ha perfettamente ragione nell'affermare che «vi è forse almeno la necessità di recuperare il senso di ciascuno di questi bivi», soppesandone l'entità, per «avere quantomeno la percezione di ciò che sarebbe potuto essere e invece, per le tante ragioni che trasformano il passato in una selva inestricabile, non è stato», e domandandosi, senza pretendere una risposta assoluta, «perché alcuni sentieri non furono percorsi ed anzi chiusi, dal fato o dall'uomo, al passaggio della storia».

Andrea Raffaele Amato

C

Peter Cane, Harshan Kumarasingham (eds.)
The Cambridge Constitutional History of the United Kingdom

Cambridge, Cambridge University Press, 2023, 2 voll.
ISBN 9781009277754, 9781108474214, £160

Le trasformazioni costituzionali in atto nel Regno Unito dagli anni Novanta in poi nonché le recenti sfide – *in primis*

quelle poste dalla *Brexit*, ovvero l'uscita dall'Unione Europea – hanno richiamato l'attenzione sullo studio della storia tra gli studiosi britannici di diritto pubblico e di scienza politica. I curatori dell'opera, esponenti delle discipline appena richiamate, hanno perciò ritenuto utile dare corpo a un progetto multidisciplinare per cercare di capire «il modo in cui i poteri pubblici sorgono, sono ripartiti, esercitati e controllati».

È appena il caso di ricordare che in Gran Bretagna per più di vent'anni non è stato pubblicato alcun volume che contenesse nel titolo la locuzione *constitutional history*, oltre al fatto (ancor più significativo) che da quarant'anni non vi sono cattedre universitarie dedicate alla suddetta materia. Tutto ciò è una sicura testimonianza del diminuito interesse della storiografia britannica per il fenomeno costituzionale, specialmente a partire dal secondo dopoguerra. La pubblicazione dei numerosi saggi raccolti nei due volumi della *Cambridge Constitutional History of the United Kingdom* è quindi un evento importante che rilancia lo studio ad ampio spettro della storia costituzionale britannica.

Per svariati aspetti, l'opera presenta alcune rilevanti differenze rispetto agli studi analoghi condotti nel passato. Innanzitutto, essa si compone di saggi scritti da storici, giuristi, e studiosi di scienza politica: un esito che discende sia dall'approccio multidisciplinare al fenomeno costituzionale sia dalla natura stessa della costituzione britannica. Gli autori propongono inoltre lo studio storico del fenomeno costituzionale in una prospettiva britannica, superando così l'impostazione tradizionale incentrata sull'esperienza inglese tra il Medioevo e l'Età moderna, e nel contempo ampliando l'arco temporale sino a comprendere la fase imperiale e coloniale, con tutto ciò che ne consegue in termini di comprensione dei rapporti rispettivamente tra le varie componenti geografiche del Regno Unito nonché tra il centro e le periferie.

Rocco Giurato

D

Loris De Nardi, Rocco Giurato
Una storia culturale del caso fortuito

Pisa, Pacini, 2023, pp. 192
ISBN 9791254863114, Euro 19

«Può il caso fortuito essere considerato una risposta antropologica all'inspiegabile?». Attorno a questa domanda – tanto semplice nella formulazione quanto intrinsecamente complessa nelle sue implicazioni concettuali – ruotano le riflessioni oggetto del breve ma splendido saggio di Loris De Nardi – *Académico-Investigador* del *Centro de Estudios Históricos e Escuela de Derecho* dell'Università Bernardo O'Higgins (Cile) – e Rocco Giurato – Storico delle istituzioni politiche dell'Università del Salento (Italia) – pubblicato dall'editore Pacini nella prestigiosa collana *Contemporary*, patrocinata dalla Fondazione di Studi Storici "Filippo Turati".

Il volume, ricchissimo di spunti metodologici e questioni antropologico-culturali – con un taglio fortemente internazionale ed interdisciplinare – cerca di tracciare una tanto inedita quanto sorprendente «storia culturale del caso fortuito», e della sua disciplina giuridica, intesa dagli Autori quale vera e propria «risposta antropologica», «prodotto dell'irrequieta curiosità dell'essere umano» per la comprensione e il dominio dell'inspiegabile che inaspettatamente ne sconvolge il quieto vivere. Si spiega in questo modo la scelta di un approccio storiografico diacronico di lunga durata, volto a ricostruire una vicenda storica che affonda le sue radici nelle fondamenta mitico-religiose del diritto delle prime civiltà mesopotamiche, e che arriva progressivamente – in parallelo all'avanzare delle conquiste tecniche e scientifiche dell'umanità – fino alle più recenti codificazioni iberiche e sudamericane della seconda metà del secolo XIX, passando

attraverso le categorizzazioni del diritto romano giustinianeo, le decisioni delle Corti della *common law* inglese e la scienza giuridica ispanica in Età medievale e moderna. Un itinerario avvincente che conduce il lettore ad affrontare uno dei postulati fondamentali della *forma mentis* umana, «il suo essere biologicamente programmato per non morire, vale a dire comprendere l'ambiente con il fine di prevedere, quindi evitare, possibili pericoli».

Il punto di partenza della riflessione sta nella definizione stessa di caso fortuito – e nel suo naturale risvolto, la forza maggiore – contrapposta al suo rovescio, l'endiadi responsabilità-colpa, che connota unitariamente la casualità umana in senso stretto. A differenza di quest'ultima, infatti, la nozione di caso fortuito è intrinsecamente polisemica, capace di abbracciare fenomeni molto diversi che vanno dagli «eventi relazionati con minacce di origine naturale (terremoti, inondazioni, tempeste di neve o grandine o sabbia, uragani, fulmini, etc.), batteriologica (l'infermità fisica a tutti i livelli), zoologica (invasioni di storni, corvi, cavallette, locuste, ratti, ecc.), antropica (rapine, atto della pubblica autorità, ecc.)», tanto di natura completamente imprevedibile ed inspiegabile, tanto di sempre maggiore prevedibilità quanto più avanza il progresso scientifico e culturale dell'uomo. Non sorprende allora che «l'analisi storico-giuridica presente in questo saggio risulti particolarmente approfondita sul versante culturale e permette di dimostrare che il campo di applicazione di questa categoria giuridica si presenta nel tempo tanto più limitato tanto più nella società si diffonde una cultura scientifica empirica, che permette di conoscere, quindi di comprendere, i meccanismi sottostanti a fenomeni naturali altrimenti inspiegabili», e che con la «progressiva secolarizzazione della cultura e la conseguente possibilità di spiegare (quindi di prevedere, prevenire e governare) un sempre maggior numero di fenomeni naturali» si determini «una riduzione dell'ambito di applicazione del caso fortuito». Questo è tanto più evidente nel diritto dei popoli antichi: sumeri, babilonesi, hittiti, assiri, israeliti o greci, che finivano per attribuire ai capricci divini il verificarsi di fenomeni per loro inspiegabili ed incontrollabili, considerando, allo stesso tempo, il caso fortuito alla stregua di un istituto di *ius gentium*, comune indistintamente a qualsiasi civilizzazione.

Come suggeriscono correttamente gli Autori, lo «studio dei "codici" prodotti da queste antiche civiltà permette di apprezzare la natura antropologica del caso fortuito e dimostra che l'essere umano sempre ricorse all'esonero di responsabilità per disciplinare giuridicamente le conseguenze di tutti quei fenomeni che per essere inspiegabili venivano attribuiti alla divinità e proprio per questo si ritenevano impossibili da prevedere o resistere». Con l'avvento della scienza giuridica romana, fortemente influenzata, in questa materia, dalla cosmologia pagana prima e dalla teologia cattolica poi, il caso fortuito viene costituito sotto forma di categoria giuridica compiuta, particolarmente fortunata durante il Medioevo a causa dell'incertezza che contraddistingueva i rapporti umani. In particolare, nel Regno di Castiglia e Leon il re Alfonso X detto il Saggio, (1221-1284), nella sua celebre legislazione le *Siete Partidas* (1265), recepì la concettualizzazione romana senza sottoporla «a nessun tipo di riforma, perché risultava conforme con il dettato delle Sacre Scritture, e consentiva di sancire giuridicamente l'impossibilità dell'essere umano di controllare gli elementi naturali». Tuttavia, con il progredire della scienza e della tecnica tra il XVIII e il XIX secolo, questa «paternità divina» cominciò ad essere messa in discussione dalla dottrina giuridica iberica, che con il «progressivo superamento del provvidenzialismo» ed il parallelo moto di «secolarizzazione del con-

cetto», finì per teorizzare la moderna nozione laica di caso fortuito come viene disciplinata, ad esempio, nel Titolo preliminare del *Código Civil de la República de Chile* del 1855.

Come sostengono correttamente gli Autori, infatti, l'art. 45 del Codice civile cileno, da un lato «aprì la strada alla possibilità che la scienza potesse spiegare le cause dei terremoti; dall'altro, autorizzò lo Stato a promulgare leggi basate sulle conoscenze scientifiche per garantire standard di sicurezza elevati nell'edilizia, al fine di proteggere la popolazione dai danni causati da tali eventi naturali». Simultaneamente a quanto avviene in terra di *civil law*, il caso fortuito assume una non trascurabile rilevanza anche nel sistema del *common law* britannico, a partire dalla nozione chiave di *act of God* (atto di Dio), così come viene elaborata dalla giurisprudenza delle celebri Corti centrali di Westminster lungo tutto il Basso Medioevo, soprattutto in materia contrattuale. E pure, sorprendentemente, tutto iniziò a cambiare radicalmente con l'avvento dell'Età moderna, e con il progressivo «inasprimento della responsabilità (o *liability*)» in caso di inadempimento contrattuale, «lasciando così un'impronta assai durevole sul diritto inglese moderno, tuttora percepibile». Il riferimento è alla nascita – nella seconda metà del secolo XVII ad opera di Sir Henry Rolle (1589-1656), nel celebre caso *Paradine v. Jane* (1647) – di quella regola nota come *absolute liability*, «secondo la quale l'obbligo assunto per contratto di eseguire la prestazione (senza espresse pattuizioni in senso contrario) non sarebbe venuto meno nell'ipotesi di caso fortuito», e mai più abbandonata dai giudici inglesi neanche nell'emergenza causata dalla recente pandemia da Covid-19. Molto si potrebbe dibattere sul fondamento culturale di questa regola, ma alla fine bisogna arrendersi all'idea, sostenuta con perizia dagli Autori, secondo cui siamo di fronte ad una regola «che trova le proprie radici esclusivamente nella cultura giuridica inglese anziché in altri sistemi, quali la morale o la religione». Due esperienze parallele ma profondamente diverse, dunque, quella iberica e quella anglosassone, che «hanno permesso di condurre il lettore per sentieri ancora poco battuti» dalla storia giuridica, aprendo però, allo stesso tempo, la strada a nuovi studi di cui quest'indagine «non rappresenta un punto d'arrivo, ma piuttosto un inizio» fecondissimo in attesa di essere proseguito. Non possiamo fare altro allora che associarci al proposito degli Autori, «di fermarsi qui ed accommiatarsi» per «ritrovarsi in futuro», magari con nuove avvincenti ricerche sulle nozioni giuridico-antropologiche di caso fortuito e forza maggiore, approfondite diacronicamente quali risposte antropologiche all'imprevedibile nei sistemi giuridici delle più diverse realtà.

Andrea Raffaele Amato

Giandomenico Dodaro
Giuliano Vassalli tra fascismo e democrazia. Biografia di un penalista partigiano (1915-1948)

Milano, Giuffrè F. Lefebvre, 2022, pp. 402
ISBN 9788828844448 8, Euro 52

Il libro di Giandomenico Dodaro è un contributo rilevante alla storia della cultura penalistica novecentesca attraverso la biografia intellettuale di Giuliano Vassalli sino alla nascita della Repubblica e alla Costituzione italiana. L'autore aveva già pubblicato un volume su Vassalli penalista partigiano (2018) ma questo nuovo libro offre, in maniera ampia e definitiva, l'immagine complessiva di un personaggio che è stato giurista e politico di primo piano, tra le figure-chiave per comprendere il difficile passaggio dal fascismo alla democrazia in Italia. Dodaro ha fatto approfondita ricerca d'archivio e ha potuto avvalersi degli importanti Fondi Filippo e Giuliano Vassalli acquisiti dalla Biblioteca dell'Università di Milano-Bicocca; ha reperito gli articoli (rari) che Vassalli ha pubblicato durante gli anni universitari quando

era membro del Guf romano, e dopo la caduta del fascismo nei vari organi del partito socialista. Emergono così aspetti inediti riguardanti sia Vassalli che molti altri penalisti italiani della sua generazione.

Vassalli appartiene alla generazione che ha vissuto il travaglio esistenziale della transizione dal fascismo alla Resistenza sino alle grandi scelte del dopoguerra. Una generazione, appunto, chiamata alla fine a decidere da che parte stare, avendo di fronte sfide difficili e delicate, comprensibili solo storicizzando a fondo i contesti. Appartenente ad una famiglia dell'alta borghesia, figlio del civilista Filippo, professore, avvocato e "legislatore" di primissimo piano, al centro di una formidabile rete di relazioni sociali e professionali, Giuliano godeva di uno *status* indubbiamente privilegiato negli anni della formazione e del suo affacciarsi all'attività professionale e accademica. Ciò significa far parte del *contesto* di un regime che, pur non controllando totalmente gli ambienti universitari e professionali, richiedeva nondimeno appartenenza e formale adesione. La vicenda di Vassalli è comparabile a quella di altri giovani che hanno vissuto la complessa situazione tra la fine degli anni Trenta e i primi anni Quaranta. Ma proprio a cavaliere dei due decenni il giovane penalista inizierà a maturare le convinzioni ideali e politiche che lo guideranno con grande coraggio nella fase resistenziale e poi per il resto della sua lunga e tanto prestigiosa militanza politica e professionale.

Vassalli matura anzitutto all'*interno* del suo lavoro scientifico le idee sul principio di legalità, sull'analogia, sul potere punitivo dello Stato *legale* fascista che si distinguono dalle posizioni dei corifei della penalistica di regime. Certamente, il suo *status* favorì questa possibilità di esprimere idee – sempre nel circuito accademico – per un diritto penale da far restare (contro i Maggiore o altri penalisti, per es. Biagio Petrocelli) – ancorato alla tradizione liberale-garantista, in una dialettica interna alla penalistica e potendo superare i concorsi per la libera docenza e per l'ordinariato. Naturalmente la cautela e il linguaggio tecnico costituivano una forma di riparo. Ma rimane in ogni caso molto evidente l'*impegno* di Vassalli per salvaguardare la classica giustificazione di stampo liberale del principio di riserva di legge.

Uno dei tanti meriti di questo volume è che, pur trattandosi della 'biografia intellettuale' di un giurista nella fase di formazione e di maturazione, esso è anche una biografia collettiva della penalistica italiana tra le due guerre. La parte centrale del lavoro – i capitoli da II a V – offre uno spaccato davvero originale, entra nelle carriere, non solo di Vassalli, ma di personaggi come Delitala o, sul fronte 'avverso', di una figura come quella di Giulio Battaglini, apparentemente 'minore' ma in realtà strategica nella costruzione ideologica e nella divulgazione all'estero del diritto penale *fascista*. Il cap. IV ha la struttura di una 'monografia' sul tema cruciale nel dibattito di fine anni Trenta, fortemente influenzato da quello che stava accadendo in Germania, su analogia e legalità passando in rassegna le diverse concezioni e proposte.

Il libro, inoltre, acquista credibilità ulteriore dal fatto che la ricostruzione delle vicende che portarono Vassalli verso il partito socialista e la fase resistenziale avviene all'interno di una riflessione che non può né deve ignorare ciò che era successo negli anni immediatamente precedenti all'interno del regime, mostrando, ancora una volta, quanto sia importante l'analisi storico-contestuale, basata su un ampio corredo di fonti e documenti, per giungere ad un ritratto complesso ma mai contraddittorio del penalista romano.

L'ampia appendice documentaria che pubblica gli articoli di Vassalli dal 1935 al 1946, apparsi in riviste come "I Littoriali" o in "Roma fascista" per arrivare dal 1944 all'"Avanti!" o a "Socialismo" rappresenta un ulteriore supporto documentale per com-

prendere in profondità il personaggio e il suo tempo.

Luigi Lacchè

G

André Gide
Il futuro dell'Europa e altri scritti

Edizione e traduzione a cura di P. Codazzi, T. Collani, Martina Della Casa e P. Fossa

Macerata, Quodlibet, 2023, pp. 136
ISBN 9788822908353, Euro 12

André Gide (1869-1951), premio Nobel per la letteratura nel 1947, è conosciuto soprattutto per la sua vastissima opera letteraria; fondatore della «Nouvelle Revue Française», ha attraversato i più diversi generi letterari. Ma Gide, intellettuale tormentato e lucido, è stato un osservatore e un critico della società contemporanea occupandosi di temi di grande rilevanza: basti pensare, per esempio, alla sua riflessione sulla giustizia in "Ricordi della Corte d'Assise" (1912).

Questo volumetto, ben curato, raccoglie per la prima volta in italiano otto testi che pubblicati tra il 1919 e il 1946, rivelano la riflessione di Gide sull'Europa, specie tra gli anni Venti e Trenta. In essi l'A. si interroga sui caratteri del vecchio continente, sul presente ma soprattutto su «Il futuro dell'Europa» (1923). Dopo la drammatica vicenda della prima guerra mondiale che aveva diviso l'Europa e portato milioni di giovani a morire sui campi di battaglia, il tempo della ricostruzione dei rapporti culturali internazionali sembrava annunciarsi. Si trattava, secondo Gide, di una visione dell'Europa immaginata come insieme di identità diverse che potevano essere però conciliate nel contesto più ampio degli interessi generali dell'Europa. In particolare è la Germania la nazione con la quale la Francia deve tornare a dialogare nonostante la grande ferita causata dalla guerra. Lo scrittore francese è pertanto critico verso il trattato di Versailles che addossa alla sola Germania la responsabilità del conflitto e le cui conseguenze rendono quantomai fragile la pace. La cultura è il terreno dal quale riprendere il discorso "inevitabile" tra i "fratelli nemici" delle due nazioni. La ripresa dei rapporti culturali appare fondamentale. È dialogando con personaggi come Ernst Robert Curtius e, suo tramite, con Thomas Mann che le relazioni intellettuali tra le due nazioni sembrano poter riprendere vigore.

Negli anni Trenta la deriva autoritaria cambia il quadro europeo. Gide, pur non volendo scendere al livello del mero discorso politico, rivela progressivamente le sue posizioni verso il sistema sovietico e il nazismo. Nel 1940 rompe i rapporti con la prestigiosa rivista che aveva contribuito a fondare, perché diretta da Drieu La Rochelle, ormai compromessa con il governo collaborazionista. Ancora nel secondo dopoguerra riprenderà il dialogo con la Germania ritornando sulla necessità di un avvenire culturale comune. Sollecitato nel 1922 da una rivista ginevrina sul futuro dell'Europa, Gide scrive che «[…] nessun paese d'Europa può più aspirare a un progresso reale della propria cultura isolandosi, né senza una collaborazione indiretta con gli altri paesi; e che, tanto dal punto di vista politico quanto economico e industriale – insomma, da tutti i punti di vista – l'Europa intera corre verso la rovina, se ogni paese d'Europa non accetta di prendere in considerazione altro che la propria salvezza particolare» (pp. 62-63).

Luigi Lacchè

Dieter Grimm
Sovranità. Origine e futuro di un concetto chiave

a cura di G. Preterossi e O. Malatesta

Roma-Bari, Laterza, 2023, pp. 160
ISBN 9788858151990, Euro 18

Già giudice costituzionale tedesco ed accademico nell'ambito del diritto pubblico, Dieter Grimm si dedica alla ricerca del significato profondo delle questioni passate e presenti, come dimostra in *Sovranità. Origine e futuro di un concetto chiave*. Il testo è stato

di recente tradotto in italiano da Olimpia Malatesta per l'editore Laterza. Nell'Introduzione, il curatore Geminello Preterossi prende le difese del concetto puro di *sovranità*, rendendolo alieno dal cosiddetto «sovranismo», ovvero da alcune interpretazioni strumentali ed extra-scientifiche. Va rammentato infatti, senza stupore, che il termine autentico è contenuto nella letteratura filosofico-giuridica e politologica da secoli fino specificatamente nelle Carte, come inserito già nell'articolo 1 della Costituzione italiana. Preterossi segnala lo stato decadente di fatto della *sovranità* odierna, poiché minata dagli effetti negativi della globalizzazione economica – e quindi dalla tecnocrazia e dal neoliberismo – con una conseguente perdita di senso della politica. Nonostante ripercorra diversi fatti storici, Grimm specifica che la finalità del libro è quella «di richiamare alla memoria la dipendenza dal contesto e la versatilità del concetto di sovranità» (p. XVII). Motivo per cui lo suddivide in tre capitoli: "La sovranità nelle trasformazioni della statualità", "Sviluppo e funzione del concetto di sovranità" e "La sovranità oggi".

Grimm focalizza in più passaggi l'argomento a partire dalle opere di Jean Bodin, Ugo Grozio e Thomas Hobbes, che hanno segnato indubbiamente la dottrina giuridica e la scienza politica fino ai giorni nostri. Nei vari concetti moderni, la *sovranità* ha acquisito il sinonimo di Stato, in quanto superamento concreto del feudalesimo in favore di un nuovo ordine basato sull'unità della nazione. Nasceva lo Stato in quanto detentore del cosiddetto monopolio della violenza, con un'acquisizione di una personalità giuridica di unità interna e con la potestà d'imperio nel diritto internazionale, attraverso la delimitazione territoriale in accordo con gli omologhi vicini. Della *sovranità* moderna, tuttavia, si distinsero due tipologie: una più rigida e circoscritta rappresentata dagli Stati continentali; un'altra di base liberale ed estendibile rappresentata dal *covenant* anglosassone. Dalla Rivoluzione francese e dal bonapartismo si manifestò un ulteriore cambio di paradigma in Europa, poiché venivano poste in discussione le monarchie dell'ordine vestfaliano da società che pretendevano un allargamento di suffragio e un rinnovato concetto di *sovranità* di legittimazione popolare. Da ciò, nel Novecento europeo, si contrapposero le filosofie di Hans Kelsen e Carl Schmitt: la prima in senso normativista, la seconda in senso decisionista-istituzionalista. In particolare, secondo il pensiero schmittiano, il modello del *Bund* tedesco nel lungo periodo avrebbe rivelato molteplici contraddizioni e problematicità per la tenuta della sovranità.

Grimm recepisce questo patrimonio culturale e scientifico, per ricercare il significato primario del termine. Sul piano del riconoscimento giuridico, l'esistenza o l'assenza della *sovranità* non permette mezze misure, diversamente da punti di vista politologici che si rifanno a contingenze particolari, *in primis* le caratteristiche discriminanti della potenza effettiva. Come noto, acquisizioni e limitazioni di *sovranità* avvengono a seguito di vittorie o sconfitte belliche e, quindi di controllo militare ed economico dello spazio, ma nei casi più moderati, a seguito di adesione a trattati internazionali ed organizzazioni sovrastatali. «Indivisibilità» e «illimitatezza» sono ulteriori connotazioni attribuite alla *sovranità*: nella contemporaneità risulterebbero in conflitto con le tendenze federalistiche e universalistiche. Una volta sottoscritti determinati trattati da Stati contraenti, in automatico vengono in gioco i «diritti sovrani» nei confronti di enti sovranazionali che intendono la soggettività non più conchiusa territorialmente.

Occorre leggere il saggio di Grimm anche alla luce della sua esperienza presso la Corte costituzionale federale (*Bundesverfassungsgericht*), dal 1987 al 1999, ovvero in un periodo di importanti cambiamenti come: la cosiddetta fine della

Guerra fredda, l'annessione dell'Est alla Germania Ovest, la nascita dell'Unione Europea. Si comprende che l'autore eviti quei percorsi analitici che hanno operato un appiattimento del concetto di *sovranità*. Il testo stimola qualche riflessione aggiuntiva sul presente: l'Unione Europea non ha raggiunto una maturità tale da imporsi come «Superstato» federale o come confederazione. Da un punto di vista giuridico, il carattere ibrido dell'UE risulta lontano da una possibile redazione di una Carta costituzionale. Dunque, anche il concetto di Costituzione (materiale) rimarrebbe legato a quelli di nazione, Stato e *sovranità*. Tra Unione Europea e Stati membri si realizza così una sorta di *sovranità* condivisa, in una competizione nel rivestire un ruolo attivo (soggettività) o passivo (oggettività) delle varie questioni, spesso confondendosi e sostituendosi. All'interno del quadro UE, uno Stato membro non dovrebbe escludere l'opzione di riservare un proprio spazio di autonomia operativa in quelle scelte che, anche se d'indirizzo comune, potrebbero finire in contrasto con le necessità e le volontà nazionali. L'autore pone uno sguardo realistico al di là della semplice interpretazione della norma scritta, poiché nell'ambito di modifiche costituzionali a seguito di richieste d'adattamento, nei fatti «la perdita di sovranità conforme alla Costituzione è pur sempre perdita di sovranità» (p. 95).

Mentre i concetti di popolo e nazione tendono a legarsi a quello di Stato, a comporre un senso di appartenenza legata all'Unione Europea, vi è invece un nuovo modello di cittadinanza che supera le identità storiche e territoriali originarie. I cittadini dell'UE pretenderebbero politiche di tutela del loro nuovo *status* a prescindere dallo Stato residente di fatto. L'UE andrebbe considerata come un fenomeno risultante dalla globalizzazione: ciò non soltanto è dimostrato dall'unione doganale e dal processo d'integrazione economica liberoscambista, ma anche da un cambio di mentalità generazionale nel modo di percepire la statualità. Per la tutela di diritti individuali e collettivi o per la difesa di interessi particolari, cittadini, associazioni e istituzioni fanno ricorso alla Corte di giustizia dell'Unione Europea. Seppur queste istituzioni abbiano struttura, efficacia e finalità diverse, si nota che si agisce anche presso la Corte europea dei diritti dell'uomo del più ampio Consiglio d'Europa. Grimm contesta inoltre le discrasie arbitrali delle istituzioni UE, nei casi strumentali del regime *Kompetenz-Kompetenz*.

D'altro canto, le Corti costituzionali hanno posto più volte riserve ai trattati, non nascondendo di preferire un rafforzamento di competenza ai rispettivi Stati, piuttosto che il trasferimento ad istituzioni UE: emerge quindi una nuova categoria, quella dei «diritti sovrani». Ulteriormente, si ricorda che i diritti umani risiedono già nelle Costituzioni, che altrimenti non otterrebbero il riconoscimento internazionale. Il compito costituzionale principale di uno Stato innanzitutto consisterebbe nel tutelare la democrazia: anch'essa diviene sinonimo di *sovranità*, a fronte di scelte tecnocratiche sovranazionali che hanno escluso il consenso popolare come principio e strumento imprescindibile di legittimità. Nelle ultime pagine, l'autore non sottovaluta la permanenza della *sovranità* ri-pensata e contestualizzata, nell'ambito delle odierne sfide globali che coinvolgono anche la struttura interna delle comunità nazionali. La volubilità del diritto internazionale e gli annessi rischi di strumentalizzazione dovrebbero spingere ad operare un realismo che tuteli gli interessi nazionali, rispetto ad universalismi astratti contenuti in alcuni trattati. Grimm sottolinea quanto gli Stati, nel loro esercizio, mantengano una propria integrità sovrana, nonostante le spinte centrifughe interne da una parte e i richiami a subordinazioni sovranazionali dall'altra: sovrana è quindi l'autodeterminazione dello Stato rispetto agli omologhi ed agli enti in-

ternazionali, così come rispetto alle dinamiche della società interna. Il giurista tedesco vede con scetticismo i tentativi di costituzionalizzazione dell'ordinamento dell'Unione Europea, poiché non si è ancora raggiunta una maturità democratica che, ad oggi, solo gli Stati riescono a mantenere nonostante la scarsa partecipazione.

Pierpaolo Naso

H

Sebastian Hartwig
Recht oder Rhetorik? Der Begriff der Würde im verfassungsrechtlichen Diskurs der Vereinigten Staaten

Tübingen, Mohr Siebeck, 2023 pp. 441
ISBN 9783161618468, Euro 124

The brilliant and outstanding Berlin dissertation, supervised by Dieter Grimm, examines dignity as a concept of American constitutional history and contemporary law. Starting from the profound methodological differentiation between (American) dignity's unsettled legal nature (subjective right, mere interest, paramount ideal, principle decision, ground issue or good of its own kind) and its unexplained meaning (esp. in the constitutional rhetoric and reasoning of the Supreme Court), the author is very precise to name the research challenges concerning dignity in past and present: there is no sense in compiling nominalistic 'legal' traces in jurisprudence and literature; instead, the dissertation promises (and keeps the promise) to explore the diversity of the term in its different contexts of use. The monograph «Recht oder Rhetorik?» is thus a particularly fine example of the functional advanced elaboration of Koselleck's approach to historical semantics. The source-rich and argumentatively convincing presentation is able to demonstrate how the American constitutional discourses 'harness' dignity into specific «conceptual networks» that vary widely on their temporal and factual contexts, and how each 'lends' dignity a character of its own. With this aim of revealing the embedding of dignity in typical clusters of meaning, Sebastian Hartwig manages to make it quite clear that despite of the conceptual ambiguities, dignity is not used arbitrarily nor reducible to a single core meaning. This is all the more convincing as the dissertation is vividly aware of counter-experiences to dignitarian treatment (humiliation, stigmatisation, tyranny or slavery) and their formative role for the contexting of dignity in typical clusters of meaning, too.

After the online of the aforementioned historical approach has been presented in the first chapter (pp. 1-9), the second chapter (pp. 11-100) traces the evolutionary aspects of dignity in the historical and constitutional-political American discourses from the 18th to the 20th century. The third chapter (pp. 101-304) is devoted to dignitarian developments in the post-war jurisprudence of the Supreme Court. After the account of the state constitutions' use of dignity in the fourth Chapter (pp. 305-322), the study turns to the debates about the value and nature of the term in constitutional writing within the fifth chapter (pp. 323-386), before the final sixth Chapter (pp. 387-393) offers the author's own concluding reflections on the meanings, functions and future of the concept of dignity in American constitutional law. A carefully compiled bibliography and subject index round off the excellent overall impression.

To be very precise: Dignity seems to have the historically grown function to do 'justice to the law' and the author can praise himself of having done 'justice to dignity'. This appreciation also refers to the mapping of contemporary Supreme Court practice in relation to human dignity: After a brief reassurance about the position and procedure of the Supreme Court (pp. 104-106), the study turns to the 1940s (pp. 127-304) as the caesura of a significant rise in redressing

to human dignity, be it as «individual dignity», «dignity of man» or «human dignity». The scrutinised categories for the inbetween- and post-war renaissance of human dignity in US constitutional law are the standards of decency, the pursuit of diversity, the mystery of life, ordered liberty and not mere charity. Thereby, Sebastian Hartwig's source-rich analysis reveals a preference for a collective singular use of dignity, by which people are addressed as human beings, be they members of ethical minorities, women, gay or queer communities, religious confessions, defendants in criminal proceedings or recipients of social benefits.

The most convincing aspect of Sebastian Hartwig's dissertation is the profound and well argued finding, that dignity lacks a certain, commonly agreed legal content, and therefore regularily emerges the 'breaking edges' of a legal system; it unfolds its argumentative strength, when legal argumentation exceeds ordinary structures and legitimisation beyond the legal realm is sought, be it the awareness of a historical political tradition, the belief in fundamental moral values or the reassurance of an international consensus. Further research on dignity in theory and practice should build on this key realisation: the redress to dignity always indicates shortcomings, inadequacies or even deficiencies of legal systems (or at least the risk of those).

Furthermore, the reviewed title even manages to detect collectivising usages of dignity in the otherwise predominantly individual-protecting range of dignity in the American constitutional discourse. The first is the section on state dignity in regard to the single states of the Union (pp. 294-299), and restricted to a state immunity from suit under the 11th Amendment. The second is the (allegedly!) collectivising (mis-)use of dignity as communitarian (European) subjection of the individual to communities, which is contrasted with the liberal liberty ideals of the American constitutional architecture (Harry V. Jaffa, Raoul Berger and Guy E. Carmi and also Neomi Rao, pp. 371-386). Such conservative ambilvalences may have even godfathered the latest carreer of 'American dignity', complementary to the 'America first' rhetoric.

Last but not least, a minor critique must not be left unspoken; it might be taken for granted that even the most brilliant dissertation cannot deal with all relevant sources on an exhaustive scale. Given the repeatedly mentioned decision Chisholm v. Georgia, 2 U.S. 419 (1793), though, it is surprising that the expressive dignity discourse of Historical American Newspapers is not mentioned. Accessible via the database (https://infoweb.newsbank.com) there is a prominent presence of dignity throughout the Boston Weekly News-Letter of 28 April 1757, the New-Hampshire Gazette (published as Supplement to the New-Hampshire Gazette) of 6 May 1757, in the Pennsylvania Gazette of 15 April 1762 or in the New-York Mercury of 12- December 1757, to name exemplarily only a few. In any case, the monograph «Recht oder Rhetorik?» should find a broad readership and a favourable expert public.

Ulrike Müßig

L

Martin Loughlin
The British Constitution: A Very Short Introduction

Oxford, Oxford University Press, 2023 (1ª ediz. 2013), pp. 144
ISBN 9780192895257, $ 12.99

Da quasi trent'anni, Oxford University Press pubblica la collana *Very Short Introductions*: volumetti tascabili, concisi ed efficaci, scritti da personalità del mondo accademico al fine di offrire a un pubblico non necessariamente specialistico una panoramica su svariati temi e argomenti. Non poteva mancarne uno dedicato alla costituzione britannica. Il vuoto è stato colmato nel 2013

grazie a Martin Loughlin, professore di *Public Law* presso la *London School of Economics and Political Science*, ma le trasformazioni della costituzione britannica occorse durante gli ultimi dieci anni hanno indotto l'A. a rivisitare in più punti il testo per approntarne una seconda edizione.

La proposta interpretativa di Loughlin scaturisce dal fatto che la costituzione britannica si fonda su un insieme di valori e pratiche tradizionali la cui esistenza e normatività sono certe, ma continuamente messe in discussione a partire dagli anni Settanta del secolo scorso. Il retaggio costituzionale britannico, composto di «intese tacite», cioè regole fondamentali create nel tempo dall'azione dell'*élite* politico-istituzionale, è stato negli ultimi cinquant'anni oggetto di approfondite riflessioni teoriche nonché di tentate riforme. Teorici e attori politici hanno sovente auspicato l'adozione di una carta costituzionale scritta, una soluzione che sembra incontrare il favore dell'A. – segno evidente del suo sguardo critico sulle ambiguità che caratterizzano la costituzione britannica – e che tuttavia rimane inattuata.

Come rileva Loughlin, la modernizzazione costituzionale, benché desiderata e in una certa misura realizzata dai partiti politici (specialmente dal *Labour Party* tra gli anni Novanta e Duemila del secolo scorso), è stata invece prodotta per lo più dai processi d'integrazione del Regno Unito nell'Unione Europea e soprattutto dalle frequenti pronunce del potere giudiziario in materia di diritti fondamentali. Il che, sostiene l'A., è indice di un conflitto emergente tra il governo e la magistratura.

Rocco Giurato

M

Shane Martin, Kaare W. Strøm
Legislative Assemblies

Oxford, Oxford University Press, 2024, pp. 432
ISBN 9780198890829, Euro 42,55

Ora, come in passato, le assemblee legislative delle società democratiche sono chiamate ad affrontare due sfide cruciali: quella della capacità istituzionale (*institutional capacity*) e quella della responsabilità verso i propri elettori (*popular accountability*). Ovvero – per dirla con James Madison, citato nell'*incipit* dell'opera – le sfide della "fedeltà all'obiettivo […], che è la felicità del popolo" e della "conoscenza dei mezzi" per realizzarlo. Guardando a queste sfide, Shane Martin e Kaare W. Strøm – rispettivamente University of Essex e University of California – esaminano le assemblee legislative in 68 dei paesi democratici più popolosi al mondo, dalla Finlandia alla Papua Nuova Guinea, dall'Argentina allo Zambia. Attraverso undici capitoli improntati ad un'analisi empirica e l'uso di una notevole mole di dati e tabelle, gli A. confrontano le caratteristiche istituzionali e le procedure dei parlamenti nei paesi considerati, valutandone il rilievo per le sfide citate, che fungono da direttrici dell'opera.

Identificano, inoltre, sulla scorta dei rapporti tra i protagonisti delle assemblee legislative, tre modelli distinti di assemblea, che accompagnano il lettore nello sviluppo dell'analisi: l'*assemblea dei membri*, strutturata per dare priorità agli interessi dei componenti della stessa; l'*assemblea dei leader*, concepita in funzione delle figure politiche di primo piano; e l'*assemblea degli elettori*, nella quale sono questi ultimi ad esercitare un'influenza diretta e immediata sulle decisioni politiche.

Sulla base dei dati presentati, nei capitoli finali del volume, gli AA. prima elaborano un indice per ciascun modello di assemblea e valutano, sulla base di tali indici, ciascun parlamento; poi affrontano il tema del ricambio nelle assemblee legislative e della rielezione dei membri; per concludere discutendo le tendenze e le prospettive nelle assemblee legislative contemporanee, nonché la minaccia rappresentata

dal c.d. *democratic backsliding* per queste istituzioni.

Giacomo Menegus

Antonello Mattone, Mauro Moretti, Elisa Signori (a cura di)
La Riforma Gentile e la sua eredità

Bologna, il Mulino, 2023, pp. 439
ISBN 9788815386984, Euro 40

Questo volume aiuta ad aumentare la nostra comprensione della riforma scolastica e universitaria intrapresa in Italia durante i primi anni del governo fascista, sotto l'egida del ministro Giovanni Gentile. La riforma, incarnata dal regio decreto del 30 settembre 1923 n. 2102, ha segnato profondamente il percorso dell'istruzione universitaria italiana, influenzandola per oltre quarant'anni, e rappresenta un *unicum* nella storia dell'istruzione italiana, un tentativo irripetibile di riorganizzazione organica del sistema scolastico, dalla scuola d'infanzia all'università, sotto una visione politico-culturale e pedagogica coesa. La sua realizzazione fu resa possibile grazie al regime di pieni poteri accordati al governo Mussolini, che permise di imporre la riforma eludendo il dibattito parlamentare.

Il libro non si limita a delineare gli aspetti storici e pedagogici della Riforma Gentile, ma approfondisce anche le sue estese ripercussioni sull'insegnamento universitario, esaminandone la qualità e le difficoltà di attuazione.

La prima parte dell'opera si concentra specificamente sull'analisi generale della Riforma Gentile, presentando al lettore una panoramica completa della sua genesi, del contesto ideologico di inserimento e dei dibattiti storiografici che ancora oggi la circondano. Attraverso gli sguardi esperti degli autori, emerge come la riforma, sebbene fosse stata accolta come «la più fascista delle riforme», affondasse le sue radici in una continuità con le politiche della Destra liberale, precedenti all'ascesa del fascismo.

La seconda sezione del libro è dedicata specificamente agli impatti della Riforma Gentile sui vari ambiti disciplinari, spaziando dai settori classici e giuridici a quelli scientifici e ingegneristici. Attraverso dettagliati studi di caso, questa parte evidenzia il tentativo della riforma di elevare il livello qualitativo dell'insegnamento universitario, nonostante le resistenze incontrate.

La terza e ultima sezione del volume si addentra in alcuni dei problemi specifici legati all'attuazione della Riforma Gentile, come l'opposizione studentesca e le questioni riguardanti la ricerca negli atenei minori. Attraverso questa analisi, si comprende come le ambizioni della riforma abbiano dovuto confrontarsi con la realtà del contesto accademico e sociale italiano dell'epoca, rivelando la complessità e le sfide della sua implementazione.

In definitiva, i saggi raccolti nel volume offrono nel dettaglio una visione del profondo impatto della Riforma Gentile sulla cultura e sulla società italiana e al contempo sottolineano anche la complessità delle sue eredità.

Giuseppe Mecca

Guido Melis
Dentro le istituzioni: idee, giudizi, critiche e proposte

Bologna, il Mulino, 2023, pp. 240
ISBN 9788815387820, Euro 24

Guido Melis ci ha abituati a guardare alle istituzioni dall'interno per capire effettivamente come funzionano. Il metodo di ricerca di Melis è incentrato tra l'altro sull'invenzione di percorsi eterodossi e sulla "mescolanza delle carte". A questa metodologia sono riconducibili anche i due volumi pubblicati nel 2023: *Governare dietro le quinte*, curato da Melis con Alessandro Natalini (cfr. scheda di lettura pubblicata in questo stesso numero), e il volume qui segnalato.

In particolare, *Dentro le istituzioni* è una raccolta eclettica «strutturalmente aperta, suscettibile di molte future integrazioni» (p. 8). Attraverso un approccio che l'autore stesso definisce «abbastanza casuale», Melis intreccia testimonianze, giudizi, analisi e interpretazioni, offrendo uno spaccato vivido e personale

della storia istituzionale dell'Italia tra la metà dell'Ottocento e i giorni nostri.

Con maestria l'autore dimostra la sua capacità di aprire vecchi libri, compulsare raccolte di riviste, memorie, diari, e documenti d'archivio, in un tentativo di riportare alla luce reperti della storia istituzionale che potrebbero altrimenti restare oscurati. Ne viene fuori un inventario aperto e non sistematico e il desiderio di stimolare il dialogo tra testi e contesti diversi.

Il libro è articolato in undici capitoli tematici (I. *Le leggi, II. Il Parlamento, III. I ministri, IV. L'organizzazione, V. Il funzionamento, VI. Il personale, VII. I luoghi, VIII. La lingua, IX.I conti: il controllo della Ragioneria, X. Il libro dei sogni: l'eterna riforma mai fatta, XI. Pensieri proposte e idee*) corredati da piccole introduzioni che fungono da guida per il lettore che deve approcciarsi a centinaia di brani estrapolati dai propri contesti. La scelta di porre l'accento sulle esperienze individuali, i vissuti e i frammenti di memoria contribuiscono a rendere il testo accessibile ad un ampio pubblico.

Giuseppe Mecca

Guido Melis, Alessandro Natalini (a cura di)
Governare dietro le quinte. Storia e pratica dei gabinetti ministeriali in Italia 1861-2023

Bologna, il Mulino, 2023, pp. 202
ISBN 9788815386816, Euro 20

Questo volume è uno dei risultati pregevoli di un ampio progetto che ha messo al centro un aspetto fondamentale del governo delle istituzioni: il ruolo dei capi e degli uffici di gabinetto nella storia italiana, dalle origini al presente. «Governare dietro le quinte» è diventato un ricorrente modo di dire per "svelare" quella dimensione – visibile per lo più ai soli addetti ai lavori – del funzionamento del governo e degli snodi di coordinamento tra i ministri e che hanno un peso rilevantissimo per la storia politico-amministrativa. Il libro segue ad uno precedente del 2019 (a cura di Melis e di G. Tosatti), su *Il potere opaco. I gabinetti ministeriali nella storia d'Italia* (il Mulino) e mette insieme dati e analisi qualitativa. Si tratta di conoscere anzitutto chi sono e chi sono stati i "gabinettisti" nell'esperienza italiana, in base a origini familiari, studi, incarichi, tipi di legame con la politica. L'analisi si avvale anche, per l'età contemporanea, di un approccio innovativo che ha preso corpo grazie a 40 interviste di un'ora e mezza, in video, realizzate professionalmente, ad altrettanti protagonisti della storia recente dei gabinetti.

Si tratta di un lavoro molto ampio e difficile per cercare di ricostruire più di un secolo e mezzo di esperienze attingendo ad una grande mole di documenti, spesso inediti. Ciò ha anche permesso di delineare non solo il fenomeno in generale ma anche di "isolare" le carriere di molti personaggi, più o meno noti, che hanno "professionalizzato" questo ruolo strategico, mostrando anche l'esistenza di un gruppo relativamente stabile e omogeneo dal punto di vista culturale. I governi passano ma non pochi capi di gabinetto conservano la posizione ai vertici degli uffici di staff dei ministri. Sono magistrati, alti funzionari (prefetti, diplomatici, militari), che offrono la loro specifica *expertise* e contribuiscono a dare sostanza e professionalità alle attività politiche-amministrative e soprattutto legislative all'interno del sistema del "governo legislatore".

Il volume, dopo l'introduzione dei curatori, è diviso in cinque capitoli. Il primo cap. esamina gli uffici di staff dei ministri in prospettiva comparata (F. Di Mascio e G. Francisci), il secondo analizza i gabinetti ministeriali dell'Italia liberale e fascista. La fase dello Stato liberale pone problemi ricostruttivi e delinea gli albori dell'organizzazione amministrativa dei ministeri. I gabinetti sono ancora poco presenti e si confondono spesso con le segreterie personali dei ministri. E' durante il fascismo che i gabinetti hanno assunto una maggiore stabilità ed evidenza ma appaiono ancora subordinati alle direzioni ministeriali. Risulta difficile individuare una linea prede-

terminata e omogenea nella selezione dei collaboratori dei ministri. Il terzo cap. studia i gabinetti nella cd. Prima Repubblica (G. Melis) sino al 1994 e mostra gli elementi di discontinuità e di innovazione rispetto al periodo precedente. Si tratta di una fase decisiva – articolabile in sottofasi – che ha fatto dei gabinetti, per una pluralità di ragioni, una componente fondamentale del sistema di governo. Qui emergono le carriere di personaggi che, provenendo soprattutto dalle magistrature, hanno svolto un ruolo di "supplenza" della giovane classe politica non sempre dotata di una solida cultura amministrativa. Infine i capitoli 4 e 5 prendono in esame i caratteri, le dinamiche e i cambiamenti più recenti sino all'attualità (A. Natalini), anche con una indagine prosopografica che può avvalersi di una vasta e specifica documentazione.

Luigi Lacchè

Antonella Meniconi, Francesco Soddu, Giovanna Tosatti (a cura di)
Mescolare le carte e la storia: come si studiano le istituzioni. Saggi per Guido Melis

Bologna, il Mulino, 2023, pp. 375
ISBN 9788815382351, Euro 30

Il volume raccoglie gli atti del convegno, tenuto a Roma nel 2021, in onore di Guido Melis. Il titolo riflette l'approccio di Melis alla ricerca storica, che combina lo studio analitico di documenti e archivi ("le carte") con nuovi metodi storiografici ("la storia") per lo studio delle istituzioni. Questa metodologia consente di esaminare un'istituzione da vicino e di studiarne i meccanismi più interni.

La prima parte del libro (*La storia delle istituzioni: uno studioso, un possibile percorso di ricerca*), con i saggi di Sabino Cassese, Luigi Berlinguer, Mario Caravale e Marina Giannetto, è un bilancio sullo stato di salute della storia delle istituzioni e sul contesto storiografico in cui Melis ha operato, evidenziando la sua capacità di innovare gli studi.

La seconda parte (*Gli studi sulla storia delle istituzioni in Italia: temi e prospettive*) si addentra nelle specifiche aree di ricerca che sono state dissodate dal lavoro di ricerca di Melis e poi coltivate da altri studiosi. Vi sono approfondimenti sulle istituzioni dell'età moderna e contemporanea (Marco Meriggi); sulla storia del Parlamento (Francesco Soddu); sulla storia dell'amministrazione (Giovanna Tosatti); sulla storia delle istituzioni giudiziarie (Antonella Meniconi); sulle istituzioni del *welfare* (Michela Minesso); sulle istituzioni del fascismo (Leonardo Pompeo D'Alessandro); sulla statistica (Dora Marucco); sull'approccio prosopografico (Fernando Venturini).

La terza parte (*La storia delle istituzioni: il cantiere delle ricerche*) offre una panoramica delle ricerche in corso e delle potenziali aree di sviluppo futuro. Gli studiosi, Francesco Bonini, Sandro Guerrieri, Francesco Di Donato, Angela De Benedictis, Giovanni Farese, Pasquale Beneduce, Alessandro Natalini, Stefano Vitali, offrono prospettive aggiuntive e indicano nuovi cantieri rispetto ai campi di ricerca coltivati da Melis.

La quarta parte (*La storia delle istituzioni: identità e contaminazioni*) evidenzia l'importanza di un dialogo tra storia delle istituzioni e altre discipline come la storia del diritto (Mario Ascheri e Bernardo Sordi), la storia delle dottrine (Luca Scuccimarra), la linguistica (Michele Cortelazzo), il diritto amministrativo e la scienza dell'amministrazione (Marcello Clarich), la storia economica (Daniele Felisini) e l'organizzazione degli istituti culturali (Madel Crasta). L'interdisciplinarietà emerge come elemento chiave per una comprensione più profonda e articolata delle istituzioni nel loro sviluppo storico.

Uno degli aspetti più interessanti del volume è la capacità di mescolare diversi approcci e prospettive, creando un dialogo costruttivo tra le "altre" discipline. Infine, il volume non solo celebra il contributo accademico di Melis ma riflette anche sulla sua eredità culturale.

Giuseppe Mecca

O

Marco Emanuele Omes
La festa di Napoleone. Sovranità, legittimità e sacralità nell'Europa napoleonica, 1799-1815

Roma, Viella, 2023, pp. 380,
ISBN 9791254693247, Euro 35

Il volume analizza – con peculiare attenzione e riferimento all'area, ed al contesto, francese, italiano e spagnolo – un aspetto – non ascrivibile a quelli più battuti e frequentati in storiografia – della imponente stagione napoleonica ovvero il complesso apparato costituito dalle feste che vennero volute, ispirate, ideate e realizzate dal grande corso e dal suo *entourage*. Si tratta di una prospettiva di indagine di indubbio interesse che permette di illuminare – ancora – e contribuire a comprendere – ulteriormente – l'amplissimo perimetro – geografico, storico e concettuale – di una età che ha avuto la forza di cangiare – ed innovare, assai spesso – profondamente (tra l'altro) la storia, la cultura, la politica, le istituzioni e il diritto europeo, e non solo.

I sette capitoli in cui l'opera risulta strutturata intendono indagare - in primo luogo – le celebrazioni 'civili'- richiamandone tipologie e peculiarità (cap. I), soffermandosi sul ruolo di funzionari e burocrati investiti del gravoso incarico di organizzare, dirigere e modellare un novello *esprit public* (cap. II) e rendendo, quale studiato risultato, l'immagine del potere – dai mille e più volti – nelle sue plurime rappresentazioni (cap. III). I capitoli IV e V – invece – rimarcano il ruolo – non irrilevante – recitato dagli ecclesiastici – tramiti insostituibili per favorire la sacralizzazione di quel potere – mentre gli ultimi due appaiono dedicati – rispettivamente – all'esercito (cap. VI) ed alla massoneria (cap. VII), a loro volta in grado di fornire ulteriori forme di celebrazione di Napoleone. Quest'ultimo è presentato – o meglio vuol presentarsi – nelle vesti di condottiero invitto, formidabile stratega, novello Giustiniano, eroe mitico, sovrano benevolo, padre della Patria, Santo. Giova – infatti – rammemorare che un – fondamentale in materia – decreto del febbraio 1806 nell'organizzare, e (ri) ordinare, il calendario festivo introduceva quale grandiosa festività annuale il giorno del 15 agosto, autentica data scolpita nel marmo della gloria in quanto fatta coincidere con il genetliaco dell'Imperatore, il ristabilimento della religione cattolica per effetto del Concordato, la festa dell'Assunzione nonché – ecco il (prodigioso) *novum* – il giorno dedicato a S. Napoleone. Il che consentiva – con inarrivato virtuosismo – di tenere insieme la dimensione privata e quella pubblica – che si immedesimavano – e pure il mondo civile e l'universo religioso, arricchito di un'inedita figura devozionale. A richiamare l'attenzione – e (lo confesso) l'ammirazione - del lettore è la capacità – una volta ancora – di Napoleone di (contribuire a) edificare la propria leggenda personale, in una colossale – e perfettamente pianificata – operazione di edificazione del proprio mito, destinato a sopravvivere anche alla inevitabile (e umana) sconfitta. Questa – in effetti, forse – la sua vittoria più grande: l'essere ancora – sempre – sulla scena.

Saverio Gentile

P

Lorenzo Pacinotti
L'ingranaggio della cittadinanza sociale. Il Welfare State britannico tra National insurance e National health service

Milano, Giuffrè, F. Lefebvre, 2023, pp. XLV-358
ISBN 9788828859901, Euro 56

Un bel libro sulla "gloriosa" parabola del *Welfare State* britannico, che è anche la parabola dell'amministrazione statale attraverso la quale si è data concretezza alla prodigiosa rivoluzione universalista dei diritti. Il *Welfare State*

britannico ha segnato, infatti, il passaggio fondamentale dai paternalismi assicurativi, e le politiche autoritarie antidemocratiche, del continente europeo alla rimozione degli ostacoli che impediscono di fatto non solo libertà ed eguaglianza degli individui ma anche il conseguimento del bene comune. La chiave di accesso è *l'ingranaggio della cittadinanza sociale* le cui radici si trovano nelle innovazioni introdotte dal 1905 e nel principio del *national minimum*. Il punto di arrivo è il *National Health Service*, la concreta manifestazione della solidarietà che ha dato accesso ad un concetto nuovo di salute inteso come il completo benessere fisico, mentale e sociale, universale e gratuito.

Le strutture amministrative sono cresciute insieme ai diritti, ma sono diventate sempre più complesse finendo per alimentare principalmente sé stesse. La complessità della macchina amministrativa occulta le inefficienze che ha contribuito a produrre e così la solidarietà va in crisi a vantaggio della concorrenza. Eppure il tema dell'universalità dei diritti è tra i più importanti proprio per la tenuta degli Stati nazionali, che si legittimano in quanto capaci di proteggere e garantire i diritti dei propri cittadini, a cominciare dai diritti sociali che sono il presupposto per l'effettivo esercizio degli altri diritti, civili e politici. Il peccato originale dello Stato sociale è giuridico, ed è l'assenza del coinvolgimento dei cittadini perché non basta lo Stato, con la sua amministrazione, che non è onnipotente. Lo sapeva bene Beveridge, il padre del *Welfare State*, che ragionava in termini pluralistici e al quale l'autore suggerisce di tornare per ripensare il welfare e probabilmente anche la cittadinanza sociale.

Monica Stronati

Adriano Prosperi
Inquisizioni

Macerata, Quodlibet, 2023, pp. 776
ISBN 9788822906601, Euro 32

Proprio nella Premessa del poderoso volume di più di 700 pagine è detto con chiarezza che cosa traviamo al suo interno: dopo l'inedito *Introduzione. Alle origini della coscienza*, gli scritti raccolti nel volume «sono dedicati a episodi e figure della storia dell'intolleranza nei secoli dell'epoca che si suole definire moderna, quella segnata dai conflitti di religione che ebbero i loro fulcri nella cosiddetta "reconquista" spagnola e nella Riforma protestante» (p. 12).

Il filo rosso che tiene insieme il volume è riferito alle origini della storia della coscienza, avvisa Prosperi, perché seppure dalle origini la Chiesa cristiana ha praticato la confessione dei peccati, che Pietro poteva rimettere per il potere conferitogli da Gesù, è solo dal Medioevo che l'inquisizione avviò la sua opera. Quello fu il momento della prima fondamentale distinzione tra la confessione, riferita al foro interno, e l'Inquisizione che divenne subito Tribunale di foro esterno per cercare l'abiura degli accusati di eresia, magia, stregoneria.

Una distinzione importante, come ha ricordato già da tempo Paolo Prodi nella sua *Storia della giustizia*, perché è solo quando nella Chiesa emerge l'azione del Tribunale dell'inquisizione, con procedure e conseguenze ben evidenti dal punto di vista materiale e sociale, che chiarisce ancora meglio quanto il foro della coscienza fosse invece interno, ovvero legato prima di tutto alla propria consapevolezza delle colpe.

Una questione di coscienza, quella coscienza che Prosperi ci indica essere comparsa per la prima volta nelle lettere di Paolo come parola di origine greco-antica e come immagine (p. 14) e che poi il cristianesimo ha ricondotto al legame forte e privato del proprio rapporto con Dio. Vero è che Dio è giudice infallibile a cui nulla sfugge ma altrettanto vero è che il buon cristiano soffre già in coscienza per i suoi peccati. La Chiesa ha costruito su questo livello interiore il suo spazio di 'monopolio giuridico' distinto dai poteri pubblici e dallo Stato e solo nel 1520 si cominciò a vedere trattata la

'libertà di coscienza' nel libro di Martin Lutero *La libertà del cristiano*.

Quasi paradossale può sembrare, dunque, che proprio in quel torno di anni invece le procedure e il modello della Santa Inquisizione romana passarono ad influenzare tutta la giustizia pubblica di allora, torcendo la repressione della criminalità anche bassa verso la categoria del dissenso politico e della violazione dell'autorità danneggiata ben oltre la semplice recriminazione tra privati accertata da un giudice terzo. Ne nacque il processo inquisitorio e la sempre più spiccata autonomia della criminalistica.

Si tratta dunque di un volume che rimanda a uomini e istituzioni dell'inquisizione ecclesiastica e che dice molto sugli accusati di dissenso, uomini e donne considerati non rispettosi dei dogmi della fede *in primis*, ma non solo, oltre che dei cambiamenti intervenuti nella Chiesa stessa che ha aperto i suoi archivi agli studiosi non da troppo, in fondo.

Ninfa Contigiani

R

Santi Romano
Lo Stato moderno e la sua crisi. Saggi costituzionali 1909-1925

Macerata, Quodlibet, 2023, pp. 168
ISBN 9788822906502, Euro 18

Dopo aver ripubblicato nel 2018 *L'ordinamento giuridico* e nel 2019 *Frammenti di un dizionario giuridico*, la collana *Ius* di Quodlibet ristampa altri sei saggi di Santi Romano (1875-1947) che coprono un arco temporale di sedici anni: *Lo Stato moderno e la sua crisi* (1909); *Sui decreti-legge e lo stato d'assedio in occasione del terremoto di Messina e di Reggio Calabria* (1909); *I caratteri giuridici della formazione del Regno d'Italia* (1912); *Oltre lo Stato* (1917); *Di una particolare figura di successione di Stati: a proposito dell'annessione di Fiume* (1925); *Osservazioni sulla completezza dell'ordinamento statale* (1925).

Romano è stato senza alcun dubbio una delle figure che ha saputo meglio cogliere ed interpretare i grandi cambiamenti del Novecento giuridico. Nel saggio introduttivo, Aldo Sandulli evidenzia come l'opera di Romano non sia frutto di improvvisazione ma il risultato di un lungo periodo di maturazione intellettuale. Dall'opera dedicata ai diritti pubblici subiettivi fino agli ultimi lavori è possibile seguire nella riflessione romaniana un percorso coeso che testimonia un'evoluzione del pensiero sempre fedele a un "filo rosso" di coerenza teorica. In particolare, in questi scritti Santi Romano elabora e perfeziona la sua rivoluzionaria teoria sull'ordinamento giuridico. Il suo istituzionalismo si distingue per la sua capacità di cogliere nel profondo la complessità delle strutture sociali e giuridiche. Il suo approccio, che nega la strumentalità dell'istituzione rispetto all'ordinamento, mira a stabilire un legame tra la dimensione sociale e quella giuridica, anticipando le dinamiche della modernità postmoderna.

Giuseppe Mecca

S

Michael Stolleis
»recht erzählen« Regionale Studien 1650-1850

Frankfurt a. Main, Klostermann 2021, pp. VIII-232
ISBN 9783465045601, Euro 28

The legal historian mastermind Michael Stolleis (1941-2021) entitled his Palatine panorama of weddings, court cases, migrations and protests »recht erzählen« («telling about the law», «telling the truth»). Among the Palatine rebels against the Bavarian monarchy in 1849 is the Neustadt ropemaker Georg Stolleis (1829-1877). The juxtaposition of monarchy and republic structures his accusation of "high and state treason" from 29 June 1850: "The monarchy is truth, because it exists, the republic is lies, because it is fading away [...], loyalty to the king, firm on the law." (Neue Münchner Zeitung of 4 No-

vember 1852, p. 2239 f., cit. in: p. 206 fn. 24) In the style of the "monarchist varnish"(p. 211) over the constitutional upheavals of 1848/49, the forms of government are associated with "truth" on the one hand and "lies" on the other. The transience of the imperial constitutional campaign is contrasted with the stability of the Bavarian crown, a royal visit instead of a popular movement at the Hambach ruins in 1852/1832! Eight chronologically arranged narratives explore historically verifiable "plausibilities"(p. 14) about the formation of legal rules, their application and the discourse about law in the broad temporal framework from the Baroque to the Restoration.

But which of these are "rightly told"? The German title "recht erzählen" is ambiguous, – even more so as the legal noun «*Recht*=law» is ethymologically derived from adverbial and adjectival linguistic figures as «*recht*=right» (here also in the old spelling «*rehte*») in the sense of «upright, straight». The genius of Stolleis can be taken for sure to have known about the literal ambiguity, and it seems to be not by hazard that he leaves the reader of his last manuscript with the uncertainties arising from the extra-legal origins of the German legal terminology «*Recht*=law».

In the Old High German «*mit rehte*» or «*nah rehte*» (Sehrt, Notker-Glossar, p. 155) by Notker von St. Gallen is not related to law or court (Freudenthal, Arnulfingisch-Karolingische Rechtswörter, p. 97), as one would assume. Rather, the extra-legal meaning «straightened» and then «correct in terms of procedure» (Graff, Althochdeutscher Sprachschatz, part 2, col. 405 f. s.v. *reht*) is brought into the legal language. This is also supported by the antithesis «*recht und krumm*» (right and wrong), whose English version inspires the later adaptation in the legal language. The notorious association of *rectitudo* with *iustitia* and *aequitas* (Graff, col. 399 ff.), and the derivation of the French *le droit* also point in the same direction: the Old French *destre*, related to the English *dextrous*, means right-handed, before *le droit* can be found in sources from the 17th century onwards to indicate direction «right or straight ahead» and then only afterwards towards the connotation of «conformity with the rules». Furthermore, the German loanword «*norm*», which can be traced from the 14th century onwards, initially describes a device for measuring right angles in the original sense of the Latin *norma*, then a perpendicular; only much later did German usage expend the word «*norm*» to the legal meaning of a commandment, a regulation or an order.

Against the backdrop of such linguistic-historical reasoning, the title of Michael Stolleis' last manuscript, «*recht erzählen*», quite rightly raises the question of which concept of law legal history should work with – a fundamental question between the «search for definition» (Kant, Critique of Pure Reason 1787, Weischedel-edition, vol. II, p. 625 fn.) and the interest in «legal thinking» (Willoweit Rechtsdenken 2024). «Sincerely» narrated is undoubtedly the quintessence of Stolleis' oeuvre; after all, he has always succeeded in interpreting the historical use of any legal language with methodological accurateness and significant convincingness.

Ulrike Müßig

Nadine Strossen
Free Speech. What Everyone Needs to Know

New York, Oxford University Press, 2024, pp. 249
ISBN 9780197699652, £ 12,99

Il volume, inserito nella serie di taglio divulgativo *What Everyone Needs to Know* della OUP, offre una ricognizione della disciplina della «libertà d'espressione» nel costituzionalismo americano. Il percorso proposto si sviluppa per interrogativi e risposte che permettono all'Autrice di delineare i contorni di tale diritto che negli USA si è sviluppato per via giurisprudenziale a partire dalla «Free Speech Clause» del I Emendamento. Il testo riesce così a compendiare in poche pagine

una disciplina tutt'altro che contenuta e d'immediata ricostruzione, e che invece risulta facilmente accessibile anche al lettore sguarnito di particolare conoscenza del sistema giuridico americano e del suo sviluppo storico. La possibilità di poter cogliere con evidenza alcuni tratti tipici del costituzionalismo americano – l'insistenza sulla tutela della libertà individuale e la resistenza all'oppressione, per esempio – costituisce uno dei principali motivi d'interesse per il volume e permette anche di identificare, fin dalle pagine introduttive, quelle che, agli occhi del lettore europeo, possono apparire come criticità, a partire da un, fin troppo idealistico, affidamento al carattere «naturale» della libertà d'espressione (p. 9), o al fatto che tale libertà sia costituzionalmente garantita soltanto rispetto alle interferenze dei pubblici poteri – la nota «dittatura della maggioranza» – e non anche di quelle di enti privatistici (p. 12).

Nel ricostruire le ragioni a sostegno della libertà d'espressione ovvero di una sua necessaria limitazione, l'A. non fa mai mistero della propria convinzione che soltanto una più ampia garanzia del «free speech» possa garantire la realizzazione dei fini ultimi della Costituzione americana.

Nei capitoli centrali sono dunque ripercorsi i diritti che hanno ricevuto tutela a partire da un'interpretazione estensiva della «Free Speech Clause», diritti curiosamente definiti «uncontroversial» a differenza di quelli connessi ad altre e più dibattute «clausole» del costituzionalismo americano, su tutte la «Due Process Clause» sancita dal XIV Emendamento (p. 90). Allo stesso modo sono ricostruite le restrizioni ammesse alla libertà d'espressione che, secondo la giurisprudenza qui ottimamente ripercorsa, devono sempre rispettare rigidi criteri di «neutralità» ed «emergenza».

Anche le questioni più problematiche (*hate speech* e disinformazione, su tutte) vengono sempre risolte dall'A. invocando la più ampia garanzia possibile per la libertà d'espressione, perché capace di generare un "circolo virtuoso" per i diritti e le libertà individuali. Così, l'unica limitazione ammissibile riguarderebbe quei «discorsi» direttamente lesivi dei diritti o della sicurezza altrui, favorendo in ogni altro caso più efficaci «non-censorial approaches» (p. 37). Tra questi, in particolare, un esteso diritto al «counterspeech» cui, secondo l'A., sarebbe possibile affidare – forse troppo ottimisticamente – sia il bilanciamento degli interessi, sia una precipua funzione sociale ed educativa e, infine, persino una peculiarissima via individualistica alla realizzazione dell'eguaglianza sostanziale che passerebbe, dunque, dal riconoscimento del più ampio grado di libertà d'espressione per tutti (pp. 39-49).

Sebbene l'idea di fondo sia sempre chiara e ben argomentata, alcune criticità vengono liquidate con eccessiva semplicità: non ultime le questioni di più viva attualità (il tema della «cancel culture», l'impatto dei *social media*) affrontate forse troppo sinteticamente nel capitolo conclusivo.

Nel complesso il volume rappresenta comunque un ottimo testo introduttivo utile ad approfondire una tematica centrale del costituzionalismo americano: un «antipasto», come candidamente ammesso in chiusura dalla stessa A. (p. 241).

Stefano Malpassi

T

Yan Thomas
La morte del padre. Sul crimine di parricidio nella Roma antica

a cura e con un saggio di Valerio Marotta
Prefazione di Maurice Godelier
Con una nota di Michele Spanò

Macerata, Quodlibet, 2023, pp. 368
ISBN 9788822907844, Euro 24

Mentre l'Italia e buona parte del continente europeo sta ancora misurandosi con la gestazione per altri, ultima frontiera della giuridicizzazione ne-

cessaria dei rapporti biologici oltre che familiari, il lavoro di Thomas, riedito sull'originale francese dalla Quodlibet di Macerata nel 2023, chiarisce in modo netto le origini di simbolismi, valori, regole che hanno definito e sostanziato il dominio del padre sul resto della cerchia familiare nella nostra cultura.

Adamantina la questione nominalistica e tutta giuridica della definizione del ventre materno nel diritto romano. «Con il termine *venter* i giuristi di Roma designavano il bambino concepito e non ancora nato, quando volevano isolare quest'invisibile soggetto che, facendo corpo con la propria madre, doveva essere già pensato come titolare di diritti patrimoniali» (p. 154). L'uso è ben specifico, chiarisce Thomas, perché non è della realtà organica che si sta trattando bensì di un referente tutto giuridico, solamente giuridico. L'embrione è infatti designato da *partus* nome che indica il contesto ostetrico.

Con l'impero dei romani la figura paterna è prima di tutto il perno dell'ordine familiare patrimoniale e politico («Il diritto paterno fra ordine domestico e ordine politico» cap. 2) tanto che la numerosità del crimine conseguente («Il parricidio» cap. 1) e la sua gravità legata alla lesa maestà, crimine politico per eccellenza, raccontano in negativo della sua autorità assoluta.

Giuridicamente il padre fu titolare de «Il potere di vita e di morte» (cap. 5) su figli che rimanevano dipendenti e sottoposti finché lui fosse stato vivo. Un legame che si creava già proprio ne «il ventre della madre» (cap. 3) quando «il nascituro <e> il "*suus* erede"» (cap. 4) portava in evidenza il 'potenziale' destino del patrimonio.

La finzione che indica l'individualità giuridica, il fascio di diritti appesi all'evento della nascita come fatto meramente giuridico, serve a dirimere in quale modo verrà condizionato lo *statu quo* patrimoniale. Ne è invalidato il testamento del padre che non abbia previsto, per esempio, di costituire erede il neonato postumo – oppure di diseredarlo – ma anche la condizione di fratelli e sorelle del nascituro, per i diritti c.d. «del medesimo grado del ventre» (p. 154), che viene modificata.

Il volume si presenta arricchito da una Prefazione di Maurice Godelier, una Nota al testo di Michele Spanò, da un saggio di Valerio Marotta su "La *solitude* di Yan Thomas" e un indice delle fonti antiche a cura di Iolanda Ruggero.

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Abstracts

Marcel Morabito, Galaad Defontaine, *Teaching constitutional history in France: challenges and prospects /Insegnare la storia costituzionale in Francia: problemi e prospettive*

This article presents the challenges and prospects of teaching constitutional history in France. It answers two main questions: how and why should constitutional history be taught?

The article first looks at the teaching method, through the wealth of tools available—the disciplinary fields on which it depends, on the one hand, the study material and teaching methods on the other – and the diversity of objectives, i.e., the material field – spatial and temporal – of constitutional history. It then analyses the value of constitutional history for its target audience, its public. The authors emphasise that constitutional history is a pedagogical tool useful for the civic culture of every citizen, a heuristic and epistemological instrument for legal students and practitioners, but that it also has a symbolic, empirical and hermeneutic role for public actors, mainly civil servants, elected officials and judges.

Questo articolo prende in esame le sfide e le prospettive dell'insegnamento della storia costituzionale in Francia. Risponde a due domande: come e perché insegnare la storia costituzionale?

L'articolo guarda innanzitutto al metodo didattico visto attraverso la ricchezza degli strumenti disponibili – le discipline di riferimento da cui dipende da un lato, i materiali di studio e le modalità di insegnamento dall'altro – e la diversità di obiettivi vale a dire l'ambito materiale – spaziale, temporale – della storia costituzionale. Analizza poi l'interesse della storia costituzionale per i destinatari di questo insegnamento, il suo pubblico. Gli autori sottolineano a questo riguardo che la storia costituzionale è uno strumento educativo al servizio della cultura civica di ogni cittadino, uno strumento euristico ed epistemologico per il giurista ma che ha anche una funzione simbolica, empirica ed ermeneutica per gli attori pubblici, in particolare i funzionari pubblici, gli eletti e i giudici.

Keywords / Parole chiave: Constitutional history, Constitutional law, Constitutional theory, Teaching methods, Teaching objectives / Storia costituzionale, diritto costituzionale, teoria costituzionale, metodi d'insegnamento, obiettivi didattici.

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Ulrike Müßig, *Teaching Experiences of Constitutional History in a Comparative Perspective – Germany / Esperienze d'insegnamento della storia costituizionale in prospettiva comparata. La Germania*

Teaching constitutional history on a comparative European scale faces the specific challenges how to explain the specific European character in past constitutionalization processes. This is even more so, as there is no sufficient geographical determinability of Europe nor continous references to it within the historical sources. Historic (European) identification patterns, often in favour of freedom (732, 1453, 1789 AC), emerged around reservations against the 'threatening other' or in an imagined cultural superiority, turning even the light-metaphor of the Enlightenment into colonial nightmares and imperialism. The romantic longing for a Western Christian Europe (1799 AC) becomes revived by nowadays populism. This essay explains the didactic commitment to the *sapere aude* among the law students. It is legal historical insights that train their awareness of the democracies' vulnerability by totalitarian degenerations. Democracies need well informed discourses, and teaching of constitutional history helps for this.

Insegnare la storia costituzionale a livello comparato su scala europea vuol dire affrontare le sfide su come spiegare lo specifico carattere europeo nei processi di costituzionalizzazione del passato. Ciò è tanto più vero in quanto non esiste una sufficiente determinabilità geografica dell'Europa né continui riferimenti ad essa all'interno delle fonti storiche. Modelli di identificazione storici (europei), spesso a favore della libertà (732, 1453, 1789 d.C.), emersero con diffidenza verso l'"altro minaccioso" o affermando un'immaginata superiorità culturale, trasformando anche la nobile metafora dell'Illuminismo in incubi coloniali e imperialismo. Il desiderio romantico di un'Europa cristiana occidentale (1799 d.C.) viene ravvivato dal populismo odierno. Questo saggio spiega l'impegno didattico del *sapere aude* tra gli studenti di giurisprudenza. Sono le intuizioni storico-giuridiche ad allenare la consapevolezza della vulnerabilità delle democrazie di fronte alle degenerazioni totalitarie. Le democrazie hanno bisogno di discorsi ben informati e l'insegnamento della storia costituzionale è utile a questo scopo.

Keywords / Parole chiave: Constitutional history, Constitutionalization processes, Europe as an Idea, European identification, Frankish dominion, Freedom by participation, Latin Christianity, Rationality of the legal process / Storia costituzionale, processi di costituzionalizzazione, idea di Europa, identificazione europea, dominio franco, libertà attraverso la partecipazione, Cristianità latina, razionalità del processo normativo.

Ignacio Fernández Sarasola, *L'insegnamento della storia costituzionale in Spagna: un'impresa incompiuta / The teaching of Constitutional History in Spain: an unfinished business*

L'insegnamento e la ricerca della storia costituzionale seguono percorsi molto diversi in Spagna. Mentre la seconda è cresciuta in modo esponenziale negli ultimi trent'anni, lo stesso non accade per la prima, nella quale svolge un ruolo puramente marginale, essendo insegnata in modo strumentale e dispersivo negli studi universitari di Storia, Diritto e Scienze politiche.

Questa circostanza spiega anche la scarsità di libri di testo in spagnolo per lo studio della storia costituzionale sia spagnola che comparata. Ciò significa che la formazione in questa disciplina deve essere intrapresa autonomamente dal futuro ricercatore. Alla fine, questo porta a una mancanza di unità metodologica tra coloro che si dedicano alla storia costituzionale dai

loro diversi ambiti accademici.

The teaching and research of constitutional history follow very different paths in Spain. While the latter has grown exponentially in the last thirty years, the same does not happen with the former, in which it plays a purely marginal role, being taught in an instrumental and scattered way in university studies of History, Law and Political Science.

This circumstance also explains the scarcity of textbooks in Spanish for the study of both Spanish and comparative constitutional history. This means that training in this discipline must be undertaken autonomously by the future researcher. In the end, this leads to a lack of methodological unity among those who dedicate themselves to constitutional history from their different academic fields.

Keywords / **Parole chiave:** Insegnamento universitario, storia costituzionale, metodologia, manuali / University teaching, constitutional history, methodology, textbooks.

José Domingues, *Duzentos e cinquenta anos de ensino da história constitucional em Portugal (1772-2022) / Two hundred and fifty years of constitutional history teaching in Portugal (1772-2022)*

Questo articolo affronta alcune vicissitudini della ricerca e dell'insegnamento della storia costituzionale portoghese negli ultimi duecentocinquant'anni, dal suo inizio, con la riforma dei corsi giuridici dell'Università di Coimbra intrapresa dagli Statuti Pombalini del 1772. La Rivoluzione del diritto politico e costituzionale del 1820-1822 fu un momento determinante, soprattutto nel reindirizzare l'insegnamento dell'antico diritto pubblico verso il nascente diritto costituzionale. Infatti, l'insegnamento dell'antica Costituzione finì per lasciare il posto a quello della Costituzione moderna e, progressivamente, la storia costituzionale, oltre a divenire un semplice capitolo nell'insegnamento del diritto costituzionale, lasciò cadere nell'oblio il pre-costituzionalismo anteriore al 1820. Tuttavia questo panorama tende a cambiare.

This article deals with some vicissitudes of the research and teaching of Portuguese Constitutional History, in the last two hundred and fifty years of university education, since the reform of legal courses at the University of Coimbra undertaken by the *Pombal Statutes* of 1772. The political and constitutional Revolution of 1820-22 was a determining moment, particularly by redirecting teaching from the ancient public law to the emerging constitutional law. As a matter of fact, the teaching of the old Constitution ended, giving way to that of the modern Constitution and, gradually, constitutional history not only became a mere chapter of Constitutional Law teaching, but also abandoned the teaching of pre-constitutionalism before 1820. However, this situation is tending to change.

Keywords / **Parole chiave**: Storia costituzionale portoghese, Costituzione antica, Costituzione moderna, insegnamento universitario / Portuguese Constitutional History, Ancient Constitution, Modern Constitution, University Education.

Rocco Giurato, *Constitutional History Teaching in Britain (19th-20th centuries) / L'insegnamento della storia costituzionale in Gran Bretagna (19-20° secolo)*

Constitutional history teaching started at Oxford University in the second half of nineteenth century, especially thanks to bishop William Stubbs, whose authoritative works were the basic teaching material for a long time. For several decades after its inception, constitutional history was characterised as a main product of the whig interpretation of history. Modernism and the transformations of British society caused a rapid loss of its traditional importance after the Second World War. However, even if its teaching stopped towards the end of the last century, it still shows signs of vitality in terms of research.

L'insegnamento della storia costituzionale ebbe inizio all'Università di Oxford nella seconda metà dell'Ottocento, soprattutto grazie al vescovo William Stubbs, le cui autorevoli opere costituirono per lungo tempo materiale didattico fondamentale. Per diversi decenni dopo la sua nascita, la storia costituzionale è stata caratterizzata come il prodotto principale dell'interpretazione *whig* della storia. Il modernismo e le trasformazioni della società britannica causarono una rapida perdita della sua tradizionale importanza dopo la seconda guerra mondiale. Tuttavia, anche se il suo insegnamento si è interrotto verso la fine del secolo scorso, mostra ancora segni di vitalità sul piano della ricerca.

Keywords / Parole chiave: Constitutional history teaching, Constitutional historiography, British constitution, William Stubbs, whig interpretation of history / L'insegnamento della storia costituzionale, storiografia costituzionale, Costituzione Britannica, William Stubbs, interpretazione *whig* della storia.

Luigi Lacchè, Giuseppe Mecca, *Constitutional History Teaching in Italy: problems, challenges, opportunities / L'insegnamento della storia costituzionale in Italia: problemi, sfide, opportunità*

The article explores the multifaceted approaches to the teaching of constitutional history in Italian universities, addressing both the challenges that this subject poses, and the opportunities it offers, in an academic environment. The teaching of constitutional history in Italy is presented as a dynamic field that benefits greatly from an interdisciplinary approach. The authors also discuss the role of constitutional history as a "bridge" between different academic disciplines.

The study finds a significant disparity between the burgeoning research in constitutional history, as evidenced by the increase in publications, lectures and doctoral dissertations, and the less appreciated aspect of teaching. The paper also examines the impact of textbooks and teaching materials on the study of constitutional history.

L'articolo esplora il multiforme modo d'insegnare la storia costituzionale nelle università italiane, affrontando sia le sfide che le opportunità che questa materia deve fronteggiare in un ambiente accademico. L'insegnamento della storia costituzionale in Italia viene presentato come un campo dinamico che beneficia in modo significativo di un approccio interdisciplinare. Inoltre, gli autori discutono il ruolo della storia costituzionale come "ponte" tra varie discipline accademiche.

Lo studio rileva una significativa disparità tra la fiorente ricerca in storia costituzionale, evidenziata dall'aumento di pubblicazioni, conferenze e tesi di dottorato, e l'aspetto meno apprezzato dell'insegnamento. Il documento esamina anche l'impatto dei libri di testo e dei materiali didattici sullo studio della storia costituzionale.

Keywords / Parole chiave: University teaching, Italian constitutional history, methodological approaches, textbooks / Insegnamento universitario, storia costituzionale italiana, approcci metodologici, manuali.

Alain Wijffels, *Teaching Constitutional History in the Benelux Countries / L'insegnamento della storia costituzionale nei paesi del Benelux*

In the Benelux countries, constitutional history is mostly taught as a propaedeutic subject for undergraduates, usually part of a broader introductory course on legal history or history of public law. In some programmes, it is further buttressed by courses on political history, or through historical discussions in courses on constitutional law or jurisprudence. At the level of taught master's degrees, legal history tends to occupy a marginal position, represented at best by a handful of optional courses. In general, this reflects a general weakening of historical awareness and expertise in legal culture and methods.

Nei paesi del Benelux, la storia costituzionale è insegnata principalmente come materia propedeutica per studenti universitari, di solito come parte di un più ampio corso introduttivo alla storia del diritto o alla storia del diritto pubblico. In alcuni programmi, l'insegnamento è ulteriormente rafforzato da corsi di storia politica o da discussioni di carattere storico in corsi di diritto costituzionale o di teoria del diritto. A livello di master, la storia giuridica tende ad occupare una posizione marginale, rappresentata nella migliore delle ipotesi da una manciata di insegnamenti opzionali. In generale, ciò riflette un diffuso indebolimento della consapevolezza storica e dell'*expertise* riguardo alla cultura giuridica e ai suoi metodi.

Keywords / Parole chiave: Law curriculum in Benelux countries, legal history, history of public law, constitutional history, good governance / Curriculum di giurisprudenza nei paesi del Benelux, storia giuridica, storia del diritto pubblico, storia costituzionale, buon governo.

Dag Michalsen, *Teaching Nordic Constitutionalism? How to understand the histories of the Nordic constitutions / Insegnare il costituzionalismo nordico? Come capire le storie delle costituzioni dei paesi nordici*

The Nordic states have had modern constitutions since 19th century (Sweden, 1809, Norway 1814), significant as all Nordic states have a history of interstate relationships. The features of a modern Nordic region came about as the results of the Napoleonic wars, thus underlining the long history of shifting external great power politics surrounding the Nordic region. To teach constitutional history in the Norden then, we must take into account the national, regional and international contexts of the making and practices of constitutions. The article argues for a contextual constitutional history that transcends the doctrinal history of constitution bringing to audiences the importance of constitutions as national and international historical themes.

Gli stati nordici hanno avuto costituzioni moderne fin dal 19° secolo (Svezia, 1809, Norvegia 1814), fatto significativo poiché tutti gli stati nordici hanno una storia di relazioni interstatali. Le caratteristiche di una moderna area nordica sono emerse come risultato delle guerre napoleoniche, sottolineando così la lunga storia di cambiamenti politici delle grandi potenze esterne che circondano la regione nordica. Per insegnare la storia costituzionale nei paesi del Nord, quindi, dobbiamo tenere conto dei contesti nazionali, regionali e internazionali della elaborazione e delle pratiche delle costituzioni. L'articolo sostiene una storia costituzionale contestuale che trascenda la storia dottrinale della costituzione segnalando l'importanza delle costituzioni come temi storici nazionali e internazionali.

Keywords / Parole chiave: Nordic countries, Constitutions of Norway, Sweden Denmark and Finland, Doctrinal and contextual teaching of constitutional history / Paesi nordici, Costituzioni di Norvegia, Svezia, Danimarca e Finlandia, insegnamento dottrinale e contestuale della storia costituzionale.

Manuel Guţan, *Teaching Constitutional History in Contemporary Romania / L'insegnamento della storia costituzionale nella Romania contemporanea*

This article is addressing the teaching of constitutional history in contemporary Romania with a particular focus on its tradition, professors, students, textbooks and methodological issues. It explains why there is no tradition of teaching constitutional history as an autonomous discipline in Romania, and evaluates why, how, and with what costs it became integrated in the courses of Romanian legal history and constitutional law. Its modest status in the academic curricula led not only to marginalization but discouraged a complex methodological approach. Generally, Romanian constitutional history is taught as a descriptive succession of past constitutions and legal acts with constitutional value. Some future possible topics and more sophisticated methodological paths are highlighted at the end, capable of making the teaching of constitutional history not only more attractive but also more relevant to the Romanian law students.

Questo articolo tratta dell'insegnamento della storia costituzionale nella Romania contemporanea con un focus particolare sulla sua tradizione, sui professori, sugli studenti, sui libri di testo e sulle questioni metodologiche. Spiega perché in Romania non esiste una tradizione di insegnamento della storia costituzionale come disciplina autonoma e cerca di capire perché, come e con quali costi esso si è integrato nei corsi di storia giuridica e diritto costituzionale rumeno. Il suo status secondario nei programmi accademici ha portato non solo all'emarginazione, ma ha scoraggiato un approccio metodologico complesso. In generale, la storia costituzionale rumena viene insegnata come una successione descrittiva delle costituzioni passate e degli atti giuridici con valore costituzionale. Vengono infine evidenziati alcuni futuri possibili temi e percorsi metodologici più sofisticati, capaci di rendere l'insegnamento della storia costituzionale non solo più attraente ma anche più rilevante per gli studenti di diritto rumeni.

Keywords / Parole chiave: Romanian constitutional history, Romanian legal history, Romanian constitutional law, teaching of constitutional history / Romania: storia costituzionale, storia del diritto, diritto costituzionale, insegnamento della storia costituzionale.

Jack N. Rakove, *Two Centuries and Counting: The Study of the United States Constitution / Due secoli e più: lo studio della Costituzione americana*

Although many academic departments of history in the U.S. treat constitutional history as an old-fashioned topic, its study remains popular among undergraduates, many of whom will apply to law school, where constitutional law is the *summa theologica* of legal studies. Moreover, one can hardly study political history in the U.S. without grasping its constitutional dimensions. In writing this history, we need not pay excessive attention to the reasoning of Supreme Court decisions, however. What matters instead are the political origins and doctrinal consequences of particular cases.

A positive agenda of constitutional history should begin with the two great Founding moments: the events and debates that led to the adoption of the Federal Constitution and its first ten amendments during the 1780s, and those that led to the adoption of the three Reconstruction amendments between 1865 and 1870. While study of the first topic is relatively straightforward, explaining and interpreting the second is far more complex. To do it comprehensively, as sound scholarship and pedagogy demand, historians need to review events beginning with the Missouri crisis of 1819-1821 and ending with the Supreme Court's 1896 decision in *Plessy v. Ferguson*. To analyze these events one needs to deploy at least these eight analytical categories:

1. The great national crises and compromises over Missouri, nullification, and the aftermath of the Mexican war;
2. The emergence and fluidity of political parties and party systems;
3. The role of social movements in turning controversial issues into mainstream political topics, and in politically engaging the unenfranchised;
4. Critical judicial interventions borth before and after the Civil War;
5. The impact of the experience of the Civil War on constitutional issues, especially the emancipation of slaves;
6. The origins and purposes of the three Reconstruction amendments;
7. How the violent oppression of free African Americans after 1865 constituted an intractable problem of transitional justice;
8. The extent to which the collapse of Reconstruction exemplified radical constitutional failure.

The agenda of twentieth-century constitutional history takes a different form. It has to explain at least these three major developments:

1. The rise and ultimate collapse of substantive due process jurisprudence, from the *Lochner* case to "the switch in time that saved nine";
2. The growth of strategic public interest litigation, as pioneered by the National Association for the Advancement of Colored People;
3. The extent to which the ultimate success of the Second Reconstruction depended on a social and political backlash to the massive resistance which greeted the desegregation decision of *Brown v. Board of Education*.

Sebbene molti dipartimenti universitari di storia negli Stati Uniti trattino la storia costituzionale come un argomento antiquato, il suo studio rimane popolare tra gli studenti universitari, molti dei quali si iscriveranno alla facoltà di giurisprudenza, dove il diritto costituzionale è la *summa theologica* degli studi giuridici. Inoltre, è difficile studiare la storia politica degli Stati Uniti senza coglierne le dimensioni costituzionali. Nello scrivere questa storia, tuttavia, non dobbiamo prestare eccessiva attenzione al ragionamento delle decisioni della Corte Suprema. Ciò che conta invece sono le origini politiche e le conseguenze dottrinali dei casi particolari.

Un'agenda ben definita di storia costituzionale dovrebbe iniziare con i due grandi momenti fondativi: gli eventi e i dibattiti che portarono all'adozione della Costituzione federale e dei suoi primi dieci emendamenti durante gli anni Ottanta del Settecento, e quelli che portarono all'adozione dei tre emendamenti della Ricostruzione tra il 1865 e il 1870. Mentre lo studio del primo argomento è relativamente semplice, spiegare e interpretare il secondo è molto più complesso. Per farlo in modo completo, come richiedono una solida dottrina e la domanda pedagogica, gli storici devono rivedere gli eventi a partire dalla crisi del Missouri del 1819-1821 e terminare con la decisione della Corte Suprema del 1896 nel caso *Plessy v. Ferguson*. Per analizzare questi eventi è necessario utilizzare almeno queste otto categorie analitiche:

1. Le grandi crisi nazionali e i compromessi sul Missouri, l'annullamento e le conseguenze della guerra messicana;

2. L'emergere e la fluidità dei partiti politici e dei sistemi partitici;
3. Il ruolo dei movimenti sociali nel trasformare questioni controverse in argomenti politici tradizionali e nel coinvolgere politicamente coloro che non hanno diritto di voto;
4. Interventi giudiziari critici sia prima che dopo la Guerra Civile;
5. L'impatto dell'esperienza della Guerra Civile sulle questioni costituzionali, in particolare sull'emancipazione degli schiavi;
6. Origini e finalità dei tre emendamenti della Ricostruzione;
7. Come la violenta oppressione degli afroamericani liberi dopo il 1865 abbia costituito un problema irresolvibile di giustizia transitoria;
8. In che misura il crollo della Ricostruzione ha esemplificato un fallimento costituzionale radicale.

L'agenda della storia costituzionale del ventesimo secolo assume una forma diversa. Deve spiegare almeno questi tre principali sviluppi:

1. L'ascesa e il crollo finale della giurisprudenza sostanziale sul giusto processo, dal caso Lochner al "the switch in time that saved nine";
2. La crescita del contenzioso strategico di interesse pubblico, come introdotto dall'Associazione Nazionale per il Progresso delle Persone di Colore;
3. In che misura il successo finale della Seconda Ricostruzione dipese da una reazione sociale e politica alla massiccia resistenza che accolse la decisione di desegregazione di *Brown v. Board of Education.*

Keywords / **Parole chiave:** Founding, Reconstruction, party systems, social movements, Fourteenth Amendment / Fondazione, ricostruzione, sistemi di partito, movimenti sociali, quattordicesimo emendamento.

Diego Nunes, *Teaching Constitutional History in Brazil: an experience in an Undergraduate Legal History Course Employing Active Teaching Methods / Insegnare la storia costituzionale in Brasile: un'esperienza in un corso universitario di storia del diritto impiegando metodologie partecipative*

This work aims to analyze the teaching of Legal History in Brazil, specifically focusing on Constitutional History. Drawing from my own experiences, I explore the use of active methodologies in the undergraduate course. I compare Constitutional History perspectives, discussing sources that include iconography and preambles. In teaching the subject, I employ methods such as moot courts, role-play, and art to incorporate Brazilian Constitutional History themes into the Legal History syllabus. The results highlight the effectiveness of active teaching methodologies and urge countries in the Global North to reconsider any self-centered or one-sided approaches that may still prevail in their teachings.

Questo lavoro si propone di analizzare l'insegnamento della Storia giuridica in Brasile, concentrandosi in particolare sulla Storia costituzionale. Attingendo alle mie esperienze personali, esploro l'uso di metodologie attive nel corso universitario. Confronto le prospettive della storia costituzionale, discutendo fonti che includono iconografia e preamboli. Nell'insegnamento della materia, utilizzo metodi come *moot courts*, giochi di ruolo e la dimensione artistica per incorporare temi di storia costituzionale brasiliana nel programma di storia giuridica. I risultati evidenziano l'efficacia delle metodologie di insegnamento attivo e sollecitano i paesi del Nord del mondo

a riconsiderare ogni approccio auto-centrato o unilaterale che possa ancora prevalere nei loro insegnamenti.

Keywords / **Parole chiave:** Constitutional History, comparative legal history, teaching practice, active methodologie, Brazil / Storia costituzionale, storia giuridica comparata, pratica di insegnamento, metodologie attive, Brasile.

Cristiano Paixão, Raphael Peixoto De Paula Marques, *Teaching constitutional history today: human rights, authoritarian legacies, and the role of the judiciary / Insegnare la storia costituzionale oggi: diritti umani, eredità autoritarie, e il ruolo della magistratura*

This article addresses the teaching of constitutional history within Brazilian legal education, highlighting the critical role and pedagogical benefits of historical study for law students. It proposes using judicial decisions to explore constitutionalism's connection with Brazil's authoritarian past, shedding light on how the judiciary navigates political transitions, human rights issues, and political amnesty. The article concludes by emphasizing the need for continuous historical critique in legal education, paralleling the impartiality deontology shared by judges and historians. Unlike judges, historians' work remains open-ended, continuously evolving with new research and discoveries. Thus, law students must engage in this perpetual process of historical rewriting, maintaining the dynamic and critical study of constitutional history.

Questo articolo affronta l'insegnamento della storia costituzionale nell'ambito della formazione giuridica brasiliana, evidenziando il ruolo fondamentale e i vantaggi pedagogici dello studio storico per gli studenti di giurisprudenza. Propone di utilizzare le decisioni giudiziarie per esplorare la connessione del costituzionalismo con il passato autoritario del Brasile, facendo luce su come la magistratura affronta le transizioni politiche, le questioni relative ai diritti umani e l'amnistia politica. L'articolo si conclude sottolineando la necessità di una critica storica continua nella formazione giuridica, parallelamente alla deontologia dell'imparzialità condivisa da giudici e storici. A differenza dei giudici, il lavoro degli storici rimane aperto, in continua evoluzione con nuove ricerche e scoperte. Pertanto, gli studenti di giurisprudenza devono impegnarsi in questo perpetuo processo di riscrittura storica, mantenendo lo studio dinamico e critico della storia costituzionale.

Keywords / **Parole chiave:** Constitutional history, Legal education, Critical role, Judicial decisions, Brazilian constitutionalism / Storia costituzionale, educazione giuridica, funzione critica, decisioni giudiziali, costituzionalismo brasiliano.

Stefano Marostica, *Sistemi elettorali e forme di governo. Il* single transferable vote *di Thomas Hare / Electoral systems and forms of government. Thomas Hare's single transferable vote*

Questo articolo si propone di tematizzare il pensiero politico di Thomas Hare (1806-1891) in relazione alle opere di riforma elettorale. Verrà analizzato il progetto di Hare, il quale si rivela pregnante come indicatore delle trasformazioni istituzionali del secolo. Si argomenta che l'obiettivo ultimo di Hare sia un mutamento del quadro costituzionale, il quale nasconde l'intento di comporre l'esecutivo con un'aristocrazia nuova, fondata sul merito, marginalizzando al contempo l'influenza

delle *working classes*. Nonostante il progetto di riforma non troverà riscontri nel Regno Unito, si intende sottolineare come esso si ponga in sintonia con una tendenza già operante nell'800 britannico, quella dell'amministrativizzazione degli apparati dello Stato.

This article seeks to examine the political thought of Thomas Hare (1806-1891) in relation to the works of electoral reform. Hare's project will be analyzed, which proves meaningful as an indicator of the institutional transformations of the century. It is argued that Hare's ultimate aim is a change in the constitutional framework, which conceals the intent to compose the executive with a new, merit-based aristocracy while marginalizing the influence of the working classes. Although the reform project will not be successful in the United Kingdom, it is intended to emphasize how it is in keeping with a tendency already at work in the British 1800s, that of the administratization of state apparatuses.

Keywords / Parole chiave: Thomas Hare, single-transferable-vote, minority representation, élite, democratizzazione / Thomas Hare, single-transferable-vote, minority representation, élite, democratization.

Alessandra Petrone, *Laboulaye e il senso della storia / Laboulaye and the sense of history*

Il percorso intellettuale e politico di Laboulaye, che si sostanzia attraverso l'ammirazione per il modello istituzionale americano fino alla definizione di un proprio modello di Stato liberale, ha il suo culmine con l'apporto da lui dato alle leggi costituzionali del 1875. L'origine, la prima direttrice di questo percorso, trae linfa dalla sua adesione ai principi della scuola storica del diritto tedesca. Scuola storica del diritto, dalla quale acquisisce quel senso della storia inteso come preservazione del patrimonio di una nazione, fatto di consuetudini e tradizioni. Il saggio analizza l'avvicinamento di Laboulaye alla scuola storica del diritto e quanto e se questa abbia influenzato le sue idee successive.

Laboulaye's intellectual and political path, which takes shape through his admiration for the American institutional model up to the definition of his own model of liberal State, has its culmination with the contribution he made to the constitutional laws of 1875. The origin, the first direction of this path, draws inspiration from its adherence to the principles of the historical school of German law. Historical school of law, from which it acquires that sense of history understood as the preservation of a nation's heritage, made up of customs and traditions. The essay analyzes Laboulaye's approach to the historical school of law and how much and if this influenced his subsequent ideas.

Keywords / Parole chiave: Laboulaye, Francia, scuola storica del diritto, Stato liberale / Laboulaye, France, historical school of law, Liberal state.

Romano Ferrari Zumbini, *25 luglio 1943: ma fu un colpo di Stato? / July 25, 1943: but was it a* coup d'état?

Il 25 luglio 1943 l'Italia cambia costituzione. Il re d'Italia, compì due gesti: la coraggiosa destituzione di Mussolini quale capo del governo e ciò in piena coerenza con il mosaico costituzionale risalente al 1848; altresì, la sciagurata nomina di Badoglio, disattendendo voci in senso contrario,e infrangendo quindi la Costituzione. Inizia l'ordinamento provvisorio, che terminerà con la Repubblica.

On July 25, 1943, Italy changed its constitution. The King of Italy fulfilled two acts: first, the bold dismissal of Mussolini as head of government, fully consistent with the constitutional mosaic dating back to 1848; then, the wretched appointment of Badoglio, ignoring contrary advices, and therefore infringing the Constitution. It's the beginning of the provisional government in Italy, which will end with the proclamation of the Italian Republic.

Keywords / Parole chiave: Storia costituzionale, mosaico costituzionale, fascismo, dimissioni di Mussolini, 25 luglio 1943 / constitutional history, constitutional mosaic, fascism, Mussolini's dismissal, July 25 1943.

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Insegnare la storia costituzionale in Italia: problemi, sfide e opportunità

Contributi di / Articles by: Francesco Bonini, Ronald Car, Paolo Colombo, Giovanni Di Cosimo, Francesco Di Donato, Romano Ferrari Zumbini, Marco Fioravanti, Massimiliano Gregorio, Sandro Guerrieri, Luigi Lacchè, Anna Gianna Manca, Giuseppe Mecca, Sonia Scognamiglio, Luca Scuccimarra, Francesco Soddu, Bernardo Sordi, Gian Marco Sperelli

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Michael Stolleis, *Introduzione alla storia del diritto pubblico in Germania (XVI-XXI sec.)*, traduzione di Paolo Scotini, 2017

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R.D. Edwards, *The Best of Bagehot*, London, Hamish Hamilton, 1993, p. 150.
A. King (edited by), *The British Prime Minister*, London, Macmillan, 1985², pp. 195-220.
AA.VV., *Scritti in onore di Gaspare Ambrosini*, Milano, Giuffrè, vol. III, pp. 1599-1615.

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W. Benjamin, *Über den Begriff der Geschichte* (1940); tr. it. *Sul concetto di storia*, Torino, Einaudi, 1997.
J.S. Mill, *Considerations on Representative Government* (1861); tr. it. *Considerazioni sul governo rappresentativo*, Roma, Editori Riuniti, 1999.

– se si tratta di un **contributo che compare in un volume miscellaneo**: iniziale puntata del nome e cognome dell'autore del contributo; titolo del contributo in corsivo; nome (puntato) e cognome del curatore/autore del volume, preceduto da 'in' ed eventualmente seguito da (a cura di); titolo del volume in corsivo; luogo; editore; anno; paginazione del contributo. Esempi:
G. Miglio, *Mosca e la scienza politica*, in E.A. Albertoni (a cura di), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, Milano, Giuffrè, 1987, pp. 15-17.
O. Hood Phillips, *Conventions in the British Constitution*, in AA.VV., *Scritti in onore di Gaspare Ambrosini*, Milano, Giuffrè, vol. III, pp. 1599 s.

– se si tratta di un **contributo che compare in una pubblicazione periodica**: nome dell'autore e titolo dell'articolo (riportati come in tutti gli altri casi); testata del periodico tra virgolette caporali preceduta da 'in'; (ove presenti) indicazione dell'annata (in numeri romani) e numero del fascicolo preceduto da 'n.' (e non da n°, N., num. etc.); anno di pubblicazione; numero pagina/e. Nel caso di citazione da un quotidiano, dopo il titolo della testata si metta la data per esteso. Nel caso si faccia riferimento ad articoli pubblicati in riviste online, si dovrà fornire l'indirizzo esatto del testo (o, in alternativa, della pagina principale del sito che lo rende disponibile) e la data di consultazione. Esempi:
G. Bonacina, *Storia e indirizzi del conservatorismo politico secondo la dottrina dei partiti di Stahl*, in «Rivista storica italiana», CXV, n. 2, 2003.
A. Ferrara, M. Rosati, *Repubblicanesimo e liberalismo a confronto. Introduzione*, in «Filosofia e Questioni Pubbliche», n. 1, 2000, pp. 7 ss.
S. Vassallo, *Brown e le elezioni. Il dietrofront ci insegna qualcosa*, in «Il Corriere della Sera», 9 ottobre 2007, p. 42.
G. Doria, *House of Lords: un nuovo passo sulla via della riforma incompiuta*, in «federalismi.it», n. 4, 2007, <http://federalismi.it>, settembre 2010.

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Jahn, *Deutsches Volksthum* cit., pp. 45, 36.
Pegoraro, Rinella, *Le fonti del diritto* cit., p. 200.
King, *The British Prime Minister* cit., p. 195.
Benjamin, *Über den Begriff* tr. cit., pp. 15-20, 23.
Bonacina, *Storia e indirizzi del conservatorismo politico* cit., p. 19.
Ferrara, Rosati, *Repubblicanesimo* cit., pp. 11 ss.
Doria, *House of Lords* cit.

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Il referaggio dei pari assiste i Direttori e i Redattori nel compiere le scelte redazionali e attraverso la comunicazione redazionale con gli autori può anche aiutare gli autori a migliorare l'articolo.

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La paternità di un manoscritto deve essere limitata a coloro che hanno dato un contributo significativo alla concezione, pianificazione, esecuzione o interpretazione dello studio riportato. Tutti coloro che hanno dato un contributo significativo dovrebbero essere elencati come co-autori. Nel caso in cui ci siano altri che hanno partecipato in alcuni aspetti sostanziali del progetto di ricerca, essi dovrebbero essere menzionati o elencati come contributori.
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Board of editors of the Giornale di Storia costituzionale / Journal of constitutional history

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1. The editorial staff accepts articles in the main European languages.
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Titles. The use of capital letters or small capital letters is to be avoided. The titles of articles and abstracts are to be written in English as well. Subheadings and sub-subheadings must be numbered with progressive Arabic numerals. Please avoid to put a full stop at the end.

Manuscript preparation. The manuscript must have basic stylistic features. The editors only require the recognisability of the elements of which the contribution is made up: the title, the subheadings and sub-subheadings, the body of the text, the quotations, the endnotes and the position of the eventual explicative material (images, graphs, tables). All the layout that is not necessary for the comprehension of the content must be avoided, in that it makes less easy file processing. Automatic text formatting, justifying lines, using numbered (or bullet) lists provided by a programme, using the hyphen or striking the enter key in order to divide words into syllables must be avoided. Automatic division into syllables must be avoided as well; it is sufficient to justify the left margin. Use the enter key only in order to end a section. Respect the function and the hierarchy of inverted commas (" ") and quotation marks (« »); limit the use of italics and, if possible, avoid the use of bold type or underlined parts.
Choose common fonts (Arial, Times, Verdana) and indicate – in a note for the editorial board – the eventual use of special type. For further instructions see below.

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Short quotations should be incorporated in the text body and put in quotation marks « »; eventual quotations which are within a quotation must be put in inverted commas " ", and never in italics.

Endnotes. Endnotes are essentially destined to mere bibliographical reference and to explicative purposes. We recommend limiting the number of endnotes. In any case, the number of characters (including spaces) of the endnotes should not exceed a third of the total number of characters of the text (therefore in a standard text of 60,000 characters, including spaces, endnotes should not exceed 20,000 characters, including spaces).
Note numbers in the text should be automatically created, should precede a punctuation mark (except in the cases of exclamation and question marks and of suspension points) and be superscripted without parentheses.
Even if it is a question of endnotes (and not footnotes), note numbers in the text should never be created superscripting numbers manually, but always using the specific automatic function of the writing programme (for example in Word for Windows 2003 in the menu Insert > Reference). A full stop always ends the text in the notes.

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In the first quotation of the work, complete data must be indicated, that is the below-mentioned elements following the order here established.

– if it is a **monograph**: initial of the name (in capital letters) followed by a full stop and surname of the author (with only the initial in capital letters and never in small capital letters); title in italic type; place of publication; publishers; year

of publication (eventual indication of the quoted edition superscripted). All these elements must be separated from one another by a comma. A comma must also separate the name of the authors, if a work has been written by more than one person. In the case in which the author has a double name, the initials should not be separated by a space. 'Edited by' must be written between parentheses in the language in which the quoted text is written, immediately after the name of the editor and the comma must be inserted only after the last parenthesis. If only a part of the work is quoted, the relative page (or pages) must be added. If it is a work of more than one volume, the indication of the number of the volume (preceded by 'vol.') must be given and it should be placed before the numbers of the pages. Examples:
F. Jahn, *Deutsches Volksthum*, Lübeck, Niemann & Co, 1810.
L. Pegoraro, A. Rinella, *Le fonti del diritto comparato*, Torino, Giappichelli, 2000.
R.D. Edwards, *The Best of Bagehot*, London, Hamish Hamilton, 1993, p. 150.
A. King (edited by), *The British Prime Minister*, London, Macmillan, 1985^{2}, pp. 195-220.
AA.VV., *Scritti in onore di Gaspare Ambrosini*, Milano, Giuffrè, vol. III, pp. 1599-1615.

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W. Benjamin, *Über den Begriff der Geschichte* (1940); It. tr. *Sul concetto di storia*, Torino, Einaudi, 1997.
J.S. Mill, *Considerations on Representative Government* (1861); It. tr. *Considerazioni sul governo rappresentativo*, Roma, Editori Riuniti, 1999.

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G. Miglio, *Mosca e la scienza politica*, in E.A. Albertoni (a cura di), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, Milano, Giuffrè, 1987, pp. 15-17.
O. Hood Phillips, *Conventions in the British Constitution*, in AA.VV., *Scritti in onore di Gaspare Ambrosini*, Milano, Giuffrè, vol. III, pp. 1599 s.

– if it is an **article which appeared in a periodical**: initial of the name (in capital letters) followed by a full stop and surname of the author of the article (with only the initial in capital letters and never in small capital letters); title of the article in italic type; name of the periodical in quotation marks (« ») preceded by 'in'; number of the volume of the periodical (if present) written in Roman numerals; number of the issue preceded by 'n.' (not by n°., N., num. etc.); year of publication; page number(s). In the case of quotation from a newspaper, after the name of the newspaper indicate the complete date. In the case of reference to articles published in online periodicals, the exact 'http' address of the text must be given, or alternatively, of the main page of the website which publishes it. Examples:
G. Bonacina, *Storia e indirizzi del conservatorismo politico secondo la dottrina dei partiti di Stahl*, in «Rivista storica italiana», CXV, n. 2, 2003.
A. Ferrara, M. Rosati, *Repubblicanesimo e liberalismo a confronto. Introduzione*, in «Filosofia e Questioni Pubbliche», n. 1, 2000, pp. 7 ss.
S. Vassallo, *Brown e le elezioni. Il dietrofront ci insegna qualcosa*, in «Il Corriere della Sera», 9 ottobre 2007, p. 42.
G. Doria, *House of Lords: un nuovo passo sulla via della riforma incompiuta*, in «federalismi.it», n. 4, 2007, <http://federalismi.it>, settembre 2010.

Bibliographical data must be complete only for the first quotation; the following quotations are shortened, indicating only the surname of the author / editor; the title (or part of it) in italic type followed by the abbreviation 'cit.' or 'cit. tr.' (in the case of translated works); the number of pages. Here we give some examples for the different typologies of works:

Jahn, *Deutsches Volksthum* cit., pp. 45, 36.
Pegoraro, Rinella, *Le fonti del diritto* cit., p. 200.
King, *The British Prime Minister* cit., p. 195.
Benjamin, *Über den Begriff* cit. tr., pp. 15-20, 23.
Bonacina, *Storia e indirizzi del conservatorismo politico* cit., p. 19.
Ferrara, Rosati, *Repubblicanesimo* cit., pp. 11 and following pages.
Doria, *House of Lords* cit.

In the case of reference to the same work and the same page (or pages) quoted in the preceding endnote '*Ibidem*' (in italic type) can be used, without repeating any of the other data; if instead reference is made to the same work quoted in the preceding endnote, but to a different page, 'Ivi' can be used followed by the page number.

FURTHER INSTRUCTION FOR THE PREPARATION OF THE MANUSCRIPT

References within the issue. They should never refer to page numbers; instead sections of the text, full articles and paragraphs or images (opportunely numbered) can be referred to.

Pages. In bibliographical references, referring to the number or the numbers of the pages must always be preceded by (respectively) 'p.' or 'pp.' and reported entirely; therefore, for example, 'pp. 125-129' and not 'pp. 125-9'. In the case in which it is a question of non consecutive pages, numbers must be separated by commas: for example: 'pp. 125, 128, 315.' in order to indicate the following page or pages, as well please use 'f.' or 'ff.' respectively (hence without the preceding 'and').

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Web reference. When referring to online contents, the complete address (including the protocol 'http://' or 'ftp://' etc. possibly without breaking it) must be indicated and must be included between the signs < >; the date of consultation or verification of the address should always be indicated. Another essential element is the title (or name) of the website / page or a brief description of the contents that could be found at the quoted address. Therefore, for example, a correct reference can be formulated as follows: Sezione novità delle Edizioni Università di Macerata, <http://eum.unimc.it/novità>, June 2010.

Publication ethics and publication malpractice statement

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Our ethic statements concerning the duties of the editors of the *Journal of Constitutional History* are based on COPE (Committee on Publication Ethics), *Best Practice Guidelines for Journal Editors*: http://publicationethics.org/files/u2/Best_Practice.pdf.

The editors of the *Journal* are responsible for deciding which of the articles submitted to the *Journal* should be published. They are guided by the policies of the *Journal*'s International Board and constrained by the laws in force.
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The editors evaluate manuscripts for their intellectual content without regard to race, gender, sexual orientation, religious belief, ethnic origin, citizenship, or political orientation of the authors.

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