

COMPARATIVE EUROPEAN EXPERIENCES IN LEGAL HISTORY AND CONSTITUTIONAL LAW (19TH – 20TH CENTURIES)

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History & Constitution offers a journey across time and space. Luigi Lacchè excels in his study of European constitutionalism by attending seminal developments in Belgium, France, Italy, and Switzerland during the nineteenth and twentieth centuries. Published in 2016 as volume 299 of the *Studies on European Legal History* series of the Max Planck Institute for European Legal History, the volume presents 25 essays that the author elaborated during the past two decades. Most contributions are drafted in Italian, though a number are drafted in English, French, German, and Spanish. The volume starts with a rich introductory essay and is completed with five chapters. Lacchè aims to preserve ignited the interest in constitutionalism and its mutations, since in his own words: “constitutionalism is changing, and in unforeseen directions” (5).

An introductory essay¹ sets the scene for the entire volume. The author there alerts readers that scholars must be fully aware of the systemic complexity of the new processes and structures. There is a call for global perspectives to the study of constitutional history, where worldwide jurists will build from national constitutional histories and elaborate broader perceptions. The author therefore plays with the idea of a polyptych, and offers an analogy with religious art. There pieces fall within a structure that is being observed and studied; and that perspective may indeed result in seeing constitutionalism as a new *ius commune*. The introductory essay also points that such an approximation to constitutionalism needs to attend crossovers, contamination, and transfers since ideas tend to circulate. After all, the adoption of a foreign legal idea makes the recipient its new owner.² The volume offers ways to trace those paths in which

¹ “When history meets the constitution”, 1-14.

² Agustín Parise, *Ownership Paradigms in American Civil Law Jurisdictions: Manifestations of the Shifts in the Legislation of Louisiana, Chile, and Argentina (16th-20th Centuries)* (Brill Nijhoff, 2017) 51.

ideas migrate and a selection of Belgian, French, Italian, and Swiss paths are explored throughout the different essays in the volume. Following those paths necessarily triggers a critical review of established positions and perspectives. Ultimately, the reader may acquire the substance of an European common core of constitutional traditions and hence attain the longed-for broader perspective. This volume can therefore be deemed an exercise of comparative legal history. Comparative legal history is the study of external and/or internal aspects of law necessarily undertaken across different time periods and jurisdictions.³ A comparative legal historical study needs to comply with both requirements: a study of an aspect of the law in at least two different time periods and at least in two different jurisdictions. Comparative legal historical studies require research across the vertical and horizontal axes, accordingly. It should be noticed that the circulation of ideas can only be fully grasped by using a comparative legal historical approach.⁴ The approach followed in the volume subscribes to these ideas.

The first chapter deals with the Swiss experience in two essays. The first⁵ essay deals with democracy in nineteenth-century Switzerland and the emergence of its current constitutional basis. A number of stops are made in that path, and a point of inflection is 1815 with the coming into force of the Federal Treaty. That document offered a “contract” amongst cantons and was then replaced by the 1848 constitution. The volume there starts to offer perspectives on the ideas of different actors: a trait of the entire volume, where names of actors and their activities offer an enriching context. Alexis de Tocqueville is one of those first actors, while Pellegrino Rossi is another fundamental player. The path continues with an exegetic approach to the 1848 constitution and is also embedded in comparative remarks. Finally, the author points that Europe could benefit from looking, *mutatis mutandis*, at the Swiss federation experience. The second⁶ essay deals with the principle of representative democracy: one of the pillars of the already mentioned 1848 constitution. That text and the total revision of 1874 aimed to achieve unity and modernity without destroying the premodern Swiss patrimony. And again, actors (eg, Tocqueville and Rossi) and events (eg, civil war) are present, which together offer the context for the development of the text. The idea of representative democracy seemed to be the best for radicals and liberals during the years that followed the 1848 constitution. Later, beyond the foundational period in Switzerland, representative democracy offered a plurality of functions that were not originally envisioned. The two essays in this chapter present an early constitutional experience and remind readers that there is much more than the *Sonderfall* when studying the Swiss path.

The second chapter deals with the Belgian experience also in two essays. The first⁷ essay refers to the Belgian “laboratory” when studying

³ Id, 31.

⁴ Id, 31-32.

⁵ “Costituzioni e federalismo nella Svizzera del XIX secolo. Note sui caratteri originari della democrazia”, 17-48.

⁶ “Una “mobile complessità”: l’istituzione parlamentare, la democrazia rappresentativa e i “diritti popolari” nella Svizzera post-quarantottesca”, 49-73.

⁷ “La costituzione belga del 1831”, 77-114.

constitutionalism. That testing ground starts with the 1831 constitution, and is followed by experiences in 1893, 1920-1921, and the more radical reform of 1993. The 1831 text is of paramount importance when studying constitutionalism, both in Belgium and beyond; since it was used as a model by a number of jurisdictions and was influenced by some important precedents. This first essay reflects—similarly to the introductory essay—that the adoption of a foreign legal idea makes the recipient its new owner: there is a re-invention that takes place in that “laboratory.” The essay notes that the 1831 text resulted from the 1830 Revolution and from the creation of a new state; and that was the institutional pillar on which an independent Belgium was constructed. The essay includes a rich exegetic analysis of the 1831 text, preceded by an account of its gestation. Lacchè refers to that text as a “constitutional mosaic” (94) due to the number of transfers that took place in that “laboratory.” The second⁸ essay offers a comparative approach to the 1831 Belgian experience by looking at France during the first half of the nineteenth century. There the 1814 and 1830 texts joined the Belgian expression as continental models and offered an inventory of the constitutional forms that could define the different relations between the monarchical and representative principles. Yet, Lacchè alerts that the use of models is not blind and that comparative legal history aims to find the particularities of each path. The author hence includes comparative explorations, such as the English experiences that crossed the Channel, when unveiling the genealogy of the French “laboratory” (150). Several actors are present, and the attention is primarily to Benjamin Constant de Rebecque (perhaps the most mentioned actor in the volume), since they aimed to fill the *lacuna* that the different texts presented. The essay finally analyses the Belgian path, from the 1830 Revolution to the 1831 text, and its merits by means of an exegetic approach to its articles. It notes that Belgians learnt from the French path, and that ultimately the 1831 text presented a compromise between moderates and conservatives. The chapter succeeds in highlighting that paths in the neighbouring states had their own particularities that help better understand the evolution of constitutionalism in Europe.

The third chapter deals with the French experience, this time in six essays. The first⁹ essay deals with a fundamental actor in the shaping of European constitutionalism: the Coppet Group. That network of intellectuals was active in expressing their ideas; and it comprised, amongst others, Madame de Staël, Jean de Sismondi, and Jacques Necker. Lacchè is guided in this path by the writings of the already-mentioned Constant, and aims to unveil the images of a liberal constitutional state as carved in the ideas of the Coppet Group. The essay effectively conveys that constitutionalism cannot be fully grasped without exploring the actions of that group. The second¹⁰ essay deals with granted constitutions, which had their heydays during the first half of the nineteenth century. The author notes that granted constitutions could serve as links that “preserve ancient forms of sovereignty alongside post-revolutionary innovations”

⁸ “Constitución, Monarquía, Parlamento: Francia y Belgica ante los problemas y “modelos” del constitucionalismo europeo (1814–1848)”, 115-198.

⁹ “Coppet et la percée de l’Etat libéral constitutionnel”, 201-226.

¹⁰ “Granted Constitutions. The Theory of *octroi* and Constitutional Experiments in Europe in the Aftermath of the French Revolution”, 227-257.

(229). The path guides readers along a number of constitutional texts even beyond France, hence being of a comparative legal historical nature. The essay also shows that there is contamination in the flow of ideas, repeating the wording of the introductory essay. The third¹¹ essay addresses the guarantee of the constitution, hence the preservation of the constitutional *machine*. Lacchè brings again enriching and sometimes naturally contradicting perspectives from multiple authors, mainly Emmanuel-Joseph Sieyès, Antoine C. Thibaudeau, and as expected, Constant. The merits of political and judicial guarantees of the constitution are pointed, together with the ideas of the different actors. The fourth¹² essay offers a study of the already-mentioned 1814 and 1830 texts in light of the representative government and the parliamentary principle. The author appeals once more to the “laboratory” that those two nineteenth-century French experiences offer; and he is far from neglecting contemporary writings by, amongst others, Prosper Duvergier de Hauranne and the recurrent Constant. Readers are therefore able to experience the French path through the eyes of these authors. The fifth¹³ essay continues exploring the French path and the establishment of a parliamentary model. A number of intellectuals reappear in this essay and the dichotomies between tradition and change and also between rational and historical constitutions are present in the context of the two *Chartes*. It is possible to perceive the nineteenth century as a fertile ground or “laboratory” for rationalization experiments and for parliamentarism. The final¹⁴ essay focuses on an actor and an event: the actor being Pierre-Louis Roederer and the event being his publication of a well-circulated pamphlet. The actor produced a pamphlet (and then a reaction to statements made by Jean-Pierre Pagès) in which he put forward the imminent threats to the fundamentals of the Orleans monarchy and that disrupted its institutional form. These related to the form of government, the royal prerogative, and the “parlamentarisation” of the constitutional system. Lacchè takes again this opportunity to look into other jurisdictions (eg, England), keeping alive the comparative legal historical approach of the volume. The author also takes opportunity to depict the context offered by the July Monarchy during which the events addressed in this essay took place. The third chapter is able to show that constitutionalism is not shaped after only one occurrence, and that during the period subject to study multiple events and actors triggered the different mutations.

The fourth chapter, being the most extensive, deals with the Italian experience. The first seven essays guide readers through a number of notions, events, and actors that shaped constitutionalism in the Italian Peninsula. The first¹⁵ and second¹⁶ essays address fundamental aspects of constitutionalism: the

¹¹ “La garanzia della Costituzione. Riflessioni sul caso francese”, 259-302.

¹² “Governo rappresentativo e principio parlamentare: le *Chartes* francesi del 1814 e 1830”, 303-327.

¹³ “La razionalizzazione ottocentesca: il problema dell’affermazione del modello parlamentare nell’età delle *Chartes*”, 329-354.

¹⁴ “«Gouverner n’est point administrer. Régner est encore autre chose que gouverner». Le retour d’un vieillard: P.-L. Roederer et le problème du «gouvernement» pendant la Monarchie de Juillet (1835)”, 355-377.

¹⁵ “Responsabilità ministeriale”, 381-390.

¹⁶ “L’ordine costituzionale liberale nel XIX secolo. Fondamenti e caratteri”, 391-405.

evolution of the responsibility of public servants and the presence of liberalism, respectively. The English experience is there an “inevitable point of reference” (384), as are other comparative experiences. Further, the writings of Italian intellectuals (eg, Gian D. Romagnosi, Vittorio E. Orlando) and members of the Coppet Group are likewise needed to guide readers through the Italian path. Italy, as other jurisdictions, cannot be studied as a water-tight compartment: the context has to be extended beyond borders. The third¹⁷ and fourth¹⁸ essays focus on the work of Giuseppe Pisanelli and Attilio Brunialti, respectively. The first actor, drafter of Italian codes, offers a “practical” approach to constitutionalism and to the importance of unity. The second actor, law professor and member of congress, points to the value of comparative and historical approximations when unveiling the weaknesses and strengths of the Italian system. The fifth¹⁹ essay attends the transplantation of models, being a recurring topic in the volume as noted in the introductory essay. *Myths* can develop around the adoption of models, such as with the French model in Italy. The activities of multiple Italian intellectuals—mainly Orlando—enable Lacchè to show how scholars approached or departed from a model according to their different needs. The sixth²⁰ and seventh²¹ essays explore the notion of public opinion. The first account develops during the Italian *Risorgimento* and incorporates ideas of multiple intellectuals from Italy and beyond, some already present in the volume, such as Constant and other members of the Coppet Group. Ideas circulate, and that account is a prime example of their permeability. The second account traces the path in the mutations of the notion of public opinion, which in Italy started to be perceived since the second half of the nineteenth century. Lacchè offers an exquisite catalogue of authors and their ideas, placing them in clusters to fully understand the shifts in perception.

The remaining six essays of the fourth chapter offer additional approaches to the Italian experience. The eighth²² essay introduces the social constitutionalism of the turn of the century by looking at Angelo Majorana. The author offers a “snapshot” (509) of that actor and his ideas, placing him in a context, also looking beyond Italian borders, and highlighting that Majorana embraced law and sociology. The ninth²³ essay touches upon liberty during the period 1848-1948. Lacchè presents three *declinations* or ways of being of liberty; and, as in other essays, builds his account on solid ground: comparative remarks and writings of leading intellectuals (eg, Brunialti, Francesco Ruffini, Piero Calamandrei). The tenth²⁴ essay attends the turn of the century, and the transition from the reforms

¹⁷ “Il “discorso” costituzionale nell’opera di Giuseppe Pisanelli”, 407-425.

¹⁸ “Il potere giudiziario come «potere politico» in Attilio Brunialti”, 427-445.

¹⁹ “Argumente, Klischees und Ideologien: Das „französisches Verwaltungsmodell“ und die italienische Rechtskultur im 19. Jahrhundert”, 447-465. The author of this review is indebted to Lotte M. Schmidt de Parise for her assistance with the German language.

²⁰ “L’opinione pubblica nazionale e l’appello al popolo: figure e campi di tensione”, 467-487.

²¹ “Per una teoria costituzionale dell’opinione pubblica. Il dibattito italiano (XIX sec.)”, 489-508.

²² “Lo Stato giuridico e la costituzione sociale. Angelo Majorana e la giuspubblicistica di fine secolo”, 509-532.

²³ “Il nome della libertà. Tre dimensioni nel secolo della Costituzione (1848–1948)”, 533-552.

²⁴ “La lotta per il regolamento: libertà politiche, forma di governo e ostruzionismo parlamentare. Dalle riforme Bonghi al regolamento Villa del 1900”, 553-575.

by Ruggero Bonghi to the regulations by Tommaso Villa. The activities of parliament were affected by the new context and Italian actors came into scene as expected, with necessary references to the ideas of Sidney C. Sonnino and Antonio Ferracciù, amongst others. Constitutionalism is indeed not static, as correctly claimed earlier by Lacchè in the introductory essay of the volume. The eleventh²⁵ essay deals with a seminal 1906 court decision that paved the way for the right of women to vote. This account takes Lodovico Mortara as the main actor, looking at his life, ideas, and efforts. The path followed by Mortara portrays him as a jurist-interpreter that could be seen as a “cautious adjuster” (611) of the law, a much needed role in those times of transition. The twelfth²⁶ essay offers a brief account of the first fifty years of the Italian Constitutional Court by focusing on seminal aspects of constitutionalism. The pragmatism of the Court is highlighted, as is the important role played by judges and assistants. After all, the Court is the guardian of the constitution and the principles it encapsulates. The final²⁷ essay returns to the constitutional text and to the idea of a polyptych that can be observed and studied from different angles. This account invites for interdisciplinary approaches to the study of the object, stating that a historical approach can offer enriching and needed perspectives. This final account is a renewed call to the use of comparative legal historical approximations. The chapter succeeds in showing readers that in-depth approaches to specific jurisdictions unveil a combination of local gestation and circulation of foreign ideas, and that this combination eventually triggers mutations in constitutionalism.

The fifth and final chapter deals with the current European perspective and with the value of comparative constitutional history in two essays. The first²⁸ essay presents constitutionalism as a new *Ius commune*, an idea that was already presented by Lacchè in the introductory essay of the volume. This new *Ius commune* would be a “manifestation of common values” (687) that would benefit from a comparative legal historical approach. Comparative legal historical explorations would help to identify individualities within the framework offered by a multicultural Europe. That early step would then assist in reaching a certain degree of universality that respects particularities: a respect that can only be reached by means of the awareness that results from acquiring knowledge. This new *Ius commune* must therefore protect particularities and individualities, while seeking for harmonization. The final²⁹ essay of the volume puts forward that challenge of reconciling unity and diversity. Again, that challenge is especially appealing for comparative legal historians since “a return to the past” (701) might help decipher unity within the existing diversity. This approach could result in reaching broader perspectives and bringing together different mentalities. This final essay was published soon after the failure of the European constitution

²⁵“Personalmente contrario, giuridicamente favorevole». La “sentenza Mortara” e il voto politico alle donne (25 luglio 1906)”, 577-616.

²⁶ “Il limite, la garanzia, l’arbitro. La Corte e il costituzionalismo”, 617-637.

²⁷ “Il tempo e i tempi della Costituzione”, 639-656.

²⁸ “Europa *una et diversa*. A proposito di *Ius commune europaeum* e tradizioni costituzionali comuni”, 659-687.

²⁹ “The Italian Constitutional Tradition and the Debate around a European Constitution”, 689-706.

project, yet its postulates are still applicable in the current European scenario. The essays in this fifth chapter excel in restating the value that history and comparative law have when looking at something as current and fundamental as constitutionalism in Europe.

History & Constitution includes a very useful index of authors that assists readers in navigating through the different essays. A thematic index would have been beneficial, as would have been the inclusion of more internal cross-references between essays, since some themes naturally tend to repeat. Finally, the inclusion of English language abstracts would have been a useful tool since contributions are in five languages.

This volume by Lacchè is an important contribution to the existing literature on constitutionalism and on comparative legal history. Readers are provided with a broader context that offers tools to fully understand the roots of European constitutionalism. In addition, the erudite presentation of events and actors turns the volume into a *vademecum* for constant reference when looking at constitutionalism during the nineteenth and twentieth centuries. It should be repeated that law is a social science that is subject to mutation, and that the actors that trigger those changes can be often identified. This volume enrolls in the efforts that are being undertaken by several scholars and research institutes to reconstruct the activities of the main actors behind those changes. These studies help attain a rich legal and cultural repository for future studies since they also develop valuable contexts. The volume ultimately shows that there were common paths followed in the constitutionalism of the different jurisdictions and that looking into different events and actors proves that cross pollination occurred, occurs, and will hopefully continue occurring in the future.

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