Citation

Crossing boundaries. Comparative constitutional history as a space of communication*

Luigi Lacchè
University of Macerata

Abstract
This paper deals with comparative constitutional history seen as a specific and relevant field of comparative legal history approach. We need to transcend the disciplinary divide between comparative constitutional history and other disciplines in social sciences studying the same set of phenomena. This vision may prove to be helpful also in dealing with the notions of “constitutional heritage” and “common constitutional traditions”. In fact, comparative constitutional history, in a transnational perspective, can perhaps help us to better decipher two very important issues in our own times: first of all, assessing the identity and the constitutional substance of a European living common core of constitutional traditions; second, considering constitutional history as a useful tool to address different levels of global constitutionalism and new trends of governance. In this paper I wish to highlight in particular three aspects. First of all, I have in mind the need to place the object of the research within a transnational and international context; second, the belief that comparative legal history can be seen as an approach more consistently oriented towards the interdisciplinary dimension; finally, a deeper and more original perception as regards relations between time and space.

Keywords
Comparative constitutional history, comparative legal history, constitutional heritage, common constitutional traditions

SUMMARY: 1. The theme: the historical comparison of constitutional phenomena. 2. Common constitutional traditions and comparative constitutional history. 3. For a critical approach to comparative constitutional history. 4. Conclusion. Bibliographical references

1. The theme: the historical comparison of constitutional phenomena

In this contribution I consider comparative constitutional history, treating it as a specific and challenging field that we can connect profitably to the wider debate on “comparative legal history”. In some respects the methodological connection between history and comparison is deeply rooted. “Comparatists and legal historians are both travellers: the one in space, the other in time. By necessity, both always look beyond present borders and boundaries, including those of our national legal systems, themselves products of past and place”. It is easy to comprehend Frederic William Maitland’s statement that “history involves comparison”, but also, according to Gino Gorla, its reverse - “comparison involves history”. To repeat this once again may be to lapse into banality but the issue is serious. With regard to constitutional “phenomena” during the 1930s, the Russian scholar Boris Mirkine-Guetzévitch insisted on the need to combine more effectively the historical and comparative methods through the use of comparative constitutional history. He sought to forge a simultaneous comparison in time and in space.

* I have revised my paper adding the endnotes. I wish to thank Professor Dr. Alain Wijffels for his kind invitation and for the wonderful hospitality.

3 “Comparatist has to look at the law with eyes similar to those of the historian”, Gorla, G., “Diritto comparato”, in Enciclopedia del diritto, Milano, 1964, XII, p. 932.
Today – in a highly diverse global perspective - comparative constitutional history can help us to better understand, among other things, the dialectic unity / diversity that is at the heart of the arduous European integration processes. Between the nineteenth and the twentieth centuries to compare historically was one of the ways to (think to) strengthen or “invent” national identities. Today it seems to us more appropriate and useful to “deconstruct” these histories, going beyond boundaries, de-nationalising them. It makes true sense in a world that we consider to be based on legal diversity and on relational networks. We are by now far away from the traditional Eurocentric vision. Post-colonial beliefs have been overcome and Western legal orders are no longer dogmas.

This point of view tends naturally to demystify the excessively simplified use of “general” typologies, models and clichés. Elisabeth Zoller’s claim for new conceptual foundations of comparative constitutional law is even more valid for comparative constitutional history. We need to transcend the disciplinary divide between comparative constitutional history and other disciplines in social sciences studying the same set of phenomena. This vision may prove to be helpful also in dealing with the notions of “constitutional heritage” and “common constitutional traditions”. In fact, comparative constitutional history, in a transnational perspective, can perhaps help us to decipher better two very important issues in our own times: first of all, assessing the identity and the constitutional substance of a European living common core of constitutional traditions; second, considering constitutional history as a useful tool to address different levels of global constitutionalism and new trends of governance.

In a workshop on comparative legal history held at the University of Lund in 2009, its participants had the opportunity to compare and evaluate some existing teaching experiences of legal history. “The acceptance of the invitation to this workshop demonstrated the need for legal historians to discuss how to handle the concepts of time and space in relation to law in our time when legal education and its curriculum are discussed and changed – more frequently than ever”. Kiell Modéer pointed out the contrast between certain major changes in recent decades (for example, the end of the “cold war”; the expansion of international law; post-colonial migrations; the development of the concept of human rights) tending towards “globalization” and “polycentrism” and, on the other side, the traditional monolithic image of national legal systems. “From a legal science perspective is developed an increasing schizophrenia between the national homogeneous monolithic legal system and its identity within the legal community on one hand and the claims from the diasporas on the other. In that respect we all are aware of the current conflicts between

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10 See Lacchè, L., History & Constitution. Developments in European Constitutionalism: the comparative experience of Italy, France, Switzerland and Belgium (19th-20th centuries), Frankfurt am Main, 2016.
secular and religious legal systems within family law. How to handle multiculturalism is an essential part of the discussions for this workshop12.

What comparative legal history emphasizes in this “new” phase is the “systemic” need to overcome a conception of law based first and foremost on national boundaries. Among the “challenges”13 there is the need to overcome persistent historiographic nationalism and the “geographical segregation” of legal history. In this sense, comparative constitutional history can make an important contribution14 to the current “renaissance” of comparative constitutional studies in search of a more coherent and convincing methodological design and clearer epistemological foundations15.

In this paper I wish to highlight only three aspects of this historiographic trend16. First of all, I have in mind the need to place the object of the research within a transnational and international context; second, the belief that comparative legal history can be seen as an approach more consistently oriented towards the interdisciplinary dimension; finally, a deeper and more original perception as regards relations between time and space.

“What are – asked Pietro Costa – the improvements a ‘spacing history’ affords to the frame of the instruments of the historical research? How can a better awareness of spatial and temporal coordinates sharpen the cognitive instruments of the historian?”17. The spatiotemporal “revolution” emphasized by the dynamics of globalization raises new questions for legal historians also. A “spacing history” solicits the design of new intellectual tools18. But bearing in mind the profound changes that are taking place at a global level does not entail, as has rightly been observed, the abandonment of the traditional perspective of regional and local studies. These latter are fundamental and indeed gain further importance if interconnected with a broader dimension.

2. Common constitutional traditions and comparative constitutional history

It is within this highly stimulating debate19 that we should place the “field” of comparative constitutional history. Indeed, constitutional history, considered as a “particular” space of

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13 Ibbetson, D., “The Challenges of Comparative Legal History”, Comparative legal history, 1 (2013), pp. 1-2: “Just as an understanding of the modern law cannot but benefit from knowing how things are done elsewhere, and beyond that from a sophisticated comparison between different systems, so an understanding of legal history can only benefit from a transcending of national or systemic boundaries”.
15 See widely R. Hirschl, Comparative Matters.
19 For further developments and remarks I have to refer to Lacché, “Sulla Comparative Legal History e dintorni,” cited in fn . 16.
communication, can help us to reflect on developments within a European legal culture of constitutionalism. What is the relationship between legal traditions, their national roots and the concern to go "beyond the particularisms"? Does the comparative history of law allow us to recognize in the long term the shared foundations of normativities that are necessary to ensure that a comparison can be realized?

One thing is certain: we are concerned here with a field of legal history that is particularly involved with the concept of legal tradition. As is well known, from the 1960s the Court of Justice of the European Communities has built up an argument regarding the constitutional traditions common to member States. Its judicial decisions Stauder (1969) and above all Internationale Handelsgesellschaft (1970) inaugurated this trend. The Court of Justice referred to general principles inspired by «constitutional traditions that are common to member States», thus generating a series of decisions focused on the protection of fundamental rights. The CJEU has drawn - facing up to some constitutional courts (German, Italian…) that consider fundamental rights to be part of the essence of the constitution - from both the European Convention on Human Rights and the common constitutional traditions of the EU Member States in outlining, as autonomous, the rights-standard applied at the supranational level.

It was in the ambit of principles and “common constitutional traditions” (CCTs) that it was possible to discern a “new common ground”, and this on two levels: on the one hand, a “heritage” that consolidated the past and which was therefore rooted primarily in national traditions, and on the other a space of communication, which made it possible to look to the future independently of the evolution of law as defined by treaties or, from another perspective, by a Constitution-Treaty. This tilling of the ground, and this task of highlighting the “common constitutional heritage” offered a stimulating prospect. It is a “technique” that has been maintained even after the coming into force of the Lisbon Treaty and, consequently, of the Charter of Fundamental Rights of the European Union. The common constitutional traditions are essentially based on the constitutionalism of the post-war period. They bear witness to the problem, at one and the same time, of two opposing movements, integration and conflict between what is “common” to the European State members and the different national peculiarities. Europe as a community ruled by law – over several decades - has integrated in different phases and steps countries with differing backgrounds, after the Second War (for example, victorious states and defeated states) or, after the fall of the Berlin Wall, states with different political, social and legal orders. In 2002 the President of the Convention on the Future of Europe, the former President of France, Valéry Giscard d’Estaing, in his opening address (26 February) defined as a condition for the success of the draft the identification of «a concept of unity for our continent and respect for its diversity». This was to acknowledge a primordial tension in the very identity of Europe. The dialectic between what unites and what divides, the

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search for political form, the identification of common values and principles are thus elements that should be brought to the fore.

In this context, history and constitutional comparison have in fact had the capacity to make a meaningful contribution. The concrete prospect of a *ius commune of constitutionalism* could not flourish, however, without a more complex, articulated and rigorous analysis of common traditions, especially in the light of the enlargement of the Union to include countries that had only recently been able to welcome the fundamental values and principles of a constitutional state. The “formula” CCTs posed the problem of identifying two different dimensions: the dimension of historical tradition and the common dimension. Popular sovereignty, rule of law, State of law, constitutional rigidity, the inviolable character of fundamental liberties, judicial review and the reinforced role of judges should serve as some of the benchmarks of those traditions.

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We can also remember two important projects funded by the European Research Council: “Europe between Restoration and Revolution, National Constitutions and International Law: an Alternative View on the Century 1815-1914” (2009–2014); „ReConFort, Reconsidering Constitutional Formation. Constitutional Communication by Drafting, Practice and Interpretation in 18th and 19th century Europe“, 7th Framework Programme, “Ideas”, ERC-AG-SH6 - ERC Advanced Grant - The study of the human past, Advanced Grant No. 339529, principal investigator Prof. Ulrike Müßig. Amongst the journals focused on (comparative) constitutional history, see *Historia Constitucional. Revista electrónica* ([http://constitucion.rediris.es/revista/hc/index.html](http://constitucion.rediris.es/revista/hc/index.html)), published since 2000 in Oviedo, Spain, and the *Journal of Constitutional History / Giornale di storia costituzionale*, six-monthly review, founded at the University of Macerata in 2001 ([www.storicostituzionale.it](http://www.storicostituzionale.it)); available full-text the years 2001-2013.

The legal historian Francisco Tomàs y Valiente, president of the Spanish Constitutional Court, assassinated in 1996 by Basque terrorists, had spoken in the 1980s about constitutionalism as a new *ius commune*. Once the legal tradition having originated in the Middle Ages had entered into crisis during the eighteenth century “because of its incapacity for constitutional evolution”, a new path founded on the idea of constitution and constitutionalism began to take shape. In this way we encounter two different levels: on one side, we may discern a process consolidating the heritage of the past, linked above all to national and local traditions, on the other side, the new “space of communication” between the constitutional traditions common to member States. Martin Krygier has reflected on the concept and the language of legal tradition. In this sense, «we use the language – he observed - of a (legal) tradition when we attempt to describe how [the] legal past is relevant to the legal present. It is about the power of the past-in-the-present».

Hence, the ascertaining of a tradition is something very complex and, as Wojciech Sadurski remarked – it is always a matter of reconstruction. “And we ‘reconstruct’ it for some purposes. Hence, these purposes guide our efforts, and making them clear may help us avoid the twin dangers of selectivity and platitude. Using the language of tradition is necessarily a pragmatic exercise: it is done for some purposes, and these purposes inform the shape of a tradition that we are reconstructing”.

3. For a critical approach to comparative constitutional history

We can say then that CCTs or, in other respects, “common constitutional heritage” have been used in the last few decades to define and construct a “new” relationship with the European legal system but they cannot be seen as a sort of “telos”, the inexorable goal of European (legal and constitutional) history. It is true that “common bases are not a matter of fact, we need to construct them”. They are useful because they urge us to reflect on these issues but our aim here is...
different; we need to transcend these notions because we want to make history and hence to contextualize critically constitutional phenomena. CCTs correspond also to the idea of the “invention of tradition”, a “storytelling” of CJEU to legitimate its action and to safeguard rights and harmonise legal systems in the absence, at the beginning, of any Charter of Fundamental Rights. It is a “functional” notion that we can consider only as a problematic concept stimulating a critical approach.

So, the concepts of “common constitutional heritage” and CCTs are to be confronted - passed through the sieve, I would say - with those, for example, of pluralism and complexity.

In this direction, comparative constitutional history 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 of constitutional history is about 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. Sometimes we chance to read that in a constitution a significant proportion of its articles are copied from texts or principles coming from other nations. But what does it mean to transpose or copy certain articles? It is evident that to copy really means to invent or to reinvent. Texts move, they are compared and also “copied” and yet every text becomes specific and “original” once again, because contexts, circumstances, times, places, authors, factors change every time. 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. This approach can serve to avert the ever-present risk of anachronism.

32 “Just as the talk of a “common constitutional tradition” or of European constitutional values, the notion of European constitutional identity has a rather limited use. Although it may help us deepen our all understanding of what we, as Europeans, have in common, and what constitutional structures prevail in our continent, we should be careful not to extend this discussion upon the constitutional debate about the level of integration within the EU. The two discourses should be kept separate because linking them is based on a faulty understanding of the practical implications of the construction of European constitutional identity” (Sadurski, W., European constitutional Identity?, p. 22).


Constitutions are “place-specific” experiences. They are always “original”, as we have observed, even when they appear to be largely “copied” from other texts. The ideology of the constitution may even lead the “constituency” to take a foreign constitution as its own constitution. This was the case with the Italian “political movements” in 1820-1821 (Naples and Piedmont) that led to their assuming the Spanish Constitution of Cadiz (1812) as the principal model when affirming the newborn and ephemeral constitutional regimes.

In March 1848 the King of Sardinia Charles-Albert granted the so-called Statuto albertino. This is the constitution that was a controversial part of Italian history for a century. It is an act of sovereign will closely depending on the movements of the liberal ruling class and above all on the nascent Risorgimento. So, in many respects the Albertine Statute is something very peculiar. But that is not all. We need to consider the Statuto albertino in a wider context, appealing thereby to the category of the “granted constitutions”. Using this category – with a comparative and transnational objective – we can reflect better on the key-elements common to many constitutional experiences during the first half of the nineteenth century. The French Charte constitutionnelle, the German Frühkonstitutionalismus, the Brazilian/Portuguese Charters of 1824 and 1826, and the Italian “Statuti” (and especially the “Statuto” granted in March 1848 by the King of Sardinia) represent only the most famous constitutional documents of this European historical period. At the European/LatinAmerican level we can see that this kind of constitution is something more than simply a transitional phenomenon, or an ‘interval’ (albeit an important one) between the idea of the eighteenth-century constitution based upon the constituent power of the people and the complete future realization of democratic constitutionalism in the course of the twentieth century.

In this example, we have to go “beyond the particularisms” and we move from observing the tree to considering the whole forest. And through the category “granted constitutions” we are better able to understand the single constitution. We realize then that some national experiences share common key-elements. Monarchical constitutionalism is not a weak concept between two “strong times”, the constitutional revolutions of the seventeenth and eighteenth centuries and the democratic constitutionalism of the twentieth century.

At a European level the Albertine Statute becomes part of a wider and more complex phenomenon marked by the conflict between tradition and change, reform and revolution, old words and new concepts. We can also see, in the relevant concrete experiences, that constitutional evolution and the process of parliamentarization are not altogether straightforward. This approach allows us to


reflect on the general importance – and not only the national or particular one - of such basic categories as nation-building, popular and national sovereignty, constitutional monarchy, the rule of law, public opinion and so on. We can say that only through this continuous entanglement of specific and “general” aspects can we truly hope to address a particular topic. It is easy enough to remark that comparative constitutional history – meaning here the building up of our research topics with a broader point of view – can really help us to study more fruitfully and in greater depth specific national experiences, thereby opening them up to more far-reaching inquiries.

4. Conclusion

This approach is useful in rethinking the standards and canons of constitutional history. Normally, the tendency is to refer, as “models”, to experiences that are “strong” and at the centre of the stage. The “peripheries” – in the last analysis, whatever does not accord with predefined standards – remain outside. So “The legal historical agenda, or menu, is set by the centre, which can sometimes be irritating to colleagues working outside the core countries”. Conversely, we need a wide and complex idea of (constitutional) culture, able to integrate the different elements, and to render the relationship between “general” and “particular” genuinely “osmotic” and fruitful.

Comparative constitutional history is not an optional addition to national constitutional histories. Constitutional history is changing and we can only hope to glimpse certain trends or paths depending on new global perspectives. “It is uncertain where the path leads to. But we definitely can say that the times of national constitutional histories are over. This is especially true insasmuch as it means going beyond national and sometimes self-referential histories. Comparative constitutional history has to be “transnational”, building up its research objects in

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40 Lacchè, L., History & Constitution. Developments in European Constitutionalism: the comparative experience of Italy, France, Switzerland and Belgium (19th-20th centuries), passim.
41 “A much more serious problem is that the heavily centralised agenda of comparative legal history works, despite what I just said, for the benefit of the periphery – and for its benefit only. The agenda forces the peripheral legal historians to consider how their legal past differs from the centre’s legal past, but it rarely forces the centre to rethink their own legal histories from a larger perspective”, Pihlajamäki, H., “Comparative Contexts in Legal History: Are We All Comparatists Now?”, in Maurice, M. and Heirbaut, D. (eds.), The Method and Culture of Comparative Law. Essays in Honour of Mark Van Hoecke, Oxford and Portland, 2015, pp. 126-127; this work was also published in Seqüência (Florianópolis), n. 70, p. 57-75, jun. 2015 (available at http://www.scielo.br/scielo.php?script=sci_arttext&pid=S2177-70552015000100057). See also Pihlajamäki, H., When small is beautiful: teaching comparative legal history in the periphery, in Modéer, K. Å. and P. Nilsén (eds.), How to teach European Comparative Legal History, pp. 39-45.
45 “Legal histories may continue to tend to be located within nations; but nations have to be located in a transnational context, and to be understood in a rounded way” (Cairns, J. W., “National, transnational and European Legal Histories: problems and paradigms. A Scottish perspective », Clio@Thémis. Revue électronique d’histoire du droit, 5 (2012), p. 13, http://www.cliothemis.com/Clio-Themis-numero-5.1,” Continuing research on our own legal tradition has even greater importance if transnational legal historical scholarship has to function, as such scholarship relies on integrating different traditions. Thus, we have to revisit and reconstruct our past and repeatedly renew our connection to it for a successful transnational dialogue on fundamental issues: A Global Legal History needs local legal histories and the analytical traditions corresponding”, Duve, T., “German Legal History: National Traditions and
such a way as to accord value to the dynamics/dialectic between what is at the national/particular\textsuperscript{46} level and what is at the inter-national/general level. This means opening up legal history to an approach able to forge connections, links, relations rather than hierarchies and mere influences or transfers. A new constitutional “connectography”\textsuperscript{47} should be privileged because maps and navigational instruments have changed. Comparative constitutional history may plausibly be viewed as one of the most fruitful fields in which to test these ideas and paradigms.

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\textsuperscript{46} On the concept of “local” see Duve, T. (ed.), *Entanglements in Legal History: Conceptual Approaches*, Frankfurt am Main, 2014, [http://dx.doi.org/10.12946/gplh1](http://dx.doi.org/10.12946/gplh1).

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