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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 constitutonal 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"[1]. It is easy to comprehend Frederic William Maitland's statement that "history involves comparison"[2], but also, according to Gino Gorla, its reverse - "comparison involves history" [3]. 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[4]. He sought to forge a simultaneous comparison in time and in space.

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[1] Donlan, S. P., Masferrer, A., "Preface", *Comparative legal history*, 1 (2013), p. III.

[2] Maitland, F. W., *Why the History of English Law is Not Written*, in Fisher H.A.L. (ed.), *The Collected Papers of Frederic William Maitland*, Cambridge, 1911, vol. I, p. 488.

[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.

[4] Mirkine-Guetzévitch, B., "Les methodes d'étude du droit constitutionnel comparé", *Revue internationale de droit comparé*, I, 4 (1949), pp. 397-417; the first chapter of Mirkine-Guetzévitch, B., *Les constitutions européennes*, Paris, 1951.

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[5], de-nationalising them. It makes true sense in a world that we consider to be based on legal diversity and on relational networks[6]. 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[7]. This point of view tends naturally to demystify the excessively simplified use of "general" typologies, models and clichés. Elisabeth Zoller's claim[8] 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[9]. 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[10], 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"[11]. 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 confcts between

[5] About several kinds of boundaries – subject-matter, disciplinary, and geographical – in current comparative law, see Tushnet, M., "The Boundaries of Comparative Law", *European Constitutional Law Review*, 13, I (2017), pp. 13-22.

[6] I follow the conclusions of Wijffels, A., "Legal History & Comparative Law", in Besson, S. and Heckendorn Urscheler, L. and Jubé, S. (eds.), *Comparing Comparative Law*, Geneva – Zurich – Basel, 2017, pp. 202-203.

[7] Wijffels, A., "Le droit comparé à la recherche d'un nouvel interface entre ordres juridiques", *Revue de droit international et de droit comparé*, 2-3 (2008), pp. 230-235.

[8] Zoller, E., « Qu'est-ce que faire du droit constitutionnel comparé? », *Droits*, 32 (2000), p. 134: «Ou bien nous persistons à étudier les systèmes constitutionnels étrangers de manière séquentielle et juxtaposée en nous appliquant à faire des typologies et à construire des modèles par rapport auxquels nous situons avec plus ou moins de bonheur nos propres institutions, ou bien nous attelons à étudier les systèmes constitutionnels, politiques et juridiques étrangers comme nos grands comparatistes – songeons à Montesquieu ou à Tocqueville – savaient les regarder autrefois, de l'intérieur, en eux-mêmes et pour eux-mêmes».

[9] See von Bogdandy, A., "National Legal Scholarship in the European Legal Area— A Manifesto", *International Journal of Constitutional Law*, 10 (2012), p. 624; Hirschl, R., *Comparative Matters. The Renaissance of Comparative Constitutional Law*, Oxford, 2014, pp. 191-192.

[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.

[11] Modéer, K. Å. and P. Nilsén, "Introduction", in Modéer, K. Å. and P. Nilsén (eds.), *How to teach European Comparative Legal History*, Workshop at the Faculty of Law, Lund University 19-20 August 2009, Lund, 2011, p. 9.

secular and religious legal systems within family law. How to handle multiculturalism is an essential part of the discussions for this workshop"[12].

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 contribution[14] to the current "renaissance" of comparative constitutional studies in search of a more coherent and convincing methodological design and clearer epistemological foundations[15].

In this paper I wish to highlight only three aspects of this historiographic trend[16]. 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 tools[18]. 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 debate[19] that we should place the "field" of comparative constitutional history. Indeed, constitutional history, considered as a "particular" space of

[12] Modéer, K. Å., "Is European Comparative Legal History running wild? From function and texts to perspectives and contexts", in Modéer, K. Å. and P. Nilsén (eds.), *How to teach European Comparative Legal History*, Workshop at the Faculty of Law, Lund University 19-20 August 2009, Lund, 2011, p. 14.

[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".

[14] Also in the sense to refine comparison in constitutional studies always more often at the center of the new canons of comparative law depending less on the private law focus. See Muir Watt, H., *Globalization and Comparative Law*, in Reimann, M. and Zimmermann, R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2006, pp. 590-592 and Wijffels, A., "Le droit comparé à la recherche d'un nouvel interface entre ordres juridiques", pp. 235-236.

[15] See widely R. Hirschl, *Comparative Matters*.

[16] For a wider overview see Lacché, L., "Sulla Comparative Legal History e dintorni," in Somma, A. and Brutti, M. (eds.), *Diritto: storia e comparazione. Nuovi propositi per un binomio antico*, Frankfurt am Main, Max-Planck-Institut für Europäische Rechtsgeschichte, Global Perspectives on Legal History, 2018, pp. 245-265.

[17] Costa, P., "A 'spatial turn' for Legal History? A Tentative Assessment", in Meccarelli, M. and J. Solla Sastre (eds.), *Spatial and Temporal Dimensions for Legal History. Research Experiences and Itineraries*, Frankfurt am Main, 2016, pp. 33-34.

[18] See more broadly Meccarelli and Solla Sastre (eds.), *Spatial and Temporal Dimensions for Legal History*, cited in fn n. 17.

[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)[20] 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[21].

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»[22]. This was to acknowledge a primordial tension in the very identity[23] of Europe. The dialectic between what unites and what divides, the

[20] CJEU, 12 november 1969, Erich Stauder / Ville d'Ulm-sozialamt, aff. 29/69; CJEU, 17 December 1970, Internationale Handelsgesellschaft, aff. 11/70.

[21] Torres Pérez, A., *Conflicts of Rights in the European Union, A Theory of Supranational Adjudication*, Oxford & New York, 2009.

[22] "concept porteur d'unité pour notre continent et de respect pour sa diversité". Giscard identified the fundamental problem in the «difficulté de conjuger un fort sentiment d'appartenance à l'Union européenne, et le maintien d'une identité nationale». On this aspect see Cartabia, M., *'"Unità nella diversità": il rapporto tra la Costituzione europea e le costituzioni nazionali',* in Donati F. and G. Morbidelli (eds.), *Una costituzione per l'Unione europea*. Torino, 2006, pp. 185 ss.; Kraus, P.A*., A Union of Diversity. Language, Identity and Polity-Building in Europe*, Cambridge, 2008.

[23] On the very controversial theme of Europe's identity from different points of view, see, amongst many works, Wintle, M., *Culture and identity in Europe: Perceptions of Divergence and Unity in Past and Present*, Aldershot, Brookfield, USA, 1996; Mikkeli, H., *Europe as an Idea and an Identity*, Basingstoke and London, 1998; Cederman, L.-E. (ed.), *Constructing Europe's identity. The external dimension*, London, 2001; De Giovanni, B., "L'identità dell'Europa", in Guerrieri, S. and Manzella, M. and Sdogati, F. (eds.), *Dall'Europa a Quindici alla Grande*

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[24]. 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[25] 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.

Europa. La sfida istituzionale, Bologna, 2001, pp. 19-40; Joyce, Ch. (ed.), *Questions of identity: A Selection from the Pages from* New European, London, 2002; Robyn, R. (ed.), *The Changing Face of European Identity*, London and New York, 2005; Karolewski, I. P. and Kaina,V. (eds.), *European Identity. Theoretical Perspectives and Empirical Insights*, Berlin, 2006; Sjursen, H. (ed.), *Questioning EU Enlargement. Europe in search of Identity*, London and New York, 2006; Parker, N. (ed.), *The Geopolitics of Europes's Identity. Centers, boundaries, and margins*, Basingstoke, 2008; Checkel, J.T. and Katzenstein, P. J. (eds.), *European identity*, Cambridge, 2009; Kastoryano, R. (ed.), *An Identity for Europe. The Relevance of Multiculturalism in EU construction*, Basingstoke, 2009; Breen, M. J. (ed.), *Values and Identities in Europe. Evidence from the European Social Survey*, New York, 2017.

[24] Amongst the volumes that over the last twenty-five years have brought into focus the question of constitutional history on a European scale I refer - considering only collective works - to Schulze, R. (ed.), *Europäische Rechts- und Verfassungsgeschichte. Ergebnisse und Perspektiven der Forschung*, Berlin 1991; the volumes by Romano, A. (ed.), *Alle origini del costituzionalismo europeo*, Messina 1991; *Enunciazione e giustiziabilità dei diritti fondamentali nelle Carte costituzionali europee. Profili storici e comparativi*, Milano, 1994; *Il modello costituzionale inglese e la sua recezione nell'area mediterranea tra la fine del '700 e la prima metà dell'800*, Milano, 1998; research work promoted by Schiera, P. and M. Kirsch, *Denken und Umsetzung des Konstitutionalismus in Deutschland und europäischen Ländern in der ersten Hälfte des 19. Jahrhunderts*, Berlin, 2000; *Verfassungswandel um 1848 im europäischen Vergleich*, Berlin, 2001; Manca, G. and W. Brauneder, *L'istituzione parlamentare nel XIX secolo. Una prospettiva comparata*, Bologna, Berlin 2000; Manca, G. and L. Lacchè, *Parlamento e costituzione nei sistemi costituzionali europei ottocenteschi*, Bologna, Berlin 2003; Dippel, H. (ed.), *Executive and Legislative Powers in the Constitutions of 1848-49*, Berlin, 1999; Brandt, P. and Kirsch, M. and Schlegelmich, A. (eds.), *Handbuch der europäischen Verfassungsgeschichte im 19. Jahrhundert. Institutionen und Rechtspraxis im gesellschaftlichen Wandel, I: Um 1800*, Bonn, 2006; Walker, N. (ed.), *Sovereignty in transition. Essays in european law*, Oxford and Portland, 2006; von Bogdandy, A. and P. Cruz Villalon, P. H. Huber, *Gründlagen und Gründzuge staatlichen verfassungsrechts*, vol. I of the *Handbuch Ius Publicum Europaeum*, Heidelberg, 2007; Loughlin, M. and Walker, N. (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, Oxford, 2007; Daum, W., Brandt, P., Kirsch, M., Schlegelmich, A. (eds.), *Handbuch der europäischen Verfassungsgeschichte im 19. Jahrhundert. Institutionen und Rechtspraxis im gesellschaftlichen Wandel, 2:1815-1847*, Bonn, 2012; Grotke, K. L. and M.J. Prutsch, *Constitutionalism, legitimacy, and power: nineteenth century experiences*, Oxford, 2014; Koskenniemi, M. and Stråth, B. (eds.), *Europe 1815-1914: creating community and ordering the world*, Helsinki, 2014; Müßig, U. (ed.), *Reconsidering Constitutional Formation. I. National Sovereignty. A Comparative Analysis of the Juridification by Constitution*, Springer, 2016; Müßig, U. (ed.), *Reconsidering Constitutional Formation. II Decisive Constitutional Normativity. From Old Liberties to New Precedence*, Springer Open, 2018.
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), 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.storiacostituzionale.it: available full-text the years 2001-2013).

[25] On the question of defining common constitutional traditions from the point of view of the identities of European peoples, v. Pinelli, C., "Le tradizioni costituzionali comuni ai popoli europei fra apprendimenti e virtù trasformative", *Giornale di storia costituzionale*, 9, I (2005), pp. 11-20.

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""[26], 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»[27]. 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"[28].

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[29] 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"[30]. They are useful because they urge us to reflect on these issues[31] but our aim here is

[26] Tomás y Valiente, F., "El «ius commune europaeum» de ayer y de hoy", *Glossae. Revista de Historia del derecho europeo*, 5-6 (1993-1994), pp. 13-14; Tomás y Valiente, F., *Constitución: escritos de introducción historica*, with an introduction of B. Clavero, Madrid, 1996. See Clavero, B., *Tomás y Valiente. Una biografía intelectual*, Milano, 1996; Clavero, B., Tomás y Valiente, storico costituzionale inedito, in Romano, A., *Il modello costituzionale inglese*. For further insights see Lacchè, L., "Europa una et diversa. A proposito di ius commune europaeum e tradizioni costituzionali comuni" and "The Italian Constitutional Tradition and the Debate around a European Constitution", now in Lacchè, L., *History & Constitution*, pp. 659-687 and 689-706.

[27] Krygier, M., "Law as Tradition", *Law and Philosophy*, 5, 2 (1986), pp. 237-262.

[28] Sadurski, W., European constitutional Identity?, *European University Institute Working Paper Law*, 33 (2006), p. 5.

[29] On the problem of "common constitutional traditions" as "sources of law" and general principles of Community law forming the common core of the unwritten "European Constitution" see Pizzorusso, A., *Il patrimonio costituzionale europeo*, Bologna, 2002; Pizzorusso, A., "Common constitutional traditions as Constitutional Law of Europe?", *Sant'Anna Legal Studies*, 1 (2008).

[30] von Bogdandy, A., "Alla ricerca di basi comuni della cultura giuspubblicistica europea: un esercizio per funamboli provetti", in Torchia, L. (ed.), *Attraversare i confini del diritto.* Giornata di studio dedicata a Sabino Cassese, Bologna, 2016, p. 10.

[31] "Broadly speaking, then, the search for constitutional traditions implies a search for the cultural traditions of a particular society, but, in concrete, the widening of the field of research to all those phenomena that can be tied to the notion of culture would end up by dissolving this reference through over-generality. In concrete, the traditions that are taken into consideration here are in fact mainly those that appear to be able to translate into "general principles of Community law" in the sense that this is described above. To single out a criterion by which to limit the notion examined here it is thus necessary to develop, on the one hand, the meaning of the term "constitutional" and, on the other, to evaluate the range of the limit deriving from the expression "common to the Member States" (of the Union) which can be considered as more or less equivalent to the term "European", and which constitutes the other description of the "traditions" recalled in Art.6, no.2 of the EC Treaty" (Pizzorusso, A., *Common constitutional traditions as Constitutional Law of Europe?*, p. 11).

different[32]; 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"[33], 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[34]. 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[35]. 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).

[33] On this topic see Hobsbawm, E. and Ranger, T. (eds.), *The invention of tradition*, Cambridge, 2012 (1983). It is important to underline that the CCTs reference was not based on a real comparative constitutional history approach: see Cozzolino, L., "Le tradizioni costituzionali comuni nella giurisprudenza della Corte di giustizia delle Comunità europee", in *La Corte costituzionale e le Corti d'Europa*, Convegno dell'Associazione dei costituzionalisti, 2002, http://www. associazionedeicostituzionalisti. it/materiali/convegni/copanello020531/cozzolino.html

[34] Belvisi, F., '"Common Constitutional Traditions" and the Integration of EU', *Diritto e Questioni pubbliche*, 6 (2006), pp. 30-33.

[35] Varela Suanzes-Carpegna, J., "L'histoire constitutionnelle: quelques réflexions de méthode", *Revue française de droit constitutionnel*, 68 (2006), p. 676.

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[36]. In March 1848 the King of Sardinia Charles-Albert granted the so-called *Statuto albertino*[37]. 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"[38]. 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

[36] See Colombo, P., "La costituzione come ideologia. La rivoluzione italiana del 1820-21 e la costituzione di Cadice", in Portillo, J.M., *La Nazione cattolica. Cadice 1812: una costituzione per la Spagna*, Manduria, 1998, pp. 129-157; Corciulo, M. S., *Una Rivoluzione per la Costituzione. Agli albori del Risorgimento meridionale (1820-'21)*, Pescara, 2009; Corciulo, M.S., "La Costituzione di Cadice e le rivoluzioni italiane del 1820-21", *Le Carte e la storia*, VI (2011), pp. 18-29; Corciulo, M.S., "Costituzionalismo (1820-21)", in *Dizionario del liberalismo italiano*, Soveria Mannelli, 2011, I, pp. 293-300.

[37] On this constitutional text see, amongst the most recent works, Guastapane, E., "Lo Statuto albertino. Indicazioni bibliografiche per una rilettura", *Rivista trimestrale di diritto pubblico*, XXXIII, 3 (1983), pp. 1070-1093; Pene Vidari, G.S., "Lo Statuto albertino dalla vita costituzionale subalpina a quella italiana", *Studi Piemontesi*, 2 (1998), pp. 303-314; Ulrich, H., *The Statuto Albertino*, in Dippel, H. (ed.), *Executive and Legislative Powers*; Casana, P., *Le costituzioni italiane del 1848-'49*, Torino, 2001; Rebuffa, G., *Lo Statuto albertino*, Bologna, 2003; Colombo, P., *Con lealtà di Re e con affetto di padre. Torino, 4 marzo 1848: la concessione dello Statuto albertino*. Bologna, 2003; Soffietti, I., *I tempi dello Statuto albertino. Studi e fonti*, Torino, 2004; Fioravanti, M., *Per una storia della legge fondamentale in Italia: dallo Statuto alla Costituzione*, in Fioravanti, M. (ed.), *Il valore della costituzione. L'esperienza della democrazia repubblicana*, Roma-Bari, 2009, pp. 3-40; Ferrari Zumbini, R., *Tra norma e vita. Il mosaico costituzionale a Torino 1846 e 1849*, Roma, Luiss University Press, 2016.

[38] On this theme we refer to Lacchè, L., "Granted Constitutions. The Theory of octroi and Constitutional Experiments in Europe in the Aftermath of the French Revolution", *European Constitutional Law Review*, 9/II (2013), pp. 285-314. See also Ferreira, O., "Les équivoques du "constitutionnalisme octroyé": un débat transatlantique", *Historia Constitucional*, 16 (2015), http://www.historiaconstitucional.com, pp. 67-131.

reflect on the general importance – and not only the national or particular one - of such basic categories as nation-building, popular and national sovereignty[39], constitutional monarchy[40], 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 enquiries.

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"[41]. Conversely, we need a wide and complex idea of (constitutional) culture[42], 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"[43]. This is especially true insasmuch as it means going beyond national and sometimes self-referential histories[44]. Comparative constitutional history has to be "transnational"[45], building up its research objects in

[39] See Lacchè, L., "The Sovereignty of the Constitution. A historical Debate in a European perspective", *Journal of Constitutional History*, 34, II (2017).

[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.

[42] Cf. Sunde, J. Ø., "Legal Cultures Changes in Europe. Teaching Future Prospects on the Basis of Legal History and Comparative Law," in Modéer, K. Å. and Nilsén, P. (eds.), *How to teach European Comparative Legal History*, pp. 49-57; Sunde, J. Ø., *Live and Let Die: An Essay Concerning Legal-Cultural Understanding,* in Maurice, M. and Heirbaut, D. (eds.), *The Method and Culture of Comparative Law*, already cited above.

[43] Stolleis, M., "Concepts, models and traditions of a comparative European constitutional history", *Journal of Constitutional History*, 19, 1 (2010), p. 53.

[44] See Vec, M., "Vergleichende Verfassungsgeschichte. Historiographische Perspektiven", *Rechtshistorisches Journal*, 20 (2001), pp. 90-110.

[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 perpective », *Clio@Thémis. Revue électronique d'histoire du droit*, 5 (2012), p. 13, http://www.cliothemis.com/Clio-Themis-numero-5.)."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[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"[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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[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.

[47] For this concept see Khanna, P., *Connectography. Mapping the Global Network Revolution*, Weidenfeld & Nicolson, 2016.

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