

COMPARATIVE CONSTITUTIONAL LAW

concerning § 3 I Constitutional history of modern times at a glance

Diagram 1

Milestones in constitutional history

Precursors		
Year	Denomination and special features	Importance
1231	Constitutions of Melfi (Sicily) - codification of rules on royal administration, the court system and court procedures, aiming for efficiency and rationality	<ul style="list-style-type: none"> • first basic legal order of a state after the fall of the Roman Empire
since middle age	Leges fundamentales - written basic rules concerning the organisation of rulership and the relation between ruler and Estates - usually agreements between ruler and Estates - ruler was bound and could not change rules unilaterally	<ul style="list-style-type: none"> • binding the ruler to positive law • common in Europe for several centuries
England a the time of Cromwell		
Year	Denomination and special features	Importance
1653	<u>Instrument of Government</u> - not only moderating but establishing rulership (constituting the ruling institutions) - executive power with "Lord Protector" and "State Council"	<ul style="list-style-type: none"> • basic legal order of England as a (short-time) republic • first written constitution of a state of modern times (first constitution in the sense of constitutional theory)
North America after independence		
Year	Denomination and special features	Importance
since 17th century	Colonial Charters [until independence] - leges fundamentales issued by the King of England	<ul style="list-style-type: none"> • basic legal orders for individual North American colonies
1776	<u>Virginia Bill of Rights</u> - similar bills in Pennsylvania, Maryland and North Carolina	<ul style="list-style-type: none"> • first positivation of fundamental rights
1776/77	First state constitutions in North America - in the former colonies - free and democratic constitutions (fundamental rights catalogues, sovereignty of the people, separation of powers, limitation of public power)	<ul style="list-style-type: none"> • impetus for development of constitutionalism in Europe
1787/88	<u>Constitution of the United States of America</u> ¹ - sovereignty of the people of the unification state ("We, the People of the United States...") - enumeration of the federal legislative competences - fund. rights catalogue added with 1 st to 10 th Amendment (1791) - development of sophisticated theory during ratification discussion by the <u>FEDERALISTS (MADISON, HAMILTON, JAY)</u>	<ul style="list-style-type: none"> • first constitution of a modern federal state • impulse, model and standard for development of constitutionalism in Europe
1803	<u>US Supreme Court, decision in the case Marbury v. Madison</u> - postulation of the primacy of the constitution and the right of the courts to review the constitutionality of laws	<ul style="list-style-type: none"> • often quoted historical elucidation of an essential basis of constitutionalism²

¹ No constitution: the Articles of Confederation of 1777/81 (international treaty establishing a confederation).

² Note that in Germany the doctrine of the primacy of the constitution only became prevalent after the Second World War!

France during and after the French Revolution		
Year	Denomination and special features	Importance
1789	<p><u>Déclaration des droits de l'homme et du citoyen</u></p> <ul style="list-style-type: none"> - proclamation with universal claim - initially only programmatic character (not legally binding)³ - preservation of human rights as objective of the state (art. 2) - sovereignty of the nation [people] (art. 3) - commitment to comprehensive liberty ("to do anything that does not harm others", art. 4) - the law as expression of the general will ["volonté générale"] (art. 6) - guarantee of fundamental rights and separation of powers as necessary characteristics of any constitution (art. 16) 	<ul style="list-style-type: none"> • first European proclamation of important fundamental values of the free and democratic constitutional state • has made the ideas of the French Revolution popular in Europe • art. 16 postulates a position that is still upheld by many constitutionalists in Europe⁴
1791	<p>Constitution of 1791</p> <ul style="list-style-type: none"> - less than one year in force - Déclaration of 1789 included (as binding constitutional law) - still a monarchy but based on the sovereignty of the people - discussion of theoretical foundations of modern constitutionalism in ABBÉ SIEYES' pamphlet "Qu'est-ce que le Tiers Etat?" (1789) 	<ul style="list-style-type: none"> • model for many constitutionalist movements in Europe
1793	<p>Constitution of the year I (Constitution montagnarde)</p> <ul style="list-style-type: none"> - adopted by referendum but not entered into force - with more egalitarian approach, new declaration of human and citizen rights and rather weak, republican executive power 	<ul style="list-style-type: none"> • first republican constitution
1795/99	Constitutions of the years III and VIII	
Poland at the time of the French Revolution		
Year	Denomination and special features	Importance
1791	<p>Polish Constitution of 1791</p> <ul style="list-style-type: none"> - even before the French ... - monarchy but sovereignty of the people and separation of powers 	<ul style="list-style-type: none"> • provoked intervention of Russia, Prussia and Austria that led to partition of Poland
Important European constitutions of the 19th and 20th century (selection)		
Year	Denomination and special features	Importance
1814	<p>France: Charte constitutionnelle</p> <ul style="list-style-type: none"> - imposed monarchical constitution 	<ul style="list-style-type: none"> • model constitution for constit. monarchy
1849	<p>Germany: Constitution of the German Reich (Frankfurt Constit.)</p> <ul style="list-style-type: none"> - drafted in the <i>St. Paul's Church</i> in Frankfurt by a national assembly on the basis of the constituent power of the people - was rejected by the King of Prussia (who was supposed to become German Emperor) and did not enter effectively into force - concept of the Reich as a democratic German federal state with separation of powers between Emperor and Reichstag - innovative, comprehensive catalogue of fundamental rights - Reichsgericht (Reich's Court) with functions of a constitutional court, including individual fundamental rights complaint 	<ul style="list-style-type: none"> • first free and democratic German constitution • important source of inspiration for the Weimar Constitution and the Basic Law
1871	<p>Constitution of the German Reich (Bismarck Constitution)</p> <ul style="list-style-type: none"> - mixed const. of the German Empire combining monarchical and democratic elements 	<ul style="list-style-type: none"> • constitution of the German national state until 1918

³ Note: Under the Constitution of 1958, the Declaration, read together with the preamble of the Constitution, is part of the French constitutional law (cf. Conseil constitutionnel, decision 71-44 DC of 16.07.1971).

⁴ While many scholars consider these elements characteristics of the type of a *free and democratic* constitution, many others maintain that a document missing one of them (as the Indonesian Constit. of 1945 until 2000) is not a constitution at all.

1919	<p>Constitution of the German Reich (Weimar Constitution)</p> <ul style="list-style-type: none"> - the Reich as a free and democratic republican federal state - destructive non-confidence vote (caused instability) - elements of plebiscitary democracy - strong position of elected President of the Reich, including right to dissolve Reichstag and to take dictatorial emergency measures - State Court with limited constitutional jurisdiction - long part on heterogeneous fundamental rights which were conceived as non-binding programmatic principles 	<ul style="list-style-type: none"> • first German republican constitution • first German free and democratic constitution entering effectively into force • conceptual flaws fostered crisis of German parliamentarism
1949	<p>Basic Law for the Federal Republic of Germany</p> <ul style="list-style-type: none"> - a constitution <i>for the West German state</i>, enacted by adoption by the parliaments of the West German Länder - the Federal Republic as a free and democratic republican social federal state based on the rule of law, with human dignity as highest fundamental value - only constructive vote of no-confidence - concept of defensive democracy - fundamental rights as directly binding law - comprehensive jurisdiction of the Federal Constitutional Court, including remedy of individual constitutional complaint 	<ul style="list-style-type: none"> • the most successful constitution in German history; has been maintained after the German reunification 1990 • has for many decades strongly fostered the identification of the citizen with the state (→ constitutional patriotism) • a source of inspiration for constitutional design in South and East Europe and for constitutional theory
1958	<p>France: Constitution of the Fifth Republic</p> <ul style="list-style-type: none"> - semi-presidential system with strong position of the President of the Republic and also of the Prime Minister (various → "cohabitations") - preventive constitutional review by Conseil constitutionnel - Déclaration des droits de l'homme et du citoyen of 1789 part of the "bloc de constitutionnalité" (recognized by Conseil const. in 1971) 	<ul style="list-style-type: none"> • prevailing constitution • not popular in the past
2004	<p>Treaty establishing a Constitution for Europe</p> <ul style="list-style-type: none"> - culmination of a decades-long debate about a European constitution - did not enter into force after rejection in referenda in France and the Netherlands (2005) - fundamental reform of the European Union and its institutions - integration of the Charter of Fundamental Rights as const. law 	<ul style="list-style-type: none"> • first constitution of an organisation based on public international law • some elements have later been incorporated into the Treaty of Lisbon