

## CONSTITUTIONALISM IN EUROPE

Contribution to the course *Constitutional Law* from a comparative perspective

concerning § 2 VI Milestones in constitutional history

### Diagram 1

#### The most important milestones in constitutional history

<b>England a the time of Cromwell</b>		
Year	Denomination and special features	Importance
1653	<u>Instrument of Government</u> - establishing the rulership (constituting the ruling institutions) - executive power with "Lord Protector" and "State Council"	<ul style="list-style-type: none"> <li>• basic legal order of England as a (short-time) republic</li> <li>• first constitution in the sense of const. theory</li> </ul>
<b>North America after independence</b>		
Year	Denomination and special features	Importance
1776	<u>Virginia Bill of Rights</u>	<ul style="list-style-type: none"> <li>• first positivation of fundamental rights</li> </ul>
1776/77	First state constitutions in North America (in the former colonies)	<ul style="list-style-type: none"> <li>• encouraged constitutionalism in Europe</li> </ul>
1787/88	<u>Constitution of the United States of America</u> - sovereignty of the people ("We, the People of the United States...") - enumeration of the federal legislative competences - fund. rights catalogue added with 1 <sup>st</sup> to 10 <sup>th</sup> Amendment (1791) - development of sophisticated theory during ratification discussion by the <u>FEDERALISTS (MADISON, HAMILTON, JAY)</u>	<ul style="list-style-type: none"> <li>• first constitution of a modern federal state</li> <li>• impulse, model and standard for development of constitutionalism in Europe</li> </ul>
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"> <li>• often quoted historical elucidation of an essential basis of constitutionalism</li> </ul>
<b>France during and after the French Revolution</b>		
Year	Denomination and special features	Importance
1789	<u>Déclaration des droits de l'homme et du citoyen</u> - proclamation with universal claim but initially not legally binding - preservation of human rights as objective of the state (art. 2) - sovereignty of the nation [people] (art. 3) - 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"> <li>• first European proclamation of important fundamental values of the free and democratic constitutional state</li> <li>• has made the ideas of the French Revolution popular in Europe</li> <li>• art. 16 postulates a position that is still up-hold by many constitutionalists in Europe<sup>1</sup></li> </ul>
1791	<u>Constitution of 1791</u> - less than one year in force - Déclaration of 1789 included - still a monarchy but based on the sovereignty of the people - discussion of theoretical foundations of modern constitutionalism in <u>ABBÉ SIEYES' pamphlet "Qu'est-ce que le Tiers Etat?" (1789)</u>	<ul style="list-style-type: none"> <li>• model for many constitutionalist movements in Europe</li> </ul>
1793	<u>Constitution of the year I (Constitution montagnarde)</u> - adopted by referendum but not entered into force	<ul style="list-style-type: none"> <li>• first republican constitution</li> </ul>

<sup>1</sup> 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.

<b>Important European constitutions of the 19th and 20th century (selection)</b>		
<b>Year</b>	<b>Denomination and special features</b>	<b>Importance</b>
1814	France: Charte constitutionnelle - imposed monarchical constitution	<ul style="list-style-type: none"> <li>• model constitution for constit. monarchy</li> </ul>
1849	Germany: Constitution of the German Reich (Frankfurt Constit.) - 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 - 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"> <li>• first free and democratic German constitution</li> <li>• important source of inspiration for the Weimar Constitution and the Basic Law</li> </ul>
1871	Constitution of the German Reich (Bismarck Constitution) - mixed constit. of the German Empire combining monarchical and democratic elements	<ul style="list-style-type: none"> <li>• constitution of the German national state until 1918</li> </ul>
1919	Constitution of the German Reich (Weimar Constitution) - the Reich as a free and democratic republican federal state - destructive non-confidence vote (caused instability) - strong position of elected President of the Reich, including right to dissolve Reichstag and to take dictatorial emergency measures - long part on heterogeneous fundamental rights which were conceived as non-binding programmatic principles	<ul style="list-style-type: none"> <li>• first German republican constitution</li> <li>• first German free and democratic constitution entering effectively into force</li> <li>• conceptual flaws fostered crisis of German parliamentarism</li> </ul>
1949	<u>Basic Law for the Federal Republic of Germany</u> - a constitution for the West German state, 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"> <li>• most successful constitution in German history; maintained after the German reunification 1990</li> <li>• has for many decades strongly fostered the identification of the citizens with the state (→ constitutional patriotism)</li> <li>• a source of inspiration for constitutional design in South and East Europe and for constitutional theory</li> </ul>
1958	<u>France: Constitution of the Fifth Republic</u> - 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"> <li>• prevailing constitution</li> <li>• not popular in the past</li> </ul>
2004	<u>Treaty establishing a Constitution for Europe</u> - did not enter into force after rejection in referenda in F. and NL - fundamental reform of the European Union and its institutions - integration of the Charter of Fundamental Rights as constit. law	<ul style="list-style-type: none"> <li>• first constitution of an organisation based on public international law</li> </ul>