The Rationale of Constitutions from a Cultural Science Viewpoint

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A. Introduction

'The rationale of constitutions from the perspective of cultural sciences' is a 'grand', perhaps too grand a subject. It almost seems more suited for the later years of an academic, a 'senior's-project', if you will. This experience, however, does not necessarily guarantee an adequate treatment of the subject. In retrospect and in anticipation of future developments, the subject could hardly be more enticing. With hindsight, there are many great names we can associate in form or content with our subject matter: F. von Lassalle (1862) for instance, or K. Hesse's '*Normative Kraft der Verfassung*' (1959), before him authors that we may justly label 'Weimar Giants' (R. Smend, H. Heller, H. Kelsen and C. Schmitt), and from abroad perhaps Swiss national W. Kägi who described the constitution as the 'legal foundational order of the State' ('*rechtliche Grundordnung des Staates*') (1945). In the present, and with a view to the future, one may rightly speak of a 'new age of constitutionalism'. Ever since the '*annus mirabilis*' of 1989, Eastern Europe has forged a multitude of good constitutional texts. These constitutional texts, along with those from other world regions such as South Africa (1997), or Switzerland with its new *Bundesverfassung* (1999) – as well as excellent cantonal constitutions – have given the idea of constitutions new 'wings', while also lending it substance. Certainly, constitutional *texts* alone

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do not suffice for a good constitution. The possible discrepancy between constitutional *law* and constitutional *reality* is a much debated, classic subject amongst constitutional scholars. Yet, the idea of a constitution reaches much further: there is talk of 'constitutionalism' in International Law, and the idea wanders even further, namely into European Law: from the European constitutional treaties sprang the constitutional law of the European Union, and spread beyond to the pan-European concept of the 'common European constitutional law' of 1991. With regard to South Africa, Afghanistan or Cambodia, the UN and international law 'induce', accompany and guide the 'constitutional development' (D. Thürer, 2005).[1]

In Italy, the subject is particularly up-to-date and enjoys enduring appeal for a wide variety of reasons: the term '*constitutio*' is itself, of course, inconceivable without Italy. The Constitution of 1946 remains exemplary (for instance in Article 3 Sentence 2), in spite of, or indeed because of, the on-going constitutional amendments (as in the matter of 'new regionalism'), and great constitutional scholars such as C. Mortati, V. Crisafulli[2] or C. Esposito, to name only the departed, who have contributed much to this – our – subject decades ago. This, along with the special '*genius loci*' of Rome and Amalfi, will do its part towards enriching our convention.

B. 'Constitution' (a Legal Positivist Inventory)

Let us approach this thing, 'constitution', through an inventory, so that we may then ascertain its purpose, its 'function'. Written constitutions (which also serve legal certainty) have over time developed certain structural components: they typically open with preambles (partially with references to God, *invocatio dei* or *nominatio dei*) written in celebratory style, akin to cultural science overtures and preludes, seeking to set the tone of the work and establish[3] crucial principles in order to assert an identity (i.e. symbolic articles). Typically, this is followed by two sections – one on fundamental rights guarantees and one on state organisation –, while a colourful, but no less important assortment of concluding and transitional provisions

1 Daniel Thürer, *Kosmopolitisches Staatsrecht*, vol. 1, (2005), 8.

2 On him, see Damiano Nocilla, 'Crisafulli – ein Staatsrechtslehrerleben in Italien', Jahrbuch des öffentlichen Rechts 44 (1996), 255.

3 Peter Häberle, 'Präambeln im Text und Kontext von Verfassungen' in: Johannes Broermann, Joseph Listl and Herbert Schambeck (eds), *Demokratie in Anfechtung und Bewährung, Festschrift für Johannes Broermann*, (1982), 211.

makes the constitution whole. Commonly, the constitution is centred on the state, also referred to as a 'constitutional state', as established through its Constitution. Only recently has the term constitution been expanded to European or even International Law, as indicated above. Sticking to the formal aspects: within the section on state organisation, where the state entities such as parliament, government, the administrative bodies and the courts are constituted (organisational function of the constitution), one may also find the procedures for constitutional amendments (in a rich array of variants) and seldom (exemplary in Switzerland) procedures for drawing up an entirely new constitution (with or without participation of the people) – altogether nuanced attempts by constitutions to accommodate the passage of 'time'.

Let us move on to substance: the 'genus constitutional state' is the cultural achievement of many centuries and of a collection of classical texts[4] from Aristotle via Montesquieu and Rousseau, to the Federalist Papers (1787) and H. Jonas's 'Principle of Responsibility' ('*Das Prinzip Verantwortung*') in environmental law. The constitutional state, while often encountered in several (domestic) variants, can nonetheless be presented in an idealised version of its foundations and individual elements: a human rights regime, growing ever more nuanced in scope and subject matter, a (pluralistic) party democracy, separation of powers, an identity (as in the articles on state symbols, such as national anthems), mission statements, such as the rule of law ('*Rechtsstaat*'), the social state, the cultural state and more recently the environmental state, and often a vertical separation of powers (federalism and regionalism). For a modern constitutional state, constitutional entities such as constitutional courts are common. They have their origins in the USA in 1803, were later established in Europe by Austria (1920) and have gone on to an unprecedented, near global triumph in the decades after 1945 and 1989 respectively. Over time, new subject matters (protection of minorities, ombudsmen, subsidiarity clauses and pluralism articles) have been added: so called 'Europe-Articles' (such as Article 23 of the German Basic Law and Article 7 Section 5 of the Portuguese Constitution, which codify a piece of 'national European constitutional law') or manifestations of the 'cooperative constitutional state' (Article 24 German Basic Law: Openness towards International Law ['friendliness' towards International Law], for instance in support of human rights, international security, conflict resolution and justice; see also Article 7 of the Portuguese

4 Peter Häberle, *Klassikertexte im Verfassungsleben* (1981).

Constitution of 1976, and the earlier example of Article 11 of the Italian Constitution).

C. The German Understanding of Constitution

1. Domestic

Even though the debate over constitutional reform in Italy has thus far not yielded a political result, the dividends of the academic discussion will remain influential in the future and should be observed closely throughout Europe.[5] For now, however, let us turn (only) to the German responses to the question of how the constitutions of constitutional states are to be understood. A priori assumptions and methodology are strikingly varied in Germany on this subject, particularly so during the Weimar Republic (*editor's note: hereinafter referred to as 'Weimar'*). There is an abundance of theories on the 'correct' understanding of written constitutions, their functions and characteristics in contrast to other areas of law, such as traditional Private Law or International Law. The following passage can only provide a cursory overview. A truly complete picture would require inclusion of the specific achievements of the Italian constitutional scholarship, such as C. Mortati's doctrine of the substantive constitution (1946)[6] or G. Zagrebelsky's paper on the '*diritto mite*' (1st edition 1992), as well as A. Paces '*La causa della rigidità constituzionale*' (2nd edition 1996) or P. Ridola's work on pluralism[7] and A. D'Atenas publications on regionalism or the principle of subsidiarity.[8] Equally, the constitutional debates in the USA, as well as in France,[9] would have to be integrated; the same goes

5 See for instance: Associatione Italiana die constituzionalisti, La Riforma Constituzionale, Atti del Convegno Roma, 6-7 Nov. (1998, 1999); Sergio P. Panunzio (a cura di), *I Constituzionalisti e le Riforme* (1998); Sergio P. Panunzio (*a cura di*), *Constituzionaliste e L'Europa* (2002); Giuseppe de Vergottini, *Diritto Constituzionale Comparato* (6th edn, 2004).

6 On this, see Fulco Lanchester (ed.), *Constantion Mortati, Constituzionalista calabrese* (1989).

7 Paolo Ridola, *Democrazia pluralistica e libertà associative* (1987).

8 Antonio D'Atena (*a cura di*), *Federalismo e regionalismo in Europa* (1994). Most recently, *L'Italia verso il 'federalism'* (2003).

9 On this, see Constance Grewe and Hélène Ruiz Fabri, *Droits constitutionnels européens* (1995).

for the lively discussions in Switzerland[10] or in Portugal (G. Canotilho).[11] Spain's constitutional scholarship is also currently 'in bloom'.[12]

Germany is characterised by a particularly intense struggle over the question of what a 'constitution' is and the following keywords will hopefully allow for an initial orientation: while for F. von Lasalle (1862) the nature of a constitution lies in the 'actual distribution of power' ('*tatsächlichen Machtverhältnissen*'), G. Jellinek, in his grand work '*Allgemeine Staatslehre*' (1900), describes the constitution as a mere 'statute with enhanced formal binding force' ('*Gesetz mit erhöhter formeller Geltungskraft*'). From this alone, we can ascertain that individual attempts to describe this genus 'constitution' have often only succeeded in formulating half-truths: a constitution is certainly *also* a statute with enhanced formal binding force, in so far as it may only be amended with a qualified majority through a formalised procedure of constitutional amendment (as in Article 79 paragraph 1 and paragraph 2 German Basic Law, Article 138 of the Italian Constitution),[13] but this mere formal perspective does not suffice: With a view to subject matter and function, a 'constitution' has considerably more to offer.[14]

'Dwarfs upon the shoulders of giants'– this famous prable is, in my view, particularly suited to describe the relationship of German constitutional

10 On this: Kurt Eichenberger and Jean-François Aubert, *La Constitution son contenue, son usage* (1991); Beat Sitter-Liver (ed.), *Herausgeforderte Verfassung* (Universitätsverlag Freiburg 1999); Peter Saladin, *Die Kunst der Verfassungserneuerung* (1998); Daniel Thürer (n. 1).

11 See José J. Gomes Canotilho, *Direito Constitucional* (5th edn, 1991).

12 See only Francisco Balaguer-Callejon, Gregorio Cámara et al. (eds), *Derecho Constitucional*, 2 vols, (1999) (2nd edn, 2005); Pedro Cruz Villalón, *La curiosidad del jurist persa, y otros studios sobre la Constitucion* (1999). From the impressive ibero-american constitutional world: Garcia Belaunde and Fernández Segado (eds), *La Jurisdiccion Constitucional en Iberoamerica* (1997); César Landa Arroyo, *Tribunal Constitucional y Estado Democratico* (1999) (2nd edn, 2004); Paulo Bonavides (see the publication *Direito Constitucional Contemporaneo* (2005), dedicated to him); Diego Valadés, *Constitución y democracia* (2000); Valadés, *El control del Poder* (1998); Eduardo Ferrer Mac-Gregor, *Interpretación Constitucional*, 2 vols (2005); Gilmar F. Mendes, *Direitos Fundamentailis e Controle de Constitutionalidad*, 3rd edition (2004); Gilberto Bercovici 'Die dirigierende Kraft der Verfassung und die Krise der Verfassungslehre am Beispiel Brasiliens', VRÜ 37 (2004), 286 ff.; Hector Fix-Zamudio and Salvador Valencia Carmona, *Derecho Constitucional Mexicana y Comparata* (2001).

13 On this: Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (2nd edn, 1998), 267.

14 On the term constitution, see Häberle (n. 13), 342 ff. and passim; in contrast, Josef Isensee, 'Staat und Verfassung' in: *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 5 (2nd edn, 1995), 591, assuming a pre-constitutional concept of the state.

scholarship from the German Basic Law (1949) up until the present day with 'Weimar'. As the roaring 1920's in Berlin brought about a blossom of art and science, so have the controversies of the Weimar constitutional scholars raised questions and provided answers which are, even today, 'classics' that have led the younger generations to appear as mere 'dwarfs on the shoulders of giants.' This, of course, does not preclude that by standing on their shoulders, we can at times see further than even the giants could!

With this limitation in mind, let us consider a few positions of the '*Weimarer Richtungsstreit*', so intently followed in Italy (for instance by F. Lanchester).[15] R. Smend's work '*Verfassung und Verfassungsrecht*' (1928) grew influential in its time; it is well known in Italy as 'integration theory' ('*Integrationslehre*') and was even translated. Smend views the state as a process of on-going integration in which flags, coats of arms and national anthems play a part. In retrospect, this view should also be seen as an attempt to combat the regrettable polarization of the political powers in Weimar. C. Schmitt, however, chose an entirely different approach. His work '*Verfassungslehre*' (1928) remains a remarkable achievement, although he develops keywords in other papers that are entirely detrimental to the idea of a constitutional state: his 'decisionistic doctrine' ('*dezisionistische Lehre*') should be mentioned here. It claims that political decisions arise from a 'normative nothing' ('*normativ aus dem Nichts*'), a concept refuted by consultation of comparative law materials alone: one need only recall the pluralism of ideas and interests that, for instance, laid the foundation for the exemplary Constitution of Spain (1978). Additionally, one must mention the dreadful suggestion that politics are defined through a 'friend/foe' paradigm. There are, in my view, under a constitution of pluralism, in an open society, 'rivals' and 'opponents', but in principle, no 'enemies'.

The nationally orientated *Integrationslehre* of R. Smend, which in light of the current state of Europe would certainly have to be recast, reminds us of indispensable community forging, the pacifist function of constitutions, the (to use the modern term) fundamental consensus of a society, which includes all citizens and, for instance, is required to facilitate a majority rule with gradual protection of minorities. H. Heller (1934) reminds us of the importance of 'consciously planned and organised cooperation'

15 Fulco Lanchester, *Momenti e Figure nel Diritto Costituzionale in Italia e in Germania* (1997). From the German scholarship: Manfred Friedrich, *Geschichte der deutschen Staatsrechtswissenschaft* (1997), 320.; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3, 1914-1945 (1999), especially 153.

('*bewussten, planmäßig organisierten Zusammenwirkens*'). However, he decidedly has the nation-state, rather than – as it is necessary these days – the constitution in mind throughout his era-defining work, '*Staatslehre*'. Yet, in a constitutional state, there can only be so much state as the constitution constitutes (R. Smend/A. Arndt).

With regard to the German Basic law, an additional 'constitutional dialogue' ('*Verfassungsgespräch*') developed, with prominent participants. Swiss national W. Kägi (1945) coined the phrase of a constitution being 'a legal fundamental order of a state'. He thus hinted towards a path further pursued at later stage: noteworthy are H. Ehmke (the constitution as 'limitation and rationalisation of power and ensuring a free political life' – '*Beschränkung und Rationalisierung der Macht und Gewährleistung eines freien politischen Lebensprozessess*')[16] and K. Hesse ('the constitution as a legal fundamental order of the polity' – '*Verfassung als Grundordnung des Gemeinwesens*')[17]. In my view, a differentiated understanding of constitutions is necessary which accounts for all their diverse functions. For instance, a constitution is, with regard to mission statements and separation of powers, 'encouragement and limitation' ('*Anregung und Schranke*') (R. Smend), and 'norm and assignment' ('*Norm und Aufgabe*') (U. Scheuner) in relation to the *Rechsstaatsprinzip* and the commitment to other basic values. A constitution has very specific functions: it not only limits and controls the exercise of power (through the judiciary), but also establishes and legitimizes power (through elections). It constitutes procedures for the resolution of disputes (for instance through Parliament), it divides areas of competence and organises institutions charged with determining and specifying particular tasks (along the three state functions). Constitutions establish a (cosmopolitan) liberal state as a 'constitutional state of cooperation' (*kooperativen Verfassungsstaat*) (Article 24 German Basic law, Article 11 Italian Constitution, Art. 49 bis Luxembourg Constitution) as well as a 'constituted society', for example with regard to the so-called third-party effect (*Drittwirkung*) of basic rights and the social state principle. It further allows citizens and groups to identify with the state in keeping with their duty to adhere to the law, through the national anthem and state colours (emotional and rational sources of consensus). In cultural constitutional law ('*Kulturverfassungsrecht*') constitutions (for

16 Horst Ehmke, *Grenzen der Verfassungsänderung* (1953).

17 Konrad Hesse, *Grundzüge des Verfassungsrechts in der Bundesrepublik Deutschland* (20th edn, 1995) (reprint 1999), 10.

instance with regard to educational goals in schools) similarly promote values that culturally ground an open society (such as tolerance, respect for human dignity, sincerity, democratic convictions and environmental consciousness). When viewed on a timeline, a constitution is (also) a public process, in the sense that we can distinguish the following 'sphere triad of the republic' ('*republikanische Berreichstrias*'): the state organisational sphere ('*Staatlich-Organisatorisches*') (of state entities, for example through public hearings), the societal-public sphere ('*Gesellschaftlich-Öffentliches*') (such as trade unions, churches and the media) and the deeply private sphere ('*Höchstpersönlich-Privates*') (such as the freedom of conscience).

The public area is a 'breeding ground for democracy' ('*Quellgebiet der Demokratie*') (*Martin Walser*), although, ever since Hegel, we know that in the court of public opinion everything is concurrently 'true and false' ('*alles Wahre und Falsche*'). First and foremost, however, a constitution is the embodiment of culture. I shall return to this point momentarily.

2. A Constitutional Outlook for Europe – Elements of European Legal Culture

The constitutional controversies mentioned above have reached a point of dramatic urgency in the context of the European integration process, in spite of the dual 'no' from France and the Netherlands respectively (2005). The fundamental question remains: Does Europe have a constitution or does Europe require a constitution? Let us begin with a clarification: one should distinguish between European law in the narrow sense of European Union Law and in the broader sense, which includes the Council of Europe with its current 46 members and the OSCE with its 55 members. This exercise alone demonstrates that we must, on the one hand, ask ourselves what our image of Europe contains in a geographic sense: does Europe include Turkey or those parts of Russia on the Asian continent? On the other hand, a Europe of flexible, open borders must nonetheless be conceived of as a complete whole in a substantive, cultural and legal-cultural sense. Europe was in the past, is in the present and will continue in the future to be literally crafted through specific legal principles, fundamental values and cultural substance.

But let us return to the question on the constitution:[18] In my view, Europe has, when taken in the narrow sense of the European Union, through the Treaties of Rome (1957), the Treaties of Maastricht (1992) and Amsterdam (1997), as well as the Treaty of Nizza (2000), established an ensemble of partial constitutions ('*Ensemble von Teilverfassungen*'), albeit not a complete constitution ('*Vollverfassung*') in the classic sense of a constitutional state, as Europe is indeed not a state. The term constitution, however, must be severed from its traditional, state-centric focus. To that end, the German debate utilizes the concept of the EU as an 'association of states' ('*Staatenverbund*') (German Federal Constitutional Court, BVerfGE 89, 155). My own suggestion draws on the wording and image of a 'developing constitutional community of its own kind' ('*werdenden Verfassungsgemeinschaft eigener Art*'), thereby incorporating W. Hallstein's fortunate concept of a 'community' of Europe. When considering the entirety of substantial and functional development, one finds so much has been achieved in the way of constitutional elements and structures that the EU, or to be precise its 25 Member States, can rightly be referred to as a constitutional community '*sui generis*'. We have a European citizenship, which overlaps the domestic nationality. The Schengen Agreement (1993/95) qualifies the notions of state territory and state sovereignty to a point where the 25 EU member states can no longer refer to each other as 'foreign countries', but rather literally 'friendly countries' ('*Freundesland*'), which is to say, as domestic countries ('*Inland*'). Many subject matters and functions of traditional, national constitutions have been wholly or partially transferred to the 'constitutional community of the European Union': fundamental rights guarantees, which are treated as general principles of community law, alongside the fundamental freedoms of EU law as well as religious freedom and the principle of equal treatment; we recall the *Rechtsstaatsprinzip*, which was heavily expanded through the European

18 Dieter Grimm, *Braucht Europa eine Verfassung?* (1994); Peter Häberle, *Europäische Verfassungslehre in Einzelstudien* (1999); see also the interview with Paolo Ridola, Diritto romano attuale 2 (1999), 185. In general: Gil C. Iglesias, 'Zur "Verfassung" der europäischen Gemeinschaft', Europäische Grundrechtezeitschrift 23 (1996) 125 ff.; Iglesias, 'Gedanken zum Entstehen einer europäischen Rechtsordnung', Neue Juristische Wochenschrift (1999), 1; Wolfram Hertel, *Supranationalität als Verfassungsprinzip* (1999); Ingolf Pernice, 'Der europäische Verfassungsverbund auf dem Weg der Konsolidierung', Jahrbuch des öffentlichen Rechts 48 (2000), 205. Additional references in: Peter Häberle, *Europäische Verfassungslehre* (4th edn, 2006), 37, 76 and so on.

Court of Justice in Luxembourg (Principle of Proportionality, a state duty to protect fundamental rights, state liability, etc.); we recall the democratic structures, even though the 'European public' ('*europäische Öffentlichkeit*') is only slowly developing from a public of the arts and culture towards a European public of politics (overthrow of the Santer-Commission 1999, public scandals in the BSE and Bangemann cases); we further continue to observe public relations deficits (such as the lack of specific European issues during the European Elections 1999 and 2004, the low voter turnout and the widespread ignorance of the critical report by the European Court of Auditors 1999[19]). Moreover, the Separation of Powers, as well as pre-federal and regional elements, require further strengthening within the ensemble of partial European constitutions. If one adds the European Convention on Human Rights,[20] which radiates into the EU, and if one considers the tentative steps towards a social and environmental union, one can immediately grasp a 'constitutional fabric' ('*konstitutionelles Gewebe*') in the EU. The individual elements of a 'constitution' would correspond with the different norm ensembles ('*Normenensembles*') of the EU, such as the fundamental order function ('*Grundordnungsfunktion*') (see the Preamble of Maastricht and Amsterdam), the limitation of power function (through EU parliamentary control and the European Court of Justice), the legitimising function (elections through European citizens) and the consensus-focused, programmatic integration function. Particularly the latter, however, requires a novel approach: R. Smend's integration theory (1928), which is traditionally fixated on the nation state, cannot simply be transferred to 'Europe'. Moreover, the national, state constitutions can no longer achieve 'integration' as they have in the past; in a sense, they only make up partial constitutions, their subject matters and functions having 'shrunk' in a European context. The 'European Germany' of Thomas Mann gains a part of its legitimacy (including that of its 16 states) from and by means of the EU. This equally applies, by way of analogy, to the 25 current EU countries. How the EU can be expected to constitutionally accomplish its indispensable integration program with 28 national (partial) constitutions in the future, is an open question. The Ensemble of 28 national and many supranational partial constitutions may prove too lightly connected.

19 On this, Peter Häberle, *Gibt es eine europäische Öffentlichkeit?* (2000); Häberle (n. 18), 163.

20 On this from the German scholarship: Jochen Abr. Frowein and Wolfgang Peukert, *EMRK-Kommentar* (2nd edn, 1996); Christoph Grabenwarter, *Die Europäische Menschenrechtskonvention* (2003).

'Flexibility' and 'core Europe' are the relevant and problematic key words in this regard.

One should recall that Europe, both in a narrow and partially in a wider sense, already displays six elements of European legal culture ('*europäischer Rechtskultur*') that form the basis of its identity, regardless of written constitutional norms: a mindfulness of more than 2500 years of historical, legal development, which finds its philosophical foundation in ancient Greece, as well as the unsurpassed, detailed legal understanding of the Romans (particularly in Private Law: *Papinian*, *Ulpian*, *Paulus*); along with the contributions of Judaism and Christianity. One is reminded of Cicero, or rather his dialogue '*De oratore*' on the five benefits of history: '*Historia vero testis temporum, lux veritatis, vita memoriae, magistra vitae, nuntia vetustatis.*' The second element of European legal culture is scholarship, the legal doctrine. Whereas it grew from pragmatic, at times ingenious, accomplishments such as the '*condictio*' in the great era of Rome, the reception of Roman law in the Middle Ages saw an increase in efforts towards scholarship.[21] In modern times, this move towards scholarship has grown ever more refined: from I. Kant to M. Weber, it has been promoted and likewise observed. The third element is judicial independence, bound solely by statues and the law, as an expression of the separation of powers, to which were added, in the service of truth and justice, the right to a fair hearing, the principles of effective legal protection and due process. The fourth element is religious and ideological neutrality of the state, in the sense of religious freedom, although certainly individual nations still have very diverse constitutional provisions on religion in place (strictly separated in the Swiss Canton of Neuenburg, while a strong cooperative relationship between church and state still exists in Germany). The fifth element of European legal culture is its diversity and unity. The plurality of national legal systems is a part of the identity of Europe. One need only consider the great differences between the Romanic countries on the one hand and Great Britain on the other, as well as, albeit to a lesser extent, Germany. The particularity and universality of European legal culture shall be named as the sixth element. Some principles lay claim to 'universality', such as human rights, particularly under a Kantian understanding, with the possible addition of the *Rechtsstaatsprinzip*. Everything else, I suggest, is but a part of a regional, European community of responsibility ('*Verant-*

21 Foundational: Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (2nd edn, 1967).

wortungsgemeinschaft'). Certainly, there are special connections to the USA (the Virginia Bill of Rights, the reception of J. Locke and the invention of federalism alone attest to this). Thanks to Spain[22] there are equally strong connections to South America (right up to Colombia, Constitution of 1991). But one should not overlook the vast differences to US legal culture, particularly in criminal law. Possibly eastern Europe must, in the long term, develop the particularities of its own legal culture, without denying its close affiliation to Europe. However, the legal culture must nonetheless be praised for its innovations (such as the protection of minorities).

In the light of the development of a 'common European constitutional law' ('*Gemeineuropäischem Verfassungsrecht*')[23] and the work of the European Constitutional Courts in Luxemburg and Strasbourg, the need arises to specifically Europeanise methods and principles of constitutional interpretation. For instance, the need to develop fundamental rights in a 'common European hermeneutic' ('*Gemeineuropäischer Hermeneutik*') and to incorporate specific European concepts such as the '*effet utile*' or the 'interpretation in conformity with EU law', etc. into a constitutional interpretation process[24] that is currently fixated on the domestic constitution (Europeanisation of the methods of constitutional interpretation – '*Europäisierung der Methoden der Verfassungsinterpretation*').

The general domestic openness towards European law (see BVerfGE 73, 339 ff.) must be resolutely integrated into the European principles and methodologies, even that currently developing in the form of the so-called 'national European constitutional law' ('*nationalem Europaverfassungsrecht*'), such as the amended Europe-Article 23 of the German Basic Law, which still eludes Italy and is expressed in the words of Article 7 paragraph 5 of the Portuguese Constitution:

22 From the Spanish scholarschip: Enrique Bacigalupo, *Principios constitucionales de derecho penal* (1999); Francisco Balaguer, 'Der Beitrag Spaniens zur europäischen Rechtskultur', Jahrbuch des öffentlichen Rechts 52 (2004), 11.

23 Peter Häberle, 'Gemeineuropäisches Verfassungsrecht', Europäische Grundrechtezeitschrift (1991), 261.

24 On methods and principles of constitutional interpretation see my contribution 'Zu Methoden und Prinzipien der Verfassungsinterpretation', Revue Européene de Droit Public 12 (2000), 867 ff.; already a classic: Hesse (n. 17), 20; Horst Ehmke, 'Prinzipien der Verfassungsinterpretation', 20 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 20 (1963), 61; Christian Starck, *Praxis der Verfassungsauslegung* (1994); on the 'effet utile' Rudolf Streinz, *Europarecht* (7th edn, 2006), margin number 444 ff.

> 'Portugal shall make every effort to reinforce the European identity and to strengthen the European states' actions in favour of democracy, peace, economic progress and justice in the relations between peoples.'

This constitutional mission statement anticipated the attempts of the EU to introduce 'Stability Pacts' on the Balkans since 1999. Even Article 54 paragraph 1 of the Constitution of the Canton of Bern is notable in this regard: 'The Canton shall participate in cooperation among the regions of Europe.'

3. Culture

After this rapprochement to the genus 'constitution' – both national and European – we now turn to the, provisionally separated, development of the associated term 'culture'.

a) Keywords on the Matter of 'Culture'

The keywords on this thing, 'culture', must, in the present context all the more happily, begin with Cicero, who was arguably the greatest jurist of roman antiquity.[25] Not all historic-terminological effects of this grand beginning can be further elaborated on here, that would constitute a topic in itself. Nonetheless, we should recall works, such as that of Swiss-born J. Burckhardt's 'Culture of the Renaissance' ('*Kultur der Renaissance*') (1919), as well as those of the likes of cultural sociologist A. Gehlen. There are many classical texts on the term culture, likely throughout all the disciplines of the humanities. We are also reminded of the open controversy whether Mathematics is a natural or a cultural science. In Germany, one train of thought on culture leads to M. Weber. In constitutional scholarship in particular, one again arrives at the Weimar classics, with its 'Giants' R. Smend and H. Heller (1934). The latter coined the keyword of 'fundamental rights as a cultural system' ('*Grundrechte als Kultursystem*' – 1928). To him,

25 From the scholarship: Joseph Niedermann, *Kultur, Werden und Wandlungen des Begriffs und seiner Ersatzbegriffe von Cicero bis Herder* (1941).

we owe the proposition of political science ('*Staatslehre*') constituting a cultural science.[26]

It was only with the advent of the 1970s, and more intensely during the 1980s, that this pioneering work was rediscovered.[27] Today, the term culture appears almost abundant: it is utilized for next to anything ('food culture', 'culture of economics', boxing as 'culture', even in the negative sense of a 'culture of death' as coined by Pope John Paul II.). Culture has turned into an *en vogue*, almost ordinary term, whose scientific value is threatened. This may only be remedied through a restructuring and clarification process, a task particularly suited to jurists.

b) Initial Distinctions

A first rough approximation may be achieved through antonyms. Culture stands against 'nature'. The latter is creation, or rather, the result of evolution. Culture is that which is created by man, *sit venia verbo*: a 'second creation', although there are certainly problems in fringe cases. A jurist of cultural goods is confronted with the following question: are religiously 'occupied' parts of nature, such as trees, in fact cultural simply because certain indigenous peoples attach religious beliefs to them ('spirit of a tree')? I would answer affirmatively, as we similarly speak of 'natural monuments' (see Article 40 paragraph 4 sentence 3 of the Constitution of Brandenburg 1992). We should however retain the principle distinction between nature and culture, even though we are mindful of Goethe's marvellous dictum: 'Nature and Art, they go their separate ways, it seems; yet all at once they find each other.'

Thanks to the so-called 'open culture concept' ('*offene[s] Kulturkonzept[]*'), the genus constitutional state and the scholarship that is continuously developing it, may provide some assistance here, in part due to positive constitutional texts in Europe. Thus, presents itself the aspect of

26 Hermann Heller, *Staatslehre* (1934), 32. From secondary literature: Albrecht Dehnhardt, *Dimensionen staatlichen Handelns* (1996). From other disciplines, see for instance the project *Kulturthema Toleranz. Zur Grundlegung einer interdisziplinären und interkulturellen Toleranzforschung*, Alios Wierlacher (ed.), (1996).

27 Peter Häberle, *Kulturpolitik in der Stadt – ein Verfassungsauftrag* (1979); Häberle, *Kulturverfassungsrecht im Bundesstaat* (1980); Häberle, *Verfassungslehre als Kulturwissenschaft* (1982) (2nd edn, 1998); Udo Steiner and Dieter Grimm, 'Kulturauftrag im staatlichen Gemeinwesen', Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 42 (1984), 7 and 46.

'high culture', in the sense of 'truth, goodness and beauty' in the antique tradition, the Italian humanism and the German idealism, as found in some educational goals of constitutions of the German states (see Article 131 paragraph 2 of the Bavarian Constitution of 1946). The 'folk culture', safeguarded in developing countries as the 'indigenous culture' (see Article 66 of the Constitution of Guatemala of 1985), is a second category. The constitutional state does well not to marginalize them: democracy also thrives on this kind of culture, one need only think of the federalism and regionalism that seek to protect the small, the local home. Alternative and subcultures are a third category. They can provide nourishment for high culture: the Beatles have, after all, turned into classics. We should further mention 'counter cultures' ('*Gegenkulturen*'), such as the former labour movement and today that of the unemployed. Expanding the term 'art' and thus the scope of the freedom of Art ('*Freiheit der Kunst*') (see the open art term – '*offener Kunstbegriff*'),[28] underscores that alternative culture, right up to the boundaries of pornography, must be afforded a chance. In a 'constitution of pluralism' ('*Verfassung des Pluralismus*') an open, pluralistic concept of culture is only consistent. Jurists have often enough, and not solely in criminal law, embarrassed themselves when they rashly rejected the label of 'art' or 'culture' for newer works.

c) Culture in the Constitution: Cultural Constitutional Law

There is a further, particularly dense connection between constitutional law and culture: in the so-called cultural constitutional law. On a plane of internal, regional and global character, a host of examples may be unearthed. One need only think of the international protection of cultural goods, for instance through the UNESCO treaty,[29] and of the European Cultural Convention of 1954. We shall only sketch the national constitutional law in keynote form. We can distinguish between: general cultural state clauses ('*Allgemeine Kulturstaatsklauseln*') as for instance in Bavaria in Article 3 paragraph 1: 'Bavaria is a legal, cultural and social state.' (1946); furthermore, it is worth mentioning the beautiful phrase in Article 40 paragraph 1 of the draft Swiss Constitution by Kölz/Müller (1984): 'Culture serves

28 See with further references Ingolf Pernice in: Horst Dreier (ed.), *Grundgesetz-Kommentar*, vol. 1, (1996), Article 5 III, margin number 16 ff. (2nd edn, 2004).

29 See Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (2nd edn, 1998), 1106 ff.

to remind man of his relationship with his fellow man, the environment and history.' ('*Die Kultur trägt dazu bei, dem Menschen seine Beziehung zu Mitmenschen, Umwelt und Geschichte bewusst zu machen*'),[30] and the more particular cultural state clauses, such as the cultural federalism of Switzerland and Germany, as well as the right to adult education (Article 35 of the Constitution of Bremen of 1947, Article 33 of the Constitution of Brandenburg of 1992). Article 10 of the Constitution of Benin (1990) affords anyone a 'right to culture'. On the plane of fundamental rights, religious freedom, the freedom of art and science may be considered cultural freedoms, as profoundly connected by Goethe: 'He who has science and art, has religion; he who has neither, let him have religion.' ('*Wer Wissenschaft und Kunst hat, hat Religion; wer diese beiden nicht besitzt, habe Religion.*'). The trinity of religion, science and art grounds an open society, creates anew the resources for the development of the constitutional state and renders comprehensible to man and citizens alike the proposition of constitutions as culture. Further tried and tested fields of cultural constitutional law are federalism, thriving especially in Switzerland and in Germany ('cultural federalism' – '*Kulturföderalismus*'), as well as regionalism ('cultural regionalism' – '*Kulturregionalismus*'), the 'little brother' of federalism – which is strongly represented in Spain with its autonomous regions and, sadly, significantly weaker in Italy. Nonetheless, the *Corte* in Rome did cast its vote in favour of Italy's cultural diversity in 1998, through a landmark ruling on the protection of the Ladin language minority. While federalism and regionalism concern themselves with the state 'enclosure' for the cultural diversity of a people, the protection of cultural goods safeguards the creation of culture itself (see the traditional preservation of monuments, for instance in Article 62 of the Hessian Constitution of 1946). Some constitutions offer contributions through creative text passages, as successfully demonstrated, for instance, by the Constitution of Guatemala with its right to 'cultural identity' (Article 58) or Article 6 paragraph 1 of the Constitution of Poland of 1997: 'The Republic of Poland shall provide conditions for the people's equal access to the products of culture which are the source of the Nation's identity, continuity and development.'

In Germany, the so-called 'state-church law' ('*Staatskirchenrecht*') is a special breed of cultural constitutional law (Article 140 German Basic

30 Cited from Jahrbuch des öffentlichen Rechts 47 (1999), 333 (Documents of the Swiss Constitution and draft constitutions). See also earlier documents in Jahrbuch des öffentlichen Rechts 34 (1985), 424.

Law). In my view, this term is, however, particularly questionable: Article 137 paragraph 1 of the Weimar Constitution in conjunction with Article 140 German Basic Law states: 'There is no state church'. This means, in my opinion, that there cannot exist any 'state-church law'. However, both Italy and Germany have indeed developed nuanced constitutional law on religions, which is currently particularly challenged on a European level (keyword: Islam). This leads us to:

d) Cultural Constitutional Law in the EU

The idea of a 'European cultural constitutional law perspective' was first raised in jurisprudence in 1983[31] and from the very beginning referred to the entirety of Europe, including the ECHR and the European Social Charter. The legal positivist keywords of all existent norms in constitutional theory at the time were, among others, the 'cultural public of Europe' ('*kulturelle Öffentlichkeit Europas*'), the 'developing cultural constitution' ('*werdende Kulturverfassung*') of Europe, 'Europe between cultural heritage and cultural assignment' ('*Europa zwischen kulturellem Erbe und kulturellem Auftrag*') (Europe as a cultural process – '*Europa als kultureller Prozess*'), 'cultural fundamental rights as part of the freedom of culture' ('*kulturelle Grundrechte als ein Stück Freiheit der Kultur*'), 'the way towards a multicultural society in Europe as a whole and in its individual states' as well as 'decentralised organisational structures' – the essence of a cultural constitutional law in Europe. To be clear, in 1983 there was no Treaty of Maastricht (1992), nor of Amsterdam (1997) nor Nizza (2000). Nonetheless, these treaties underlined the existence of cultural constitutional law in the EU in a legal positivist sense. A small detour ('*Inkurs*') shall prepare us for the theoretical framework of the upcoming fourth section entitled: 'Constitutions as culture' and at the same time serve to refute the misconception that Europe can be reduced to a mere economic region sustained by the EURO, a Europe without a soul. As much as a European history book, authored at a round table of academics from all European nations, remains a *desideratum* of educators (which, however, exists on a bilateral basis between Germany and Poland), so must the cultural constitutional law of the EU, as well as that of Europe in a wider sense, be unravelled dogmatically in the future.

31 See my contribution 'Europa in kulturverfassungsrechtlicher Perspektive', Jahrbuch des öffentlichen Rechts 32 (1983), 9 ff.

At this point, a few keywords must suffice.[32] Characteristically, the preamble of the Treaty of Maastricht (1992) already hinted at deep cultural layers: for instance, in the words 'solidarity between their peoples while respecting their history, their culture and their traditions' and 'thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world.' (Remark: the term of 'European identity' is already *prima facie* a term from cultural sciences!). Maastricht also pioneered the creation of a cultural constitutional law of the EU, which we shall return to in the discussion of the Treaty of Amsterdam. The *sedes materiae* is formed by Article 151 TEC. Its first paragraph reads:

> 'The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.'

The plurality of national and regional cultures is referenced jointly with the 'cultural heritage'. Such cultural heritage clauses have also found their way into newer, national constitutions and their references to Europe 'as a whole' leave us to unravel this fortunate term in earnest. The term perceives Europe from the perspective of its historical development, but certainly does not exclude an acknowledgment of the extent to which Europe in particular continues to draw from its non-European roots and contributors: one need only think of Arabian culture, which merged into Andalusia and Palermo. Among the cultural action of the Community mentioned in Article 151 paragraph 2 TEC, only the improvements to the 'knowledge and dissemination of the culture and history of the European peoples', the 'conservation and safeguarding of European cultural heritage' and the 'non-commercial cultural exchanges' shall be pointed out here. Those who would forget that Europe developed from and will advance from its culture should recall the cultural diversity clause in paragraph 4: 'The Union shall take cultural aspects into account in its action under other provisions of

32 The scholarship appears to be suddenly abundant: see for instance Georg Ress and Jörg Ukrow, *Kommentar zur Europäischen Union* (1998), Article 128 EGV; Hermann-Josef Blanke, *Europa auf dem Weg zu einer Bildungs- und Kulturgemeinschaft* (1994); Stefanie Schmahl, *Die Kulturkompetenz der Europäischen Gemeinschaft* (1996); Jürgen Schwarze, 'Die Kompetenz der Europäischen Gemeinschaft auf dem Gebiet der Kultur' in: id. (ed.), *Geistiges Eigentum und Kultur im Spannungsfeld von nationaler Regelungskompetenz und europäischem Wirtschafts- und Wettbewerbsrecht* (1998), 125 ff. Additional references in Häberle 2006 (n. 18), 489.

the Treaties, in particular in order to respect and to promote the diversity of its cultures.' – which refers to the often-stressed principle of subsidiarity (see Article 5 TEC). The particular culture clauses of the TEC, for instance regarding general and vocational education, as well as those regarding the youth (Article 149) with the beautiful phrase of the 'the European dimension in education', or those concerning research (Articles 163 et seq. TEC) shall only be briefly acknowledged here.

In closing, let us examine the TEU for statements relevant to cultural science: we read of the 'Union's objectives', for instance its claim to identity on the international plane (Article 2 paragraph 1 TEU), a similar identity clause is also found in Article 6 paragraph 3, requiring the Union to respect the 'national identities' of the Member States. Similarly, invoking the ECHR as part of the 'constitutional traditions common to the Member States' which 'shall constitute general principles of the Community's law', is in itself a mere cultural science fundamental values clause, as much as Article 11 paragraph 1 TEU is a mission statement clause: 'to safeguard the common values, fundamental interests' etc. Paragraph 2 urges the member states to act 'in a spirit of loyalty and mutual solidarity.' These 'spirit-clauses' ('*Geistes-Klauseln*') are themselves a classic element of many constitutional state constitutions and regional constitutional documents.[33]

Certainly, 'the spirit goes, where it will' ('*der Geist weht, wo er will*'), but jurists can still occasionally pin it down and thus, perhaps over the course of a century, along with the necessary humility in the face of Montesquieu's 'Spirit of the law', develop an addendum entitled 'Spirit of the European constitution as culture'.

The much talked of Europeanization of individual fields of law, European Private Law and European Criminal Law, should be mentioned here, along with the 'Europeanization of administrative law'[34], which sadly has still not been connected to 'European Constitutional Law', although it remains imperative. Ever since R. Prodi, at the latest, the demand for a new 'administrative culture'[35] in the Europe of the EU/EC has been deafening,

33 See only the preamble to the ECHR (1950): 'common heritage'. From the literature with additional references see Häberle (n. 13), 10 ff., 98 ff., 376 ff., 604 ff. and passim.

34 On this from the literature: Jürgen Schwarze (ed.), *Europäisches Verwaltungsrecht*, 2 vols (1988) (2nd edn, 2005); Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (1998), 307.

35 On the term 'administrative culture' for the national sphere: Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (1982), 20, recital 25; from the more recent litera-

including, for instance, the personal responsibility of the members of the Commission, more transparency of administrative actions, etc.

D. Constitutions as Culture

I. Initial Propositions

In light of the above, the proposition of a 'constitution as culture' is proven consistent. No longer is it a question of constitutions *and* culture, but rather, constitutions *as* culture. Mere legal outlines, texts, institutions or procedures will not suffice. Constitutions are not solely a legal order for jurists to interpret according to the old and new rules of their trade; they are also an important guideline for those not versed in legal matters: the citizens. Constitutions are not mere legal texts or normative rule-books, but an expression of cultural development, the means to cultural self-presentation of a people, a mirror of their cultural heritage and foundation for renewed hope. Living constitutions are the joint product of all the constitutional interpreters of an open society. They are far more in their form and substance than mere expressions and conveyance of culture; they are a framework for cultural (re-)production and reception and at once a memory of overcome 'cultural' norms, experiences, at times even wisdoms. Thus, their cultural relevance gains all the more depth. This is perhaps nowhere more beautifully expressed than in the words of H. Heller, who, in channelling Goethe, declares the constitution to be a: 'cast form, alive and developing.' ('*geprägte Form, die lebend sich entwickelt*').

The stages of the developmental history of this 'constitutional state', with the ever changing facets of its classic constitutional texts from Aristotle to H. Jonas – albeit under a wide understanding, although some nonetheless, over time, often transform into constitutional texts in a narrow sense (as for instance with Montesquieu's Separation of Powers) –, but also the 'counter classics', provoke questions such as that posed by B. Brecht: 'All state power emanates from the people, but where does it go?' ('*Alle Staatsgewalt geht vom Volke aus, aber wo geht sie hin?*'). All these elements – the struggle for an approximate 'correct' understanding of constitutions and finally laying bare the general and particular cultural constitutional law – demonstrate,

ture: Detlef Czybulka, *Verwaltungsreform und Verwaltungskultur, Festschrift Knöpfle* (1996), 79.

in conjunction with the opening of constitutional theory to comparative and cultural scientific aspects: constitutions *are* culture, with many layers and distinctions. Constitutions absorb the cultural experiences of peoples and from their fertile ground are nourished cultural hopes right up to specific utopias, as for instance in the case of German reunification. Individual constitutional principles draw on the deeper cultural layers, as for instance with the (differing) understanding of regionalism, which is now experiencing its breakthrough in the United Kingdom (Scotland, Wales, Northern Ireland), or with federalism ('cultural federalism' in Germany). Even and especially Europe, which is currently bringing itself into constitutional shape, ultimately founds itself on the six evolved elements of its legal culture, as described above. Europe's identity is rendered accessible through a cultural science approach; the protection of the national identity of the Member States in the treaties of Maastricht (1992) and Amsterdam (1997), as well as Nizza (2000), is an expression of Europe's plurality, which is itself in the end a cultural plurality. The same applies to the preliminarily failed EU Constitution of 2004.

2. Insights

The insights gained from a paradigm of 'constitutions as culture' shall now be sketched: constitutional theory is (re-)introduced to the circle of the other cultural sciences, such as literature and music. Similarly, to the cultural sciences, constitutional theory works both on and with texts (constitutional theory as a 'legal text and cultural science'), moreover, there is a certain familiarity between written constitutions and three major world religions, in the sense that they constitute 'book religions'. Thus, even theology moves into view, as far as it operates in a hermeneutic sense (since Schleiermacher), although texts are oftentimes only a reference to their underlying cultural context. This close connection between constitutional texts and literature or music, respectively, is best studied (besides, of course, through national anthems) in the preambles. Their celebratory and exalted tone is literally intended to 'set the mood' of the following work: similar to prologues, overtures or preludes. Switzerland, for instance, enlisted the help of a poet (A. Muschg) in 1977, the 'round table' of East Berlin in 1989 called upon Christa Wolf. Equally, one should mention the often defined 'national anthem' (as, for instance, in Article 28 paragraph 3 of the Polish Constitution of 1997). National anthems belong to the category of

'emotional sources of consensus', the cultural identity elements of a polity. They are often mired in controversy and from this negative perspective they demonstrate how lowly or highly they are regarded in an anthropological sense. The established power of Verdi's 'Nabucco' (Chorus of the Hebrew Slaves), the 'secret national anthem' of Italy, in dispelling the secessionism of U. Bossis 'Pandaria' ('*Vorfall in Mailand*') (1995) need not be recalled.

The concept of a constitution as culture can also better account for the phenomenon of an evolution in the meaning of constitutional norms without formal textual amendments. R. Smend's classic work from the 1950s states: 'When two fundamental laws state the same thing, they do not mean the same thing' ('*Wenn zwei Grundgesetze dasselbe sagen, meinen sie nicht dasselbe*'). This still rings true today, in spite of the globalized production and reception process in which a wide variety of national species of the genus constitutional state develop. Moreover, terms such as 'fundamental rights culture' ('*Grundrechtskultur*') and 'constitutional culture' ('*Verfassungskultur*'), as suggested in Germany in 1979 and 1982 respectively,[36] are only conceivable in the framework of the above sketched cultural science understanding of constitutions.

Finally, two additional insights should be noted: In Germany, the term constitution traditionally refers to the state, which, ever since G. Jellinek, presents itself in the shape of the three elements theory ('People, Territory and Sovereignty'),[37] ignoring culture. Today, culture must be incorporated, if not as the 'first', then as the fourth element of a constitutional state.[38] Moreover, the term constitution should be freed from its fixation on the state. International Law scholarship, or rather A. Verdross, proposed exactly this in 1926 ('The constitution of the International Community' – '*Die Verfassung der Völkergemeinschaft*'). Today, in light of the constitutional perspective of the EU/EC, a state reference no longer appears workable.[39]

The other insight likely lies in the fact that constitutional scholarship, understood as a cultural science, better expresses the 'vertical', 'idealistic'

36 Peter Häberle, *Kommentierte Verfassungsrechtsprechung* (1979), 88, 90; Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (1982), 20.

37 On the term constitution, see Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. 1 (2nd edn, 1984), 19.

38 An earlier, albeit not further pursued suggestion by Günter Dürig, 'Der deutsche Staat im Jahre 1945 und seither', Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 13 (1955), 27, 37 ff.

39 On this, see Peter Häberle, *Europäische Verfassungslehre in Einzelstudien* (n. 18) passim, especially 15 ff. for additional references, as well as *Europäische Verfassungslehre* (n. 18), 349.

and if you will 'platonic' dimension, than when understood as a social science. Human dignity is a cultural, anthropologic premise that was earned through countless cultural socialisation processes – it allows the citizens to 'walk tall' and explains why Hegel vividly refers to education as the 'second birth' of a human being, why A. Gehlen demands a 'return to culture' and further explains why culture is the 'second creation.' Democracy then is the organisational consequence of human dignity, which we understand in the sense of I. Kant. The normative claim which constitutional principles make, the limitations they place on (power) politics and economic domination, their 'directing power', as made tangible in state mission statements ('*Staatsziele*'), and their postulates of justice, which are often left unfulfilled – all these can only be conceptualised through social sciences, which take the normative seriously. Jurisprudence is therefore most certainly not a 'social science', as propagated by the German student movement of 1968. A constitution is equally not identical to the 'true balance of power' (though F. von Lassalle, 1862, claims this). The governing power and the governing will, the 'normative power of a constitution' (K. Hesse) works through culture: guiding principles, educational goals, but also the legal protection of citizens through fundamental rights and an independent judiciary.

3. Reservations and Limits

Nonetheless, certain reservations and some limitation of this approach must be acknowledged. The specific normativity of a constitutional state's constitution should be recalled. It differs from the validity of the Torah, of Biblical texts or of Quran verses, as the hallmark of a constitutional state is an open society (K. Popper) and the 'constitution of pluralism'. One should further recall the specific 'tools of the trade' of jurists, they are not entirely formalised rules of art, with which they interpret a constitution or other norms. F. C. von Savigny (1840) canonised the four methods of interpretation (textual, historical, systematical and telos, already tentatively practiced in ancient Rome, for instance by Celsus), which are these days supplemented by a 'fifth', the comparative legal method,[40] as received by the Constitutional Court of Liechtenstein. As flexible as the interplay of

40 Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat', Juristenzeitung 44 (1989), 913. On methodical consequences of a comparative approach in general, see: Ernst Kramer, *Juristische Methodenlehre* (1998), 190

the four, or rather five, interpretation methods may be in individual cases and as intently as this pluralism must be directed towards a specific goal by reference to postulates of justice: these rules of art are indispensable. Even and especially a 'European Jurist', thus gains 'autonomy' from other sciences, but likewise within the framework of the cultural sciences. The relative autonomy of jurisprudential treatment of legal texts and cultural contexts prevails even in the face of all hermeneutic analogies or interpretational considerations (as with the appreciation of an image by Rembrandt) and all reception theory commonalities (as, for instance, in the sense of H. R. Jaus's Constance School in Literature). Naturally, jurists are no strangers to pre-conceptions and paradigms (such as the 'round table' as a new social contract), are mindful of change and transition (for instance with regard to time sensitive projects like the inter-generational contract ['*Generationenvertrag*']) and occasionally experience the 'overthrow' of paradigms (for example the abolition of the death penalty as a form of 'compensatory' ('*wiederherstellende*') retribution in criminal law); but their paradigms resonate in the medium of 'their' science, even if it happens to be a cultural science.

4. The Limitations of Constitutions

As much as the 'normative power of constitutions', along with their authorization for the (controlled) exercise of power, have been placed front and centre, as much praise as has been voiced for the new constitutions that emerged in this 'era of constitutions' since 1989 ('*Verfassungszeitalter*') and as much as the author has permitted himself to profile and give contours to his cultural understanding of constitutions: as academics we must pause to critically assess our work – keeping a professional distance, and cautioning ourselves is necessary with every draft. Specifically: Neither constitutional texts, nor a constitutional state should be overestimated in terms of scope and 'competence'. There are limits to what they both can bring about.

On this subject, a few key points: Even though constitutions are sensible as a means of curtailing and rationalising the exercise of power, humans are, after all, involved and there will consequently be errors and deficits along with abuses of power. Politics and power will continue to test the

(2nd edn, 2005); on the European dimension, see Helmut Coing, 'Europäisierung der Rechtswissenschaft', Neue Juristische Wochenschrift (1990), 937.

constitutional state, and it may not always prevail. In Germany, the manipulated, pre-mature dissolution of the *Bundestag* (*editor's note: the German Parliament*) by the Federal Chancellor in the summer of 2005 is such an example. Neither the Federal President, nor the Federal Constitutional Court (BVerfGE 114, 121, Judgment of 25.8.2005)[41] were able withstand the momentum of an, in my opinion, unconstitutional, process put in motion by former Federal Chancellor G. Schröder. A further example from Italy is the, from the perspective of constitutional theory, intolerable, but evidently legal accumulation of political, economic and media power in the hands of Prime Minister S. Berlusconi. On an international level there are additional examples, especially as the 'constitutionalisation' of International Law is still ongoing, and it remains questionable to what extent it can and should succeed. This refers to the violations of International Law such as the Iraq War of the USA, possibly also to the intervention and attacks by NATO in Serbia and Kosovo that are defended as 'humanitarian intervention'. Finally, we should remind ourselves of the 'internal' limitations of constitutions: morals and ethics. Constitutional law and morality must remain separated as a consequence of the long developmental history of the constitutional state. Where they meet, as in Islamic states or other forms of totalitarian regimes, individual freedom inevitably falls by the wayside.

Apart from this, we should recall the general limits placed on all human thoughts and endeavours. Even constitutional states remain mere human constructions, although they do well to recall God through references in their preambles ('responsibility before God' – '*Verantwortung vor Gott*' [*editor's note: this is a direct quote from the Preamble of the German Basic Law*]), as in South Africa and Switzerland. Even the constitutional state can, at best, legitimise itself by reference to a 'cautiously optimistic' conception of humanity.[42] Especially the constitutional state understands that humans, by their nature, tend to abuse power: the wisdom of Montesquieu. Even constitutional law scholarship is, after all, the business of fallible, mistaken human beings: an 'eternal *search* for truth'. Nonetheless, constitutional scholarship must bind itself to the 'principle of responsibility' ('*Prinzip*

41 On this, Wolf-Rüdiger Schenke, 'Das "gefühlte" Misstrauen', Zeitschrift für Politik 53 (2006), 26; Tonio Gas, 'Die Auflösung des Bundestages nach Art. 68 GG mittels unechter (auflösungsgerichteter) Vertrauensfrage', Bayerische Verwaltungsblätter 137 (2006), 65; Hans-Peter Schneider, 'Der Kotau von Karlsruhe', Zeitschrift für Politik 53 (2006), 123.

42 On this, Peter Häberle, *Das Menschenbild im Verfassungsstaat* (3rd edn, 2005).

Verantwortung' – H. Jonas) and must endeavour to walk tall ('*aufrechter Gang*' – E. Bloch).

E. Outlook: the 'Future' of the National Constitution in a Globalised World

While the preceding passage may have sounded somewhat bleak, the concluding outlook will dare to strike a more optimistic tune. The constitution – all the more if supported by law comparison as mode of its interpreration ('*Rechtsvergleichung als fünfte Auslegungsmethode*'[43]) has a future,[44] albeit in an ever-changing world. A national constitutional state makes sufficient sense, especially in a European context and in a globalised world, particularly so when intensified through a cultural science approach. Some of its functions and subject matters may fade and shrink in the face of the Europe of the EU, in which many classical constitutional states are overshadowed by European Constitutional Law (as, for instance, with the three classic elements of the state: a people, a territory and sovereignty; 'Schengen', EU citizenship, the constitutional court that is the European Court of Justice), but new ones are also added (as with regard to the protection of minorities and new fundamental rights, for instance to cultural identity). The idea of a constitution finds new purpose through a process described as the constitutionalisation of International Law: human rights and human dignity are, after all, typical subject matters of national constitutions, which have grown into International Law and are now returning back to the domestic realm. International-Law-friendly constitutional law and constitutional state-focused International Law are merging to form two sides of the same coin, albeit this is currently only noticeable in rough outlines. In other words: the future of (nation state) constitutions lies in International Law. This could lead to a 'new school of Salamanca', to which 'Amalfi' has perhaps today contributed some valuable insights. Not only must a living constitution flow from human dignity, with time, even International Law could find in human dignity, seen as a cultural-anthropological premise, its ultimate point of accountability.

43 Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als "fünfter" Auslegungsmethode', Juristenzeitung 1989, S. 913 ff.

44 On this, see Gustavo Zagrebelsky and Pier Paolo Portinaro (eds), *Il Futuro della Constituzione* (1996).