CONSTITUTIONAL HISTORY: SOME METHODOLOGICAL REFLECTIONS

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SUMMARY: I. TWO PERSPECTIVES OF CONSTITUTIONAL HISTORY: THE LEGAL-INSTITUTIONAL PERSPECTIVE AND THE DOCTRINAL PERSPECTIVE.- II. LAWS AND CONSTITUTIONAL INSTITUTIONS: TEXT AND CONTEXT, PERMANENCE AND CHANGE.- III. DOCTRINES AND CONSTITUTIONAL CONCEPTS: THEIR LEGAL CONTENT.- IV. THE INTERPRETATION OF CONSTITUTIONAL DOCTRINES AND CONCEPTS: *PRESENTISM* AND *ADANISM*.

Abstract: In this article Constitutional History is defined as a branch of History with a clearly legal content, which explores the origin and development of the Liberal and Democratic-Liberal State, using an axiological concept of Constitution. Based on this definition, the study addresses some of the problems inherent in the historical study of laws and institutions, particularly with respect to doctrines and constitutional concepts. It should be stressed that an interpretation of past doctrines and concepts from a present-day perspective is not required, although the categories defined by constitutional theory must be taken into account. With the above-mentioned objective, the study draws from examples of comparative constitutional history; a field which the author has been studying for the last 35 years.

Key Words: concept, method, sources, constitutional history

A good starting point is the premise that Constitutional History is a highly specialised historical discipline, largely developed *sub specie iuris.* It contemplates the genesis and development of the constitution of the liberal and liberal-democratic State, regardless of the form that the Constitution adopts or its position within the legal system, even though its form and position may be extremely pertinent to Constitutional history, as we will see further on.

This substantive and axiological concept of Constitution should, in my view, be considered in order to determine the object of Constitutional History and to define the temporal and spatial boundaries of constitutionalism as a historic phenomenon designed to limit the State to serving individual rights. The origin of this concept can be traced back to seventeenth-century England.

However, this article does not seek to analyse this concept of Constitution in great depth. It is implicitly covered in Article 16 of the French “Déclaration des Droits” of 1789 and is explicitly addressed by the German doctrine when,

according to Otto Hintze[1], distinguishing between *Verfassung and Konstitutionelle Verfassung*.

This paper will merely examine some of the problems arising from the historic study of laws, institutions and especially constitutional doctrines.

In order to avoid these reflections from becoming too abstract, I will include some very specific examples of constitutional history, many of which I myself have studied over the last 35 years[2].

I. TWO PERSPECTIVES OF CONSTITUTIONAL HISTORY: THE LEGAL-INSTITUTIONAL PERSPECTIVE AND THE DOCTRINAL PERSPECTIVE

The study of Constitutional History, either on a national or compared basis, - the latter unfortunately being much less discussed – may be approached from two very different angles: the legal-institutional perspective and the doctrinal approach.

From the institutional standpoint, Constitutional history addresses the laws that in the past regulated the bases of the organisation and functioning of the liberal and liberal democratic State as well as the institutions that these laws established: the electorate, the parliamentary assembly, the head of state, the government, the administration, judges and courts[3].

From the doctrinal standpoint, Constitutional History examines the intellectual reflection that surrounded the liberal and liberal democratic State. This reflection not only gave rise to a constitutional doctrine but also to a wide range of other concepts. There is a clear distinction between the constitutional doctrine and the other concepts which we will address later.

From the above we can conclude that the sources of research and knowledge of Constitutional History are extremely varied. From a purely legal-institutional perspective they include constitutional texts and even drafts which,

[1] *Staat und Verfassung: gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte (1902-1932)*, Vandenhoeck & Rupert, second edition, Gottingen, 1970.

[2] In fact, the conception of Constitutional history which is to be addressed here is actually based on this research; therefore it should be mentioned in the footnotes. However, I am aware that numerous quotes from an author's own bibliography may be stifling and I apologise in advance if this is the case. Regarding the affairs dealt with here I consider particularly interesting the Reading of Interviews that I carried out in the Electronic Journal "Historia Constitucional" with Emst Wolfgang Böckenförde (No. 5, 2004 bilingual version German/Spanish); Michel Troper (N0. 7, bilingual version French/Spanish); M. J. C. Vile (No. 2009, bilingual version English/Spanish) and Maurizio Fiorvanti (No. 14, 2013, bilingual version Italian/ Spanish), as well as the Reading of the very recent book co-ordinated by Carlos Miguel Herrera "Comment écrit-on l'histoire constitutionnelle ?", Kimé, Paris, 2012.

[3] Institutions whose existence is not limited to the laws that they create or the competences that are attributed to them. In this sense, whilst for Constitutional Law it might be more appropriate to refer to "organ" rather to "institution" the opposite occurs with Constitutional History. The concept of "organ", elaborated by the German doctrine from Gerber to Kelsen, emphasises the "constitutional position" in the legal status, for example that of Parliament, whilst the concept of "institution", which takes a central place in the doctrines of Santi Romano and that of Maurice Hauriou, without overlooking this status, also underlines their dynamics and therefore the conventions or unwritten rules developed in a sometimes multi-secular practice – to which I will refer further on- as well as a set of symbolic and representative functions, not necessarily regulated by law.

while never having come into effect, are sometimes of great interest[4]. However, these sources also include other different texts which, considering the material which they regulate, could also be deemed constitutional, such as the Parliament rules of procedure and the electoral laws, constitutional conventions or unwritten rules, which are an essential aspect for understanding the basic state institutions, and one which we will analyse later.

From a doctrinal perspective, the sources of Constitutional History are also highly varied: the records of parliamentary proceedings, mainly those of a constitutive nature (also useful as a source of interpretation of the laws), booklets designed for immediate political intervention, articles published in the press, jurisprudence arising from the court sessions and finally scientific papers published in specialised magazines, manuals, treatises and monographs are essential for documenting the origins and development of Constitutional Law.

Although it is inevitable that constitutional historians focus their attention on one of these two perspectives, ideally they should study both. This is particularly true in the study of constitutionalism in Anglo-Saxon countries in which constitutional doctrines are more closely linked to their legal-institutional context than in the constitutionalism of continental Europe, at least in its beginnings. Let us take an example: whilst the concept of parliamentary sovereignty advocated by David Hume in the mid eighteenth century reflected the legal-institutional framework of England during the reign of George II[5], the concept of national sovereignty defended by Sieyes in his pamphlet on the Third Estate (1789) or that which, under his influence, the Spanish liberals defended in the *Cortes* of Cadiz, were formulated outside of and contrary to the legal and institutional system that prevailed during the reign of Luis XVI in France and Fernando VII in Spain, respectively. Historians should contemplate this system in order to gain a better understanding of the revolutionary constitutional concepts[6].

Of course, it would be unrealistic to ignore the antihistoricist position in British Constitutional thought in the eighteenth century. Paine is a good example[7]. Nor would it be fitting to define French and Spanish constitutional thought of that century as being merely iusnaturalist and revolutionary. In the case of France, this would mean ignoring the highly interesting historicist and reformist thought from Montesquieu to the "notables", which undeniably

[4] As I have pointed out in *Proyectos constitucionales en España* in "Revista Española de Derecho Constitucional", No. 76, January-April 2006, pp. 297-304, commentary on Ignacio Fernandez Sarasola's book.

[5] See my article *Estado y monarquía en Hume,* "Revista Española de Derecho Constitucional", No. 22, September-December, Madrid,1995, pp 59-90, and my long essay *Sovereignty in British legal doctrine. From Bracton to Dicey*, in "E- Law, Murdoch University Electronic Journal of Law", vol. 6, No. 3, September 1999, http://www.murdoch.edu.au/elaw/issues/v6n3/ suanzes63-text.html; and in "Historia Constitucional", No. 4, Oviedo, 2003, http://historiaconstitucional.com

[6] Regarding the concept of national sovereignty in Sieves and its influence in the *Cortes* of Cadiz, I have developed it more fully in *La teoría del Estado en las Cortes de Cádiz. Orígenes del constitucionalismo hispánico,* second edition CEPC, Madrid, 2012. foreword by Ignacio de Otto. I address these issues again in *El Conde de Toreno (1786-1843). Biografía de un Liberal*, Marcial Pons, Madrid, 2005, foreword by Miguel Artola.

[7] Regarding Paine, see my monograph *Sistema de gobierno y partidos políticos:de Locke a Park*, CEPC, Madrid, 2002, pp. 99 and ss, translated into Italian with a more appropriate title: *Governo e partiti nel pensiero británico (1690-1832)*, Giuffrè, Milano, 2007.

influenced the more conservative Constitutionalism of the Restoration[8]. In the case of Spain, it would mean disregarding the thought of Jovellanos, the most important theorist of the historical Constitution, whose influence in this country throughout the nineteenth century was decisive[9].

In general terms we could say that historicist constitutionalism, which was particularly influential in Great Britain, sought to adapt the constitutional doctrines to the laws and institutions comprising a specific historical Constitution which was more or less alive. On the other hand, rationalist constitutionalism, the prototype being the eighteenth-century French constitution, sought to do just the opposite: to model the norms and constitutional institutions in accordance with doctrines previously designed "ex novo" and to clean the slate of the existing laws and institutions[10].

Nevertheless, combining a normative-institutional perspective with a doctrinal perspective in the study of constitutionalism is not sufficient. The laws, institutions and constitutional doctrines must also be connected with the society in which the historian is to place them. This connection requires a knowledge, albeit instrumental, of the historical reality as a whole, especially with respect to the political and institutional contexts. Going back to the examples mentioned earlier, neither the concept of Parliamentary sovereignty defended by Hume nor that of national sovereignty supported by Sieyes and the Spanish liberals in the *Cortes* of Cadiz can be understood outside the context of the political and intellectual struggle within which they were formulated. Hume disagreed with the Tory Jacobites who supported the sovereignty of the monarch and certain Whig groups who defended the Lockean thesis of the sovereignty of the people. Sieyes was in contention with the *Notables* who wished to maintain the sovereignty of the King which was restricted by the basic ancient laws of the monarchy. And finally the liberal deputies in the *Cortes* of Cadiz developed their concept in stark contrast with the royalist deputies who upheld the scholastic thesis of sovereignty shared between the king and his kingdom. These liberal deputies also disagreed with the American deputies in the *Cortes,* who defended the sovereignty of overseas colonies through a strange mix of doctrines emanating from Indian Laws and Francisco Suárez, from German iusnaturalism (Grotius, Puffendorff) and from Rouseau.

[8] See my article *Constitución histórica y anglofilia en la Francia pre-revolucionaria (la alternativa de los "Notables"*), "Giornale di Storia Costituzionale", No. 9, 2005, pp. 53-62.

[9] See my article *La doctrina española de la Constitución Histórica*, "Fundamentos", No. 6, Oviedo, 2010, and my preliminary study on *La Constitución de 1876*, Iustel, Madrid, 2009.

[10] That is why the starting point from which to study the constitutional history of a nation cannot be the date on which its first constitutional text was approved. The constitutional historian must also study the constitutional doctrines which preceded it, without which the text could not be wholly understood. Adopting this view, the constitutional history of the United States does not begin in 1787, nor does that of France begin in 1789, or that of Spain in 1808. A constitutional debate which the historian should know and study was sparked off before those dates. With respect to the link between political doctrines and constitutional history the observations made by Alfred Dufour in *Considérations inactuelles sur les rapports entre doctrines politiques e histoire constitutionnelle, «* Giornale di Storia Costituzionale *»,* No. 2, *2001,* pp. 15-20, are of particular interest.

II. LAWS AND CONSTITUTIONAL INSTITUTIONS: TEXT AND CONTEXT, PERMANENCE AND CHANGE

When studying a Constitution, or any materially constitutional law, the constitutional historian should take into consideration that his focus of study is a law which is not in force. Even when he analyses a historic Constitution which is still in force, such as the British or American one, he should be concerned with its genesis and development and not the final result which is the objective of the constitutionalist. However, the study of constitutional history can also be very useful to explain and better understand the existing constitutionalism. The constitutionalist analyses the meaning which can currently be given to the Constitution, while the constitutional historian primarily analyses how it was interpreted and applied in the past by political players (heads of state, ministers, parliamentarians) and by the diverse legal practitioners (judges and scientific doctrine), as well as contemplating its effectiveness in protecting citizens' basic rights. This does not prevent the constitutional historian from carrying out his own grammatical, teleological and above all systematic interpretation of the legal texts which he studies, relating certain precepts with others with a view to revealing their internal logic and the real meaning of these texts: the *voluntas legis*, not only the *voluntas legislatoris*.

With respect to institutions, the constitutional historian should seek to fully understand the changes within the institutions and see beyond their apparent stillness[11]. In this respect the study of constitutional conventions, through which the institutions were being modified without necessarily altering the written laws that they regulated, takes on a key role[12]. The importance of the conventions is particularly relevant in the constitutional history of Great Britain where, as is well known, the transfer of power from the monarch to a Cabinet responsible before the parliament, especially before the Commons, began in the early eighteenth century, by way of a group of unwritten conventions or laws. However, the legislation approved by parliament was not modified until at least the beginning of the twentieth century. It is also true that this transfer of power, which gave rise to the transition from a constitutional monarchy to a parliamentary one, involved the intervention of judges[13].

These conventions also played a crucial role in other European constitutional monarchies such as Belgium. Nevertheless, it should be noted that constitutional law scholars did not always highlight their importance. The most significant example is Blackstone, undoubtedly the most influential jurist of

[11] It is worth mentioning the words of the great Spanish legal historian Francisco Tomás y Valiente: "The problem that the historian of institutions must resolve consists of discovering within the long period of institutions under scrutiny its own functioning, its peculiar rhythm of change almost perceivable. However, generally it is indeed contemplated swiftly or tries to be measured by the *histoire evenementielle* clock. However, there are no unchangeable or unalterable institutions", *Historia del Derecho e Historia*, in "Obras Completas de Francisco Tomás y Valiente", CEPC, Madrid, 1997, IV, p. 3294.

[12] Included in a long bibliography, see the classic work of G. Marshall, *Constitutional Conventions*, *the Rules and Forms of Political Accountability*, Oxford, Clarendon Press, 1984, and that of P. Avril, *Les conventions de la constitution*, coll. Léviathan, Paris, PUF, 1997.

[13] I have already addressed this in *El constitucionalismo británico entre dos revoluciones (1688-1789)*, "Fundamentos", No. 2, Oviedo, 2000, pp. 25-96; and the previously quoted, *Sistema de gobierno y partidos políticos: de Locke a Park*.

the eighteenth century, who remained eloquently silent with regard to such conventions, in sharp contrast to Burke. But perhaps even more significant is the way many English constitutional historians chose to ignore these unwritten laws which conclusively changed the constitutional agreement of 1688. In fact, with the exception of Hume, British historiography did not pay much attention to such conventions until the early nineteenth century. Even as late as 1827 Henry Hallam, in his *The Constitutional History of England,* still firmly maintained the continuity of the English constitution from the Revolution of 1688 and considered the Magna Carta to be a document with the same status as the Bill of Rights.

Opposing this standpoint, certain romantic historians, such as James MacKintosh and William Betham, did address the constitutional change which had been taking place in Great Britain since 1688, recognising that it had gone beyond its apparent continuity. Nevertheless, it was not a historian as such but a jurist who most firmly upheld this new perspective of Constitutional History, namely J.J. Park who today has almost been forgotten even in England and who was influenced by Savigny and Comte. In his book, *The Dogmas of the Constitution*, published in 1832, he analysed the constitutional transformations that had been taking place since the Revolution in 1688 in great depth. Park also criticised the traditional interpretations of Montesquieu, De Lolme and especially Blackstone, which he considered were more inspired by the text than the spirit of the Constitution or by the "formal" constitution rather than the "real" constitution. We will return to this important distinction later. This in turn led these authors to focus on the permanence of laws and institutions without taking into account the profound change which had taken place in them both as a result of the unwritten norms agreed by the main political players[14].

As far as the historic study of institutions is concerned, it is worth stressing the importance of and difficulties inherent in studying the Crown, *nomen iuris* of the head of state of monarchical states in several countries including Great Britain and Spain led by the King or Queen. When studying the Crown, constitutional historians should, of course, define its constitutional position based on its legal status and the conventions imposed over time. This is useful for analysing, for example, its *de iure* and *de facto* participation in the legislative framework or in the political management of the state, highlighting the use or the disuse (the *desuetudo*) of veto rights with regard to acts drafted by Parliament. In addition, the historian must address the integrating function of the Crown, studied in depth by Rudolf Smend[15], as a symbol of embodiment or representation of the State. This integrating function is more pronounced in a monarch than a president of the Republic. Therefore, the role of the monarch at

[14] See my preliminary study on J. J. Park, *Los Dogmas de la Constitución*, translated into Spanish by Ignacio Fernández Sarasola, Istmo, Madrid, 1999, pp. 16, 30 to 43 and 5 (a new edition will be published by Tecnos in 2014), in addition to my afore-mentioned study *Sovereignty in British legal doctrine. From Bracton to Dicey.* As highlighted in these texts, this way of approaching constitutionalism, which had been defended by Thomas Erskine and Lord John Russell a little earlier than J. J. Park, would later provide a huge breakthrough in the area of political-constitutional theory (Henry G. Grey, J. Stuart Mill and Walter Bagehot), in the Philosophy of Law (Austin), in Constitutional Law (Dicey) and in Constitutional History itself (Maitland).

[15] *See* Rudolf Smend, *Verfassung und Verfassungsrecht* (1928).

the heart of national political life and his social roots must be studied, without forgetting his role as moderator and arbitrator[16].

To sum up, when the constitutional historian analyses laws and institutions he should focus on its permanence but also its change. This change is not only brought about through reforming the constitutional text but also through the reforms of other materially constitutional legislation and through conventions and legal jurisprudence, without the need to specifically reform any legal text. In short, the constitutional historian should take into account the *Verfassungswandlung* and the *Verfassungänderung,* in other words the "constitutional reforms" and the "Constitucional mutations"[17].

III. DOCTRINES AND CONSTITUTIONAL CONCEPTS: THEIR LEGAL CONTENT

The historical study of constitutional doctrines poses problems of a very different nature depending on the kind of sources through which they are expressed. Studying essays aimed towards political action such as *Thoughts on the Cause of the Present Discontents* (1770)*,* by Burke, and *La Monarchie selon la Charte* (1816)*,* by Chateaubriand, is not the same as studying an academic work, such as *Allgemeine Staatslehre* (1900), by Jellinek. The former requires a definition of the political climate while the latter should highlight the scientific and intellectual context. In all of the three texts mentioned above the historian finds a previously defined doctrine. The same cannot be said when studying parliamentary debates which provide vital information especially when the Parliaments have a constituent nature as in the Philadelphia Convention, the French Assembly of 1789 or the *Cortes* of Cadiz. In these cases, after closely examining the parliamentary debates, the historian's task is to reconstruct the constitutional theory manifested in them. To do this it is very useful to classify the members of these assemblies into "constitutional tendencies" - groups with distinct constitutional ideologies which do not necessarily coincide with political parties- in accordance with the proposals that they defended regarding State organisation and its relationship with society. These proposals constituted genuine "constitutional models" in contention with each other which the historian must also examine[18].

[16] These symbolic, representative and arbitral functions of the monarch upon which Benjamin Constant and later Walter Bagehot had strongly insisted upon may be found in article 56 of the current Spanish constitution, which states: "The King is the Head of State, the symbol of its unity and permanence. He arbitrates and moderates the regular functioning of the institutions, assumes the highest representation of the Spanish State in international relations, especially with the nations of its historical community, and exercises the functions expressly conferred on him by the Constitution and the laws". I enlarge on Constant's ideas in *La Monarquía en el pensamiento de Benjamín Constant (Inglaterra como modelo)*, "Revista del Centro de Estudios Constitucionales", No. 10, 1991, pp. 121-138. I have addressed Bagehot, and his influence in Spain in the preliminary study on the recent Spanish edition of his work The English Constitution, *La Constitución Inglesa*, CEPC, Madrid, 2010.

[17] The distinction between the two concepts can be found in Laband and particularly in Jellinek, although the classic book on the subject is that by Hsü-Dau-Lin, *Die Vefassungswandlung*, Berlin und Leipzig, 1932.

[18] With respect to the concepts of "constitutional tendencies" and "constitutional models", I studied the doctrines defended in the *Cortes* of Cadiz in my aforementioned book *La Teoría del Estado en las Cortes de Cádiz*. I did the same with the French Assembly of 1789 in *Mirabeau y la monarquía o el fracaso de la clarividencia,* "Historia Contemporánea", No. 12, Bilbao, 1995, pp. 230-245. In the same way, I used the concept of "constitutional model" in *Las cuatro etapas de la historia constitucional comparada,* as an introduction to the book coordinated by myself:

Within the framework of constitutional doctrines the historian is particularly interested in examining the concepts that may be formed both expressly and implicitly. A constitutional doctrine, for example the one proposed by Burke, Chateaubriand and the French patriots of 1789, is very different to the concepts of "Constitution", "monarchy" and "political party" supported by these authors and movement. Constitutional doctrines are made up of a group of systematic ideas relating to the organisation of the State, prepared by a writer or a "constitutional tendency". Constitutional concepts are much more exact and specific. They are reflected in a term or a word and their origins are much more varied as they can be devised by any of the leading players on the political and legal stage (monarchs, ministers, parliamentarians, judges, editors and professors). They may be expressed through a host of sources such as legal texts, ministerial council acts, parliamentary speeches, jurisprudence during trials, the press and political essays, academic manuals, encyclopaedias and dictionaries and even anonymous documents such as clandestine pamphlets.

Constitutional doctrines and concepts may contain a greater or lesser legal content. From this viewpoint it is important to distinguish between common law countries and their European continental counterparts. In the former, the intellectual study of the constitutional State has been closely linked to the legal system, which was formally very stable in some countries such as Great Britain and the United States of America. The afore-mentioned *Commentaries* by Blackstone, which also had great repercussions on the other side of the Atlantic, are in this sense paradigmatic. Furthermore, in common law countries the juridification of doctrines and constitutional concepts is largely due to the fact that judges are genuine creators of law, even constitutional law, and not mere interpreters and appliers thereof as in Continental Europe. It is well-known that the British Constitution was largely judge-made. When interpreting and applying it, for instance in the case of individual rights, court rulings (their *ratio decidendi*, not their *obiter dicta*) correspond to a doctrine and a series of precedents to which judges must later adhere to in order to resolve similar cases. In the United States Supreme Court jurisprudence had a decisive role in such juridifying activity. This is illustrated by the concept of judicial review, earmarked by Judge Marshall, Chief Justice of this Court, in 1803, in accordance with certain precepts of the 1787 Constitution. A concept which brought into effect the doctrine - previously defended by Hamilton and reflected in "The Federalist"- of the supremacy of the federal Constitution over and above other laws and statutes, both federal and those affecting the member States of the Federation, which meant that it was underpinned by the Federal State itself[19].

Textos básicos de la historia constitucional comparada, CEPC, Madrid, 1988, and which has been published recently in French in "Historia Constitucional", No. 12, 2011, entitled *L'histoire constitutionnel comparée: étapes et modèles*. This concept has also helped me to conceive and coordinate the second volume of "Fundamentos", entitled "*Modelos constitucionales en la historia comparada"*. Finally, I have used the concept of "constitutional model" in *La construcción del Estado en la España del siglo XIX. Una perspectiva constitucional),* which has been included in my book *Política y Constitución en España (1808-1978),* CEPC, Madrid, 2014, as well as in my recent monograph *La Monarquía Doceañista. 1810-1837,* Marcial Pons, Madrid, 2013.

[19] I have addressed the concept of Constitution as a supreme law in *Riflessioni sul concetto di rigidità costituzionale,* "Giurisprudenza Costituzionale", Anno XXXIX, fasc.5, 1994, pp. 3313-3338, later published in Alessandro Pace/ Joaquín Varela, *La rigidez de las Constituciones escritas*, CEPC, Madrid, 1995.

In continental Europe, however, the juridification of political-constitutional concepts began in the second half of the nineteenth century through scientific doctrine, though the work undertaken by some tribunals, even years beforehand, should not be dismissed. In this regard I will quote one example. Benjamin Constant's idea of *pouvoir neutre*, expounded during the French Restoration implied a distinction to be drawn between the monarch as Head of State and the Government or Cabinet and, in turn, between governing and administrating. These premises -later reinforced by Thiers, Prevost-Paradol and Bagehot - established the basis upon which the *Conseil d'Etat* could distinguish, also throughout the Restoration, between the Government's legal action and political action. The same premises would later be used to distinguish between the executive function of the Government and its political activity or *extra iuris ordinem,* which turned out to be decisive for the creation of French Administrative Law and the delimitation of the concept of "governance" or of "*indirizzo politico*"*,* on which the Italian constitutional doctrine of the twentieth century (Crisafulli, Lavagna, Virga and Mortati) so heavily relied.

Nevertheless, the juridification of the constitutional doctrines in continental Europe was achieved more through scientific doctrine than jurisprudence. Before the second half of the nineteenth century it had been mainly philosophers and politicians who had analysed the emerging constitutional state (philosophers and politicians who had also played a decisive role in Great Britain and the United States). However, after the mid-nineteenth century, when the constitutional state was consolidated in Western Europe, it was the jurists and particularly professors of law who reflected on this field of study[20]. The doctrines and political-constitutional concepts, such as *Rechtstaat,* coined by Von Mhol in agreement with Kant and replicating the Anglo-Saxon *rule of law*, were being refined and transformed into legal doctrines and concepts even though the Constitution in Europe had no real legal value until the twentieth century. This juridifying task, which provided the framework for creating the science of Constitutional Law as a branch of the Science of Laws, was primarily motivated by legal positivism which dominated European constitutional thought until the 1930s. This purifying process gave rise to the creation of real legal and constitutional dogmas, which were deliberately unrelated to the political and social reality and were aimed at explaining and interpreting the constitutional framework of a nation. This was applied to the field of Private Law in order to explain property or family based on the concepts supplied by Roman law. The greatest doctrinal works of Gerber, Laband and Jellinek in Germany, of Orlando in Italy, of Dicey in Great Britain and, later, those of Esmein and Carré de Malberg in France were based on these approaches.

The crisis of legal positivism, which we could also refer to as classic positivism -and to which despite its defects, modern Constitutional Law is owed – particularly after the 1930s, hindered the juridifying process of doctrines and constitutional concepts, which were reinstated in their historic, social and political context. This reinstatement was defended not only by historians such

[20] I refer to these extremes in *¿Qué ocurrió con la ciencia del Derecho Constitucional en la España del siglo XIX?,* included in my afore-mentioned book, *Política y Constitución en España (1808-1978*).

as Otto Hintze[21] and above all Otto Brunner[22] but also by numerous cultivators of Constitutional Law, including Carl Schmitt[23], one of the harshest critics of legal positivism and in particular of kelsenian normativism.

Undoubtedly, the criticism of legal positivism by these authors, and many others such as the afore-mentioned Smend, is highly useful even today for Constitutional History, although it has little use for Constitutional Law and even less for the judicial interpretation of law[24]. Nevertheless, it is important to highlight that although the attacks on legal positivism weakened the juridifying task of the constitutional doctrine, they did not prevent this process from going ahead, supported even by authors far removed from positivism, as highlighted in the above-mentioned concept of *indirizzo politico.* It is important to bear in mind that the juridification of political-constitutional concepts gained momentum in twentieth-century Europe as a consequence of the creation of constitutional courts in various countries. While a study of this phenomenon would be too lengthy to include in this article, I deem it worthy of mention.

IV. THE INTERPRETATION OF CONSTITUTIONAL DOCTRINES AND CONCEPTS: "PRESENTISM" AND "ADANISM"

It should be added that, whatever the source through which the doctrines and concepts are expressed and regardless of their greater or lesser legal content, constitutional historians should not interpret these doctrines and concepts from a present-day perspective. They should be analysed within the historical context in which they emerged. In short, the main pitfall of these historians is *presentism*, which many have been guilty of, largely because they have approached constitutionalism of the past not so much in order to attempt to understand and explain it but to justify their own doctrinal analyses.

This was precisely the case of Raymond Carré de Malberg, who, in my view is the most brilliant exponent of Constitutional Law in France. In his splendidly subtle *Contribution a la Théorie Générale de l'Etat,* when exploring the concept of sovereignty during the French revolution he attributed to the constitutional doctrine of that period a clear conceptual distinction between national and popular sovereignty[25]. However, this distinction was not established with the

[21] See Otto Hintze, *Staat und Verfassung. Gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte*, Göttingen, Vandenhoek und Ruprecht, 1962.

[22] See Otto Brunner, *Land und Herrschaft,* 1939. On the great Austrian historian, see Helmut Quaritsch, *Otto Brunner ou le tournant dans l'écriture de l'Histoire constituionnelle allemande*, « Droits », No. 22, 1995, pp. 145-162.

[23] See, for example, their work, influenced by Otto Brunner, *Staat als ein konkreter, an eine geschichtliche Epoche gebundener Begriff,* en *Verfassunsrechliche Aufsätze*, in "Verfassunsrechliche Aufsätze", 1958. See also the essay by Fulco Lanchester *Carl Schmitt e la storia costituzionale*, "Quaderni Costituzionale", No. 3, 1986, pp. 487-510.

[24] In fact, in my opinion it is perfectly coherent to accept the validity of legal positivism and even that of kelsenian normativism within the confines of the General Theory of Law and Constitutional Law and at the same time accept its lack of or limited value in terms of Constitutional History.

[25] See *Contribution a la Théorie Générale de l'Etat*, Paris, Sirey, 1920-1922, vol 2. pp. 152-197.

clarity or consequences described by Carré de Malberg until the July Monarchy[26].

Presentism is at the root of many anachronisms, extrapolations, prolepsis or anticipations when examining constitutional doctrines and concepts. More than a few historians of political doctrines have been guilty of *presentism,* some as acutely as Otto von Gierke[27], sometimes paying more attention to the study of a repertoire of immovable ideas throughout time, rather than the time of those ideas or, in other words, its long standing existence and therefore its diverse meaning and purpose. Throughout the twentieth century we were warned of this danger by numerous authors, including the above-mentioned Otto Brunner, co-editor, together with Reinhart Kosselleck and Werner Conze, of "Basic Concepts in History: A Historical Dictionary of Political and Social Language in Germany", compiled between 1972 and 1997. This publication was, without doubt, the most brilliant achievement of *Begriffsgeschichte,* promoted years earlier by the hermeneutics of Hans-Georg Gadamer and focused on the projection of the political concepts in the social praxis. Many of the premises of this *Begriffsgeschichte* are also very useful for historians of constitutional concepts.

The same may be said of the methodological approach used by the members of the so-called "Cambridge School", particularly Quentin Skinner and J. G. A. Pocock to whom we owe the exceptional reassessment of history of political thought, with the purpose of better understanding the original meaning of earlier texts and therefore the doctrines through which they are explained. Skinner, the founder of intentionalism, emphasised not the doctrine as such but the *how* and *purpose* of it. Pocock, on the other hand, focused on the concepts in the framework of languages or political discourses which make up a determined interpretative paradigm[28].

All of these examples, and others, such as those of the Ecole Normale Supérieure of Fontenay/Saint Cloud, a promoter of *Laboratoire de Lexicométrie et Textes Politiques*- are useful to the constitutional historian. One of the primary objectives when studying constitutional doctrines and concepts is to explain their origins and development. Historians should explore how and why they came about, how they were interpreted, in close connection to the political,

[26] Guillaume Bacot highlights this point in *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale,* editions du CNRS, Paris, 1985, especially on pp. 14-18, 164-165 and 177-182. *Vid*, likewise, Christoph Schönberger, *De la souveraineté nationale à la souveraineté du peuple : mutation et continuité de la Theorie Generale de l'Etat de Carré de Malberg »,in* « Revue Française d'Histoire des Idées Politiques », No. 4, 1996, pp. 297-316.

[27] A writer who, in spite of his direct criticism of legal positivism, especially that of Laband, barely addresses the historical circumstances of the concepts he examines, reflecting on burdensome extrapolations. For example, when using the concepts of State and sovereignty in the medieval context as he does in his splendid and well-known work *Die publicistichen Lehren des Mittelalters* (1881), translated into English by Maitland in 1900. I have further highlighted this in *Política y Derecho en la Edad Media*, commented by Otto Von Gierke, *Teorías políticas en la Edad Media*,"Revista Española de Derecho Constitucional", No. 49, 1977, pp. 335-351. Madrid, 1995.

[28] An interesting criticism of the Cambridge School thesis and *Begriffsgeschichte* may be found in the work of Lucien Jaume *El pensamiento en acción: por otra historia de las ideas políticas*, "Ayer", No. 53, Madrid, 2004, pp. 109-130. In general, this edition of "Ayer" dedicated monographically to the history of concepts and edited by Javier Fernández Sebastián and Juan Francisco Fuertes is of particular interest.

social and intellectual context in which they arose. In doing so, they should not lose sight of how they were connected to other earlier and closely related doctrines and concepts (both national and foreign) and the legal, institutional and intellectual impact that they had in their era and later.

However, this attitude should not be understood as a license to rebuff all concepts elaborated by Constitutional History as a result of a rationalisation of its subject of study. Otherwise *presentism* would merely be replaced by a scientifically unsustainable *adanism* which would, in turn, convert the constitutional historian into a kind of intellectual Sisyphus continually proposing then retracting conclusions, without incorporating them into his terminological repertoire. In other words: the need to place constitutional concepts in their time should not mean that Constitutional History, as all fields of knowledge which seek to scientifically explain a piece of reality, refuses to establish its own concepts or analytical categories when examining and demonstrating its subject matter, such as the afore-mentioned "constitutional model" which is useful to systemise national and the comparative constitutional history[29].

Moreover, it is fitting to underline that the constitutional historian, regardless of his academic background, should have a sound knowledge of Constitutional Theory. This could be defined as a kind of common and general Constitutional Law created through the scrutiny of a diverse range of constitutional orders, either in force or not, regarding, for example the concept of Constitution, the functions which it fulfils within the legal system, its drafting interpretation and reform as well as its endorsement and guarantee. In the same way that a medical or economic historian must have an expert knowledge of the concepts conferred by medical or economic sciences, a constitutional historian must have a precise understanding of the concepts forged by the Theory of Constitution, such as the "constitutional rigidity" or the afore-mentioned "constitutional mutation". These concepts are extremely useful if not essential to the constitutional historian although they must be addressed with care and their origin must be stated.

A practical example with which to end these reflections may help us to clarify the above-mentioned observation. J. J. Park clearly outlines in the previously mentioned book*, The Dogmas of the Constitution*[30] the distinction between "formal Constitution" and "material Constitution", even though it was the Italian Constitutionalist Costantino Mortati who would brilliantly expound it in 1940[31]. Such a distinction is especially important in order to analyse the constitutional debate that took place in Great Britain during the eighteenth century. This debate ensued between the supporters of the formal constitution

[29] Or that of "structural principle" as a set of precepts that define the form of State. A concept widely used among current Spanish constitutionalists and which I myself have used to classify the Spanish Constitutions and in which to set the current Constitution of 1978, as it is more accurate than the typical dichotomy of "conservative constitutions" and "progressive constitutions". See *La Constitución de 1978 en la historia constitucional española*, which I have included in the quoted book *Política y Constitución en España (1808-1978)* and my recent preliminary study in *Constituciones y Leyes Fundamentales*, Iustel, Madrid, 2012.

[30] See my mentioned Preliminary study to J. J. Park, *Los Dogmas de la Constitución*, pp. 27 and ss, as well as the final chapter of my afore-mentioned book *Sistema de Gobierno y partidos políticos (de Locke a Park)*.

[31] *See* Costantino Mortati, *La Costituzione in senso materiale*, 1940, reprinted in 1998 by Giuffre, Milán, 1998, with a *premessa from* Gustavo Zagrevelsky.

(Bolingbroke and Blackstone, among others) as defined by Locke immediately after the revolution in 1688 and the supporters of the material constitution (such as Walpole and Burke). The material constitution had been taking shape throughout this century through conventions and its central element was bipartisanship. Is it scientifically legitimate for historians to use this conceptual distinction arising in 1832 and developed in 1940 to analyse and illustrate British constitutional history in the eighteenth century? Of course it is, because it is a useful analytical tool for studying this period. However, it should be made clear that it was developed after the period which it is being used to study.

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