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PART I

Introduction

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1

European and US constitutionalism: comparing essential elements

GEORG NOLTE

Until the end of the Cold War comparative constitutional lawyers and political scientists tended to emphasise the common ground within the North Atlantic region.[1] Today, some even speak of a 'European-Atlantic constitutional state'.[2] This view was and is perfectly legitimate. It was not only the radically different socialist understanding of law which made western constitutional theories and practices appear to be so similar. This similarity is also firmly grounded in the cross-fertilising constitutional developments between Western Europe and North America which have taken place before and since the eighteenth century.

The end of the socialist systems in Eastern Europe and increasing 'globalisation', however, may bring about a change of emphasis from the similarities to the differences between the constitutionalisms in the United States and Europe. Over the past few years issues have emerged which seem to indicate that European constitutional theory and practice is becoming aware that it has developed certain rules and possesses certain properties which are characteristically different from US constitutionalism and vice versa. This new perspective, or rather such a change in emphasis, is likely to be reinforced by political developments which expose discrepancies in the evaluation of fundamental questions between the majority of Europeans on the one hand and the majority of Americans on the other.[3]

[1] See e.g. Klaus Stern, *Grundideen europäisch-amerikanischer Verfassungsstaatlichkeit* (Berlin: de Gruyter, 1984).

[2] Thomas Giegerich, 'Verfassungsgerichtliche Kontrolle der auswärtigen Gewalt im europäisch-atlantischen Verfassungsstaat: Vergleichende Bestandsaufnahme mit Ausblick auf die neuen Demokratien in Mittel- und Osteuropa' (1997) 57 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 405–564.

[3] Robert Kagan, *Of Paradise and Power* (New York: Knopf, 2003).

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This book was conceived before the drama of the latest Iraq crisis unfolded. That crisis has had profound repercussions on transatlantic and intra-European political relationships. It has obviously gone beyond disputes about international law. But has it also reached the level of constitutional law? It is true that weapons of mass destruction and Iraq as such have little to do with constitutionalism. The approaches of how to deal with such threats, however, may well be somehow connected to more fundamental questions of the respective political identities. This is where the area of constitutionalism begins.

I. European constitutionalism?

Constitutionalism is about the fundamental rules and the identity, or better the self-understanding (*Selbstverständnis*), of any particular political community.[4] In different ways, the self-understanding of both the European states and Europe on the one hand, and the United States on the other, has become somewhat insecure over the past few years. The question is therefore whether this insecurity has affected the most fundamental areas of political self-understanding, the respective constitutionalisms, and whether a new relationship between Europe and the United States is emerging in this respect. In exploring this question the political context cannot be disregarded. At the same time, however, one should not lose one's sense of proportion. Constitutional law concerns the deepest layers of the respective legal systems and political identities. Those layers cannot be changed easily even by major international developments.

But does comparing 'European and US constitutionalism' at all make sense? Is it not an exercise in comparing apples to oranges? European constitutionalism mostly appears to be a distinctly intra-European phenomenon.[5] This is true even though reference to US constitutionalism

[4] Michel Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham: Duke University Press, 1994); on constitutionalism generally see also Charles Howard MacIlwain, *Constitutionalism* (Ithaca: Cornell University Press, 1947); Larry Alexander (ed.), *Constitutionalism* (Cambridge: Cambridge University Press, 1998).

[5] *Cf.* Joseph H. H. Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003); Koen Lenaerts and Piet van Nuffel, *Constitutional Law of the European Union* (London: Sweet and Maxwell, 1999); Denis Blanchard, *La Constitutionnalisation de l'Union européenne* (Rennes: Apogée, 2001); Renaud Dehousse (ed.), *Une Constitution pour l'Europe?* (Paris: Presses de Sciences Po, 2002); Paul Magnette (ed.), *La Constitution de l'Europe* (2nd edn, Bruxelles: Editions de l'Université de Bruxelles, 2002).

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is frequently made in the intra-European debate.[6] One hesitates to compare the term European constitutionalism to US constitutionalism. Traditionally, US constitutionalism is still compared to French or German or other national constitutional systems.[7] The reason for this is obvious since the US, French and German constitutional systems, with their respective characteristic judicial practice and cultures of interpretation – their constitutionalism – concern the same object: the rules concerning the working of an independent and self-governing political community of human beings and their fundamental rights. 'European constitutionalism', on the other hand, seems to embody something which is both more removed from 'the people' and more vague than national constitutional law.

The development of European integration, however, has started to make these clear-cut differences disappear. This is not only because a European entity is developing which more closely resembles a state. It is also because the European states themselves and their characteristic constitutionalisms are being transformed by the process of European integration. This is visible most clearly in the jurisprudence of the European Courts in Strasbourg and Luxembourg. The jurisprudence of the European Court of Human Rights necessarily influences and harmonises national human rights jurisprudence. To a lesser extent, similar developments are taking place in the area of state organisation.[8] These developments seem to justify posing the question of whether a

[6] Anne Peters, Anne Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin: Duncker and Humblot, 2001), pp. 96 et seq.; Armin von Bogdandy (ed.), *Europäisches Verfassungsrecht* (Berlin: Springer, 2003), at pp. 60, 75, 99, 646, 932; also Ulrich Everling, 'Die Europäische Union im Spannungsfeld von gemeinschaftlicher und nationaler Politik und Rechtsordnung,' in ibid., p. 852 and Paul Kirchhof, 'Die rechtliche struktur der Europäische Union als Staatenverbund,' in ibid., p. 907; Michel Rosenfeld, 'La Convention européenne et l'œuvre des constituants américains' (2003) 13 *Cités*, 47–55.

[7] Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press, 1999); Donald P. Kommers, 'Can German Constitutionalism Serve as a Model for the United States?' (1998) 58 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 787–98; Elizabeth Zoller, 'Les Horizons de la souveraineté – l'ésprit de la constitution hier et aujourd'hui – des usages de la Constitution en France et aux États Unis' (2002) 1 *Esprit*, 99–107.

[8] The consultative practice of the European Commission for Democracy through Law, the so-called Venice Commission of the Council of Europe, is an important, though sometimes overlooked, resource for identifying the European constitutional heritage in the area of democracy and rule of law, which includes separation of powers, see www.venice.coe.int.

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distinct 'European constitutionalism' is beginning to emerge.[9] Asking this question correctly, however, requires not only determining the *genus* of this constitutionalism, as it is currently undertaken in the intra-European debate, but also the *differentiae specificae*, which have so far been somewhat neglected.

Trying to determine identity by looking for characteristic differences is, however, a delicate enterprise. Much depends on what is being looked at. Even if characteristic differences between a European constitutionalism and US constitutionalism could be found, this would not automatically mean that Europe would already possess its 'own' characteristic constitutionalist traits. It is equally possible that Europe and its member states share any characteristic differences vis-à-vis the United States with other non-European constitutional states. This is why the comparison cannot be limited to European and US constitutionalism strictly speaking. There must also be a *tertium comparationis*. This *tertium* cannot be the rest of the world but must rather be other constitutional states.[10] For this reason a number of commentators from such other constitutional states, such as Canada, Israel, Japan, Peru and South Africa have been invited to contribute to this book. Perhaps these *tertia comparationis* lead to the conclusion that it is not so much Europe which is developing a more distinctive constitutional identity, but rather that it is the United States which is once and here again an exception.

II. The choice of topics

The choice of topics for this book deserves to be explained. The first consideration is a limitation to the most fundamental aspects of constitutionalism. A second consideration is that any topic must be apt to provide meaningful comparison between Europe and the United States. While it should be fairly obvious that the topics chosen do satisfy these criteria, it may be less clear why other important areas have been left out. Freedom of religion and the relationship between church and state, for

[9] Paul P. Craig, 'Constitutions, Constitutionalism, and the European Union' *European Law Journal* (2001) 7, 125–50; Renaud Dehousse, 'Un nouveau constitutionnalisme?' in Dehousse, *Constitution pour l'Europe?*, above, note 5, at pp. 19–38; Stefan Oeter, 'Europäische Integration als Konstitutionalisierungsprozeß' (1999) 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 901–17; Lucia Serena Rossi, '"Constitutionnalisation" de l'Union européenne et des droits fondamentaux' (2002) 38 *Revue trimestrielle de droit européen*, 27–52.

[10] Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review*, 771–97; Norman Dorsen, *Comparative Constitutionalism* (St Paul: West Group, 2003).

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example, are important topics. It is quite clear, however, that they do not (yet?) yield much common ground *within* Europe. Equal protection would have been a fertile topic, but ultimately the most important differences in this field would seem to lie in the realm of anti-discrimination policy. The most important issues in this context, however, such as the permissibility of affirmative action, are currently in flux both in Europe and in the United States.[11] Federalism is certainly an important topic insofar as it can be debated whether the US experience is significant for EU integration. This issue, however, has already been widely discussed.[12] Finally, the role of the constitution in its respective national, legal and political environment, its amendability and its entrenchment, are important background topics which should be kept in mind.

Do the five topics 'freedom of speech', 'human dignity', 'duty to protect', 'adjudication' and 'democracy and international influences' indeed yield characteristic differences between a European and a US constitutionalism? The purpose of this introduction is not to give conclusive answers, but to establish that the question is legitimate.

III. Freedom of speech

If average Europeans were asked which fundamental right is much more protected in the United States than in Europe, most people would probably give the answer: freedom of speech. Rightly so: hate speech, in particular Nazi propaganda, is not only tolerated but even to a large extent constitutionally protected in the United States. The same is not true in Europe. Most European states have enacted special legislation, in conformity with international human rights requirements, to ban incitement to racial hatred, and even to ban certain right-wing insignia and propaganda.[13] The European Court of Human Rights has accepted such legislation in principle, as have the

[11] *Gratz* v. *Bollinger*, 539 U.S. ___ (2003).

[12] Von Bogdandy, *Europäisches Verfassungsrecht*, above, note 6, at pp. 60, 75, 99, 646, 932. Mauro Cappelletti, Monica Seccombe, Joseph H. H. Weiler, *Integration Through Law, Europe and the American Federal Experience* (Berlin, New York: Walter de Gruyter, 1986).

[13] UK, *Race Relations Act* 1976, see also the establishment of the 'Commission for Racial Equality'; France, Arts. 225–1 and 432–7 *Code pénal*; Germany, ss. 130, 185 *Strafgesetzbuch*; compare also European Commission against Racism and Intolerance, *Legal Measures to Combat Racism and Intolerance in the Member States of the Council of Europe*, CRI (95) 2 rev. (1996); for a general survey cf. Peter Rädler, *Verfahrensmodelle zum Schutz vor Rassendiskriminierung* (Berlin: Springer, 1999), pp. 198–203.

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national Constitutional Courts in Europe. The two leading cases of the European Court of Human Rights in this context are characteristic. In *Jersild v. Denmark*[14] the Court declared that a journalist who had conducted an interview with right-wing youths which was then broadcast on television could not be punished for dissemination of prohibited hate speech. A closer look at the judgment shows, however, that the Court has very much restricted its holding to the particular facts of the case. The Court found relevant the obvious informational and non-associative nature of the programme and that it was viewed by 'informed' recipients.[15] Therefore, the judgment is rather a confirmation of the rule that the media can be restrained when covering racist or extreme right-wing activities than an affirmation of media freedom.

The same is true for the case of *Lehideux v. France*.[16] In this case the French authorities had applied a law which prescribed that French history during the time of the German occupation may not be 'falsified'. Two persons were convicted who had described General Pétain, the leader of the Vichy puppet government, as a patriotic figure by emphasising certain of his deeds and leaving out others which most people would regard as crucial, in particular the Vichy regime's policy of persecution of Jews. These persons had not, however, denied this persecution or the holocaust as such. Again, the judgment of the European Court is liberal only in a very limited sense: the Court took pains to declare that holocaust denial and Nazi propaganda can be punished, and are even outside the scope of protection of the freedom of expression, and it only held that in the case at hand the issue was still within the realm of legitimate historical debate.[17] Such a careful, some might even say timid, case-by-case liberalism is not the style of the US Supreme Court. The American Court has forcefully rejected any possibility of 'viewpoint-discrimination'.[18] It has thereby excluded special legislation against certain ideological positions, even if they are expressed in the form of otherwise unprotected hate speech. Such speech is defined as speech which typically provokes immediate violent reactions and thereby constitutes a clear and present danger.

[14] 298 Eur. Ct. H. R. (ser. A) 4 (1994). [15] Ibid., pp. 24 et seqq., paras. 34 et seqq.
[16] 1998-VII Eur. Ct. H. R. 2864. [17] Ibid., pp. 2886 et seq., paras. 54 et seq.
[18] *R. A. V.* v. *City of St. Paul*, 505 U.S. 377, 391 et seqq. (1992); see also *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 55 (1988).

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This stark contrast in the free-speech jurisprudence between European and US courts is not necessarily predetermined by the respective instruments themselves. It is true that the American free-speech clause is phrased in absolute terms while the European provisions usually contain limitation clauses. At the same time, however, one must remember that until the First World War the judicial understanding of 'freedom of speech' in US law was rather limited.[19] It was not until 1968 and the case of *Brandenburg v. Ohio*[20] that the 'clear and present danger test' was firmly established. The European provisions with their limitation clauses could, on the other hand, permit the identification of 'hard cores' of free speech which would not be subject to much ad hoc balancing. It is indeed striking to read certain leading judgments of the European Court of Human Rights which resonate with ideas and concepts from the jurisprudence of the US Supreme Court. The oft-quoted formula of the European Court according to which freedom of expression also protects statements which 'offend, shock and disturb'[21] immediately reminds the reader of the US Supreme Court's formula in *New York Times v. Sullivan* according to which 'debate on public issues ... may well include vehement, caustic and sometimes unpleasantly sharp attacks'.[22] The same is true of some of the legal concepts which serve to circumscribe spheres of greater or lesser protection: while the US Supreme Court has afforded greater protection to attacks against public officials and public figures,[23] the European Court has found the same for speech which is directed against public officials and politicians.[24]

Already such a cursory glance at the different courts' jurisprudence raises profound questions which four authors address in their contributions. Roger Errera puts the European and the US jurisprudence into the general context of the development of judicial review and looks more closely at the areas of political speech, libel, personality rights and privacy. Frederick Schauer concentrates on the characteristic

[19] David M. Rabban, *Free Speech in its Forgotten Years* (Cambridge: Cambridge University Press, 1997), pp. 175–6.
[20] 395 U.S. 44 (1969).
[21] *Lingens* v. *Austria*, 103 Eur. Ct. H. R. (ser. A) 26 (1986), para. 41; *cf.* also *Lehideux* v. *France*, 1998-VII Eur. Ct. H. R. p. 2864, para. 55.
[22] 376 U.S. 254, 270 (1964).
[23] *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 343–5 (1974).
[24] *Lingens* v. *Austria*, 103 Eur. Ct. H. R. (ser. A) 26 (1986), para. 42; *Barfod case*, 149 Eur. Ct. H. R. (ser. A) 12 (1989), paras. 25 et seqq.

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methodologies used by the courts and relates methodology and substance by adopting a broad historical perspective. In their comments, Lorraine Weinrib and Wilfried Brugger pursue this broad inquiry from their respective Canadian and German perspectives.

IV. Human dignity

Another reason why freedom of speech occupies such a different place in European and US constitutionalism may be related to the second topic of this book, human dignity. Human dignity is a comparatively modern *legal* term.[25] It is therefore not surprising that the term is not mentioned in the US Constitution, but is in a good number of post-war European constitutions as well as in international human rights instruments. The stimulus for the career of human dignity as a legal term is widely perceived to come from the global sense of unprecedentedness which the Nazi and other atrocities gave rise to, and the corresponding discovery of an even more fundamental legal right (or value) than the classical 'life, liberty and property'.[26] In a sense, therefore, the reason for recognising and proclaiming human dignity in post-war European constitutional texts can be seen as being structurally similar to why a need was felt to punish perpetrators for crimes against humanity and not merely for murder or enslavement. This reading of the history of the term human dignity as a constitutional concept easily explains why it has been more prevalent in Europe than in the United States. In America, the European experience which gave rise to the concept was simply not felt to be relevant.

Such an explanation is, however, itself too narrow. The term human dignity not only has an age-old philosophical tradition, but it is also frequently used in discourses of all sorts, including in the judgments of the highest courts on both sides of the Atlantic. The US Supreme Court has indeed used and applied the term human dignity in a number of its judgments. The most important of them concern the delimitation of what is cruel and unusual punishment in the sense of the Eighth Amendment,[27] the establishment of rights to a hearing under the Due

[25] *Cf.* David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002).
[26] Horst Dreier, 'Art. 1 I', in H. Dreier (ed.), *Grundgesetz Kommentar* (1st edn, 3 vols., Tübingen: Mohr Siebeck, 1996), vol. I, paras. 20–1.
[27] *Atkins* v. *Virginia*, 536 U.S. ___ (2002); *Trop* v. *Dulles*, 356 U.S. 86, 100–1 (1958); *Rochin* v. *California*, 342 U.S. 165, 174 (1952).

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Process Clause,[28] the extent of the right to privacy (in the abortion context)[29] and, finally, the free speech area.[30] In all these cases, however, the concept of human dignity has remained in a rather limited role as a background concept. It has not been transformed into an operational legal term, as some dissenting opinions have suggested it should. This situation contrasts starkly with the role of human dignity in the German constitutional context in particular where voices have warned that the term not become 'small change' in constitutional interpretation.[31]

The German practice is, however, not fully representative of European constitutionalism. At the European level a picture emerges which, at first sight, resembles that in the United States. Like the US Constitution, the European Convention on Human Rights does not contain the term human dignity, and, like the US Supreme Court, the European Court of Human Rights has not used the term very frequently, and, when it does so, it uses it most often in connection with efforts to define what is degrading treatment in the sense of Article 3 of the European Convention.[32] In addition, the European Court has pronounced *dicta* which are similar to the one in the US Supreme Court judgment of *Gertz v. Robert Welch Inc.* in which the Court declares the fundamental importance of human dignity for the Convention system as a whole without, however, drawing many specific conclusions from it.[33]

Looking only at the use of the *term* 'human dignity', however, would not appropriately portray the situation. What is important is the substance of the concept. In this respect it is necessary to bear in mind that the European Court does not need to refer to the concept of human dignity when it can base its decisions on the right to privacy (Article 8 of the Convention). The right to privacy is the subject of a well-known

[28] *Goldberg* v. *Kelly*, 397 U.S. 254, 264 et seq. (1970); *State of LA. Ex Rel. Francis* v. *Resweber*, 329 U.S. 459, 468 (1947).
[29] *Thornburgh* v. *American College of Obstetricians*, 476 U.S. 747, 772 (1986); *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 851 (1992).
[30] *Cohen* v. *California*, 403 U.S. 15, 24 (1971); *National Association for the Advancement of Colored People* v. *Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982).
[31] Günter Dürig, 'Art. 1', in Theodor Maunz and Günter Dürig (eds.), *Grundgesetz* (1st edn, München: C. H. Beck, 1958), para. 16: "Art. 1 I ist keine 'kleine Münze'".
[32] *Tyrer* v. *The United Kingdom*, 26 Eur. Ct. H. R. 16 (1978), para. 33; *Ribitsch* v. *Austria*, 336 Eur. Ct. H. R. 26 (1995), para. 38; *Tekin* v. *Turkey*, 1998-IV Eur. Ct. H. R. 1518, para. 53.
[33] E.g. *Cossey judgment*, 184 Eur. Ct. H. R. (ser. A) 22, 24 (1990), para. 2.7 (dissenting opinion of Judge Martin); *Pretty* v. *The United Kingdom*, 2002-III Eur. Ct. H. R. 155, 194, para. 65.

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