

## Crossing Border: Constitutional Development and Internationalisation

by Florian Grotz and Theo A. J. Toonen

*This ZSE Special Issue is in honour of Joachim Jens Hesse, a scholar whose multi-faceted work may be characterised as an attempt at “crossing border” in several respects. These primarily include fostering interdisciplinary cooperation between law, economics and social sciences, analysing public sector developments in an international and intercultural perspective as well as bridging the “gap” between academia and practical politics. Therefore, the volume deals with a subject that covers these features in an exemplary manner: the interrelationship between nation-state constitutions and their international environments. In this context, ongoing processes of transnationalisation have not only contributed to blurring the formerly clear-cut boundaries between these two domains, but also provoked a growing interest in and demand for comparative, interdisciplinary and applied research on constitutional developments. The present contribution highlights the “cross-border” aspects of Hesse’s work, points to some theoretical and analytical challenges of the topic and provides an outline of this Special Issue.*

*Dieses ZSE-Themenheft erscheint zu Ehren von Joachim Jens Hesse, einem Wissenschaftler, dessen facettenreiches Oeuvre als ein Versuch verstanden werden kann, in mehreren Hinsichten „grenzüberschreitend“ zu wirken. Dazu zählen vor allem die Förderung interdisziplinärer Zusammenarbeit zwischen Rechts-, Wirtschafts- und Sozialwissenschaften, die Analyse des öffentlichen Sektors im internationalen und interkulturellen Vergleich sowie die Überwindung der „Kluft“ zwischen Staatswissenschaften und Staatspraxis. Der vorliegende Band befasst sich mit einem Gegenstand, der die benannten Dimensionen in exemplarischer Weise erfüllt: dem Wechselverhältnis von nationalstaatlichen Verfassungen und ihrer internationalen Umwelt. In diesem Zusammenhang hat die fortschreitende Transnationalisierung nicht nur dazu beigetragen, die ehemals klaren Grenzen zwischen den beiden Bereichen zu verwischen, sondern auch wachsendes Interesse und zunehmenden Bedarf an vergleichenden, interdisziplinären und anwendungsbezogenen Verfassungsanalysen hervorgerufen. Der vorliegende Beitrag geht zunächst auf die „grenzüberschreitenden“ Aspekte in Hesses Werk ein, benennt dann einige theoretische und analytische Herausforderungen der Themenstellung und gibt schließlich einen Überblick über den Aufbau des Sonderhefts.*

### I. “Crossing Border” as Leitmotiv: The Work of Joachim Jens Hesse

This volume is dedicated to *Joachim Jens Hesse*, a scholar who over the last three decades has produced many publications on public sector developments both in historical and cross-national perspective. While this may apply to other social sci-

entists as well, his work definitely stands out because it has had an enormous impact on various environments – academic and non-academic alike. Doing justice to Hesse’s multi-faceted writings is thus no easy task, if possible at all. For the purpose of this *Festschrift* we decided to concentrate on an aspect that in our view is probably most specific to his approach: the almost continuous attempt to broaden the analytical and empirical perspectives on public sector developments. We therefore suggest that the metaphor of “crossing border” be taken as leitmotiv for *Joachim Jens Hesse’s* academic work. This is true for at least the following three dimensions that will be outlined briefly below:

- fostering dialogue and cooperation between public sector related disciplines;
- analysing public sector developments in an international and intercultural perspective; and
- bridging the “gap” between academia and practical politics.

First, *Joachim Jens Hesse* has always highlighted the potential benefits of interdisciplinary dialogue and cooperation. Repeatedly referring to the integrated concept of *Staatswissenschaften* rooted in the German academic tradition of the 19<sup>th</sup> century,<sup>1</sup> he is firmly convinced that a combination of normative thinking, which is primarily found in public law, and functional categories emphasised in economics and social sciences, is the best way to analyse public sector developments. This permanent claim of “indispensable multidisciplinary” has not been mere window-dressing. Rather, *Hesse’s* own writings have been oriented towards interdisciplinary criteria, for example the well-known and widely-used monograph on the German governmental system.<sup>2</sup> Furthermore, he launched several “forums” for continuous interchange between lawyers, economists, social scientists and historians, such as *Staatswissenschaften und Staatspraxis*, the *Jahrbuch für Staats- und Verwaltungswissenschaft* and the *European Yearbook of Comparative Government and Public Administration*.<sup>3</sup> In this way, he has rendered outstanding services in tightening cooperative relationships between the different *Staatswissenschaften* in Germany and Europe.

The second “crossing-border” dimension in *Joachim Jens Hesse’s* work seems to be closely connected with the aforementioned aspect: If public sector develop-

1 Ellwein, T./Hesse, J.J. (eds.): *Staatswissenschaften: Vergessene Disziplin oder neue Herausforderung?*, Baden-Baden, 1990.

2 Hesse, J.J./Ellwein, T.: *Das Regierungssystem der Bundesrepublik Deutschland*. 2 vol., 9<sup>th</sup> ed., Berlin, 2004.

3 *Staatswissenschaften und Staatspraxis*, Baden-Baden, 1990–1998; Ellwein, T./Hesse, J.J./Mayntz, R./Scharpf, F.W. (eds.): *Jahrbuch zur Staats- und Verwaltungswissenschaft*, Baden-Baden, 1987–1991; Ellwein, T./Grimm, D./Hesse, J.J./Schuppert, G.F. (eds.): *Jahrbuch zur Staats- und Verwaltungswissenschaft*, Baden-Baden, 1992–1997; Hesse, J.J./Toonen, T.A.J. (eds.): *The European Yearbook of Comparative Government and Public Administration*, Boulder, CO/Baden-Baden, 1995–1997.

ments are to be analysed in a problem-adequate manner, international and intercultural comparison is of crucial significance. At this point, we could elaborate on the methodological advancements of social sciences over the last decades and then review *Hesse's* work from this angle. For the present purpose, however, it suffices to say that he has not only published several comparative studies on key aspects of public sector development in Western countries,<sup>4</sup> but also, step by step, widened the empirical scope of his analyses. After the fall of the Berlin Wall, he was among the first Western scholars to study the processes of administrative transformation in Central and Eastern Europe.<sup>5</sup> Since the mid-1990s, when the impact of European integration on national legal and political systems considerably increased in the aftermath of the Maastricht Treaty, *Hesse* has also included the EU in his analyses.<sup>6</sup> More recently, his research interests have again broadened to encompass large-scale comparisons in an interregional perspective, with a special focus on East Asia.<sup>7</sup>

The third aspect to be addressed here is *Hesse's* belief that *Staatswissenschaften* in general and social sciences in particular ought to conduct fundamental research but at the same time should not forget about their applied dimension. In other words, the relevant disciplines should contribute to bridging the gap between academic environments and practical politics. In our view, *Hesse* himself has definitely succeeded in meeting this ambitious demand. During the last 30 years, he has extensively worked as a consultant for national and subnational ministries, local government associations, national and transnational interest groups as well

- 4 Cf. for example, *Hesse, J.J./Benz, A.*: Die Modernisierung der Staatsorganisation, Baden-Baden, 1990; *Hesse, J.J.* (ed.): Local Government and Urban Affairs in International Perspective, Baden-Baden, 1991; *id./Johnson, N.* (eds.): Constitutional Policy and Change in Europe, Oxford, 1995; *id./Wright, V.* (eds.): Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems, Oxford, 1996; *Hesse, J.J./Schuppert, G.E./Harms, K.* (eds.): Verfassungsrecht und Verfassungspolitik in Umbruchsituationen, Baden-Baden, 1999.
- 5 *Hesse, J.J.* (ed.): Administrative Transformation in Central and Eastern Europe, Oxford, 1993; *id.*: Rebuilding the State. Public Sector Reform in Central and Eastern Europe, in: Lane, J.-E. (ed.): Public Sector Reform, London, 1997, 114–146.
- 6 *Hesse, J.J./Grimm, D./Jochimsen, R./Scharpf, F.W.*: Zur Neuordnung der Europäischen Union, Baden-Baden, 1997; *Bruha, T./Hesse, J.J./Nowak, C.* (eds.): Welche Verfassung für Europa?, Baden-Baden, 2001; *Hesse, J.J./Grotz, F.*: Europa professionalisieren. Kompetenzordnung und institutionelle Reform im Rahmen der Europäischen Union, Berlin, 2005; *Hesse, J.J.*: Vom Werden Europas – Der Europäische Verfassungsvertrag: Konventsarbeit, politische Konsensbildung, materielles Ergebnis, Berlin, 2007; *Hesse, J.J./Toonen, T.A.J.* (eds.): The Impact of the/a “European Constitution” on the National Legal and Political Systems, Baden-Baden, forthcoming.
- 7 *Hesse, J.J./Hood, C./Peters, B.G.* (eds.): Paradoxes in Public Sector Reform, Berlin, 2003; *Hesse, J.J./Lane, J.-E./Nishikawa, Y.* (eds.): The Public Sector in Transition. The European Union and East Asia Compared, Baden-Baden, forthcoming.

as for international organisations.<sup>8</sup> Furthermore, he was invited to be an expert member of various political advisory bodies and reform commissions.<sup>9</sup> Last but not least, he was founding director of several policy-oriented research institutions, such as the *Rhein-Ruhr-Institut für Sozialforschung und Politikberatung*, the *European Centre for Comparative Government and Public Policy* and the *International Institute for Comparative Government and European Policy (ISE)*.<sup>10</sup>

After this quite selective overview, it should be clear that we cannot aspire to highlight all relevant facets of *Hesse's* academic and practical work. In his honour, we rather sought to address a subject that meets the above criteria in an exemplary way: the relationship between constitutional development and internationalisation. To analyse key issues of this topic in a “cross-border” perspective, we invited a number of eminent lawyers, economists and political scientists from Europe, the United States and East Asia who worked together with *Joachim Jens Hesse* in different contexts to contribute to a *Festschrift*. The *Zeitschrift für Staats- und Europawissenschaften/Journal for Comparative Government and European Policy (ZSE)* struck us as an appropriate venue: This multilingual quarterly was founded by *Hesse* some years ago precisely for the purpose of promoting discussions across different disciplines, various national cultures as well as between academics and practitioners.

The following section elaborates in more detail on how the topic of constitutional development fits the leitmotiv of “crossing border” in the threefold sense

- 8 Among the vast number of reports and expert opinions, cf. as a selection of the most recent ones: *Hesse, J.J.*: Überprüfung der kommunalen Verwaltungsstrukturen im Saarland. Gutachten im Auftrag des saarländischen Ministeriums für Inneres und Sport, Berlin, 2004; *id.*: Niedersachsen: Staatliche Repräsentanz in den Regionen. Funktion, Aufgaben und Organisation von „Regierungsbüros“. Gutachten im Auftrag des Gesprächskreises Weser-Ems, Berlin, 2004; *id.*: Reorganisation der Hauptstadtverwaltung. Funktional- und Verwaltungsstrukturreform in Berlin. Gutachten für die FDP-Fraktion im Abgeordnetenhaus von Berlin, Berlin, 2005; *id.*: Regierungs- und Verwaltungsreformen im internationalen Vergleich: der Fall Australien. Untersuchung im Auftrag des Bundesministeriums des Innern, Berlin, 2006; *id.*: Regierungs- und Verwaltungsreformen im internationalen Vergleich: der Fall Neuseeland. Untersuchung im Auftrag des Bundesministeriums des Innern, Berlin, 2006; *id.*: Evaluation der Aufgabenträgerschaft nach dem SGB II. Jahresbericht 2006. Untersuchung im Auftrag des Deutschen Landkreistages, Berlin, 2007; *id./Götz, A./Schubert, S.*: Reform der Hoheitsverwaltung. Das Beispiel der Finanzverwaltung in Baden-Württemberg, Baden-Baden, 2007; *Hesse, J.J.*: Verwaltungsstruktur- und Funktionalreform in Schleswig-Holstein. Untersuchung im Auftrag der Landesregierung Schleswig-Holstein, Berlin, 2007.
- 9 To name only a very recent example, he serves as expert on the current *Bund-Länder-Commission for Reforming the Federal Fiscal Relations*. See *Hesse, J.J.*: Stellungnahme im Rahmen der Sachverständigen-Anhörung der Kommission von Bundestag und Bundesrat zur Modernisierung der Bund-Länder-Finanzbeziehungen. Verwaltungsthemen. K-Drs. 78, 08.11.2007.
- 10 The *Rhein-Ruhr-Institut für Sozialforschung und Politikberatung* was founded at the University of Duisburg in 1980 (cf. <http://www.uni-duisburg.de/Institute/RISP/>), the *European Centre for Comparative Government and Public Policy* was established by the three Berlin Universities in 1996, whereas the *ISE* began its work in 2001 (cf. <http://www.internationales-institut.de>).

explained above. It is followed by an outline of the sections and individual contributions in this ZSE Special Issue.

## II. Constitutional Development in a Cross-Border Perspective: Theoretical and Analytical Challenges

Constitutional policy and change strike us as almost ideal topics to exemplify that “cross-border” perspectives are both needed and fruitful in analysing key issues of public sector development. First of all, the concept of constitution can be defined in very different ways.<sup>11</sup> “Constitution” in a formal sense is normally restricted to fundamental law texts in a country. But it can also be understood in a more functional sense, referring to the “general rules of the socio-political game” which are usually found both within and beyond constitutional frameworks. Furthermore, the main purpose of constitutions may also be interpreted in two basically distinct ways: Either constitutions are regarded as instruments to stimulate or facilitate specific policies, or they are considered to have their own objective, expressing general attitudes, opinions and views of a society.

It goes without saying that individual *Staatswissenschaften*, in accordance with their meta-theoretical and methodological preconditions, tended to highlight only one side of the abovementioned distinctions. The formal meaning of the concept predominated in constitutional analyses from a public law perspective,<sup>12</sup> whereas approaches in the constitutional political economy tradition were usually based on a functional and instrumental understanding of the concept.<sup>13</sup> In political science, the use of “constitution” has never been as uniform as in other disciplines. Nevertheless, a considerable part of mainstream literature focused on the formal as well as instrumental aspects of the term.<sup>14</sup> However, recent develop-

11 Cf. Brennan, G./Hamlin, A.: Constitutions as Expressive Documents, in: Weingast, B.R./Wittman, D.A. (eds.): *The Oxford Handbook of Political Economy*, Oxford, 2006, 329–341.

12 See for example Mohnhaupt, H./Grimm, D.: *Verfassung*, in: Brunner, O./Conze, W./Koselleck, R. (eds.): *Geschichtliche Grundbegriffe*, Vol. 6, Stuttgart, 1990, 831–899; Böckenförde, E.-W.: *Staat, Verfassung, Demokratie*, 2<sup>nd</sup> ed., Frankfurt/M., 1992; Gosewinkel, D./Masing, J. (eds.): *Die Verfassungen in Europa 1789–1949*, München, 2006.

13 Buchanan, J.: *Constitutional Economics*, Oxford, 1991; Ackerman, B.: *Constitutional Economics – Constitutional Politics*, in: *Constitutional Political Economy*, 10/4 (1999), 403–412; Vanberg, V.: *The Constitution of Markets*, London, 2001.

14 Lane, J.-E.: *Constitutions and Political Theory*, Manchester/New York, 1996; Lutz, D.S.: *Principles of Constitutional Design*, Cambridge, 2006; Oberreuter, H.: *Verfassung*, in: Helms, L./Jun, U. (eds.): *Politische Theorie und Regierungslehre*, Frankfurt/New York, 2004, 45–73.

ments within the said disciplines point to a careful broadening of classical definitions and thus to rudimental processes of convergence. In European law, for example, a fundamental debate has emerged about the application of the concept of constitution beyond the nation-state, where a formal understanding in the traditional sense is certainly not appropriate.<sup>15</sup> In parallel, there are increasing demands to include social and political – i.e. functional – preconditions into legal analyses of national and European constitutional law.<sup>16</sup> Furthermore, current political science literature includes analytical approaches that stress the symbolic rather than instrumental dimension of constitutions.<sup>17</sup> Yet, constitutional political economy is also taking growing account of the “expressive” aspects of constitutions.<sup>18</sup> In a nutshell, ongoing debates and analytical advancements in constitutional research might profit enormously from “cross-border” exchange between the respective disciplines.

Secondly, constitutions seem to be almost predestined to be explored from a comparative perspective. In this context, two empirical trends require special attention. On the one hand, many nation-states have recently made substantial reforms in their constitutional frameworks. Relevant cases include “old” democracies, such as Belgium, Finland and Switzerland, “young” democracies, such as the Central and Eastern European countries, as well as non-democracies like the People’s Republic of China. While each of these processes has clear idiosyncratic features, there may be similar normative and functional patterns underlying these reform policies. Against this background it is not surprising that the analysis of constitutional reforms has become quite a “fashionable” field of research within comparative political science, after the discipline’s mainstream had more or less ignored this issue for a long time.<sup>19</sup>

On the other hand, and in stark contrast to the classical view of constitutionalism, constitutional developments are no longer confined to “closed” nation-

15 *Kirchhof, P.*: Europa auf dem Weg zu einer Verfassung?, in: ZSE, 1/3 (2003), 358–382; *Robbers, G.*: Eine neue Verfassung für die Europäische Union, in: ZSE, 1/3 (2003), 383–399; *Haltern, U.*: Europäische Verfassung, in: Nohlen, D./Grotz, F. (eds.): Kleines Lexikon der Politik, 4<sup>th</sup> ed., München, 2007, 125–127.

16 *Haltern, U.*: Europarecht und das Politische, Tübingen, 2005.

17 *Vorländer, H.* (ed.): Integration durch Verfassung, Baden-Baden, 2000; *Vorländer, H.* (ed.): Die Deutungsmacht der Verfassungsgerichtsbarkeit, Wiesbaden, 2006.

18 *Brennan, G./Hamlin, A.*, op. cit.

19 See for example *Lutz, D.S.*: Towards a Theory of Constitutional Amendment, in: American Political Science Review, 88/2 (1994), 355–370; *Schultze, R.-O./Sturm, R.* (eds.): The Politics of Constitutional Reform in North America, Opladen, 2000; *Lorenz, A.*: How to Measure Constitutional Rigidity, in: Journal of Theoretical Politics, 17/3 (2005), 339–361; *Colomer, J.P.*: Comparative Constitutions, in: Rhodes, R.A.W./Binder, S.A./Rockman, B.A. (eds.): The Oxford Handbook of Political Institutions, Oxford, 2006, 217–238. Among the “classical” studies on comparative constitutionalism cf. *Friedrich, C.J.*: Der Verfassungsstaat der Neuzeit, Berlin, 1953; *Loewenstein, K.*: Verfassungslehre, 2<sup>nd</sup> ed., Tübingen, 1969.

states. The emergence and evolution of international organisations where parts of the national sovereignty have been “pooled”, raise questions about the possibilities and limits of constitution-giving at supranational level. The elaboration and rejection of the EU Constitution is only the most prominent case in point.<sup>20</sup> An even more problematic issue in this context is how and to what extent ongoing regionalisation and internationalisation processes impact on national constitutional frameworks.<sup>21</sup> In all the abovementioned cases we are not faced with simple causalities, but rather complex and indirect patterns of exogenous and endogenous influence. As a consequence, comparisons between nations and cultures seem to be the only way to systematically learn more about the “silent” transformation of the constitutional state in an era of internationalisation.

The third aspect of why constitutional development seems to be pre-eminently suited for illustrating the usefulness of “cross-border” perspectives is its inherent applied dimension. Since the ancient world, constitution making and constitutional reforms have been classical issues about which academics at least maintained to have specific expertise based on their research. Although by far not all current literature on constitutions and constitutionalism claims to have immediate practical value,<sup>22</sup> it should not be forgotten that cognitive interests in constitutional analysis are always connected to the fundamental significance which constitutions have as a “framework and programme”<sup>23</sup> for the public sector at large. Therefore, the various *Staatswissenschaften* constantly have to consider how their research may contribute to adapting a given constitutional framework to changing national and international environments in normatively and functionally adequate ways.

### III. Outline of the Special Issue

The contributions in this Issue highlight these and other cross-border aspects of constitutional development by applying different analytical approaches to a variety of contexts. The first section deals with the historical and intellectual founda-

20 Hesse, J.J.: Vom Werden Europas, op. cit.; *id./Toonen, T.A.J.*: European Constitution, op. cit.

21 For a more theoretical view see Dobner, P.: Konstitutionalismus als Politikform. Zu den Effekten staatlicher Transformation auf die Verfassung als Institution, Baden-Baden, 2002; for a comparative study of the impact of European integration on national institutional systems, cf. Grotz, F.: Europäisierung und nationale Staatsorganisation, Baden-Baden, 2007.

22 One of the most prominent examples of the latter position in political science is Sartori, G.: Comparative Constitutional Engineering, 2<sup>nd</sup> ed., Basingstoke, 1996.

23 Hesse, J.J./Ellwein, T.: Regierungssystem, op. cit., 118 ff.

tions of comparative constitutionalism. The two respective contributions highlight the key role that “internationalised” concepts and comparative interpretations of national history can play for constitutional development. Although the authors analyse very different cases in specific periods, they both refer to individual academics and their work, thus underlining the – more or less indirect, but practically significant – impact which scholarly debates can have on constitutional politics in the middle and long term.

*Dieter Langewiesche* shows that the common view of a historical *Sonderweg*, which has characterised the discussions about political self-understanding in Germany, goes back to the *Kaiserreich* in the late 19<sup>th</sup> century. Since the institutional order of the German Empire mainly aimed at hindering the development of parliamentary democracy, it already had numerous critics, among them the leftist-liberal politician and lawyer *Hugo Preuß*. By comparing Germany with England, France and North America, he searched in national history for a reason why the country was so different from other Western states and societies. Although he produced insights that are astounding even today, *Preuß*’ political influence remained limited until the end of the *Reich*. *Langewiesche*’s study thus presents a relatively unfamiliar side of *Hugo Preuß*, who later became known as a “founding father” of the Weimar Constitution.

In a quite similar way, *Yoichi Nishikawa* explores the works of *Ludwig Rieß* (1861–1928), the first European historian who taught at the Imperial University of Tokyo and introduced modern historical studies there. Strongly influenced by *Leopold von Ranke*’s concept of world history, *Rieß* saw the “universal meaning” of Japan’s rise as regional power in its historically acquired ability to build up a nation-state in the “spirit of Western societies”. It is interesting to note that this analytical concept was Eurocentric as well as outmoded in Germany by that time. However, in the context of the *Meiji* restoration, which led to a fundamental transformation of the Japanese state and society, *Rieß*’ work had an enormous impact on national historiography and, eventually, on constitutional development, as for the first time Japan’s history could be interpreted in an international perspective.

The first section thus focuses on examples of the “intellectual roots” of comparative constitutionalism in the late 19<sup>th</sup> century and why such cases remain worthwhile studying. The next three articles concentrate on current constitutional developments in Western democracies. As case studies on Germany and the United States show, key issues of present constitutional politics are triggered by substantial changes in the international environment.

Since the functional distinction between domestic and foreign security has become blurred because of transnational terrorism, *Peter Badura* re-examines the

constitutional mandate of the Federal Armed Forces in Germany. Contrary to the widespread belief that military missions have to be strictly limited to defending the country against external enemies, he convincingly argues that the *Grundgesetz* does not rule out such operations on the state's own territory. They should, however, be confined to constitutionally enumerated cases, in which domestic security can neither be guaranteed by police danger prevention nor by deploying military abilities. In critically reviewing relevant reform initiatives, *Badura's* essay also contributes to the current political debate on adjusting the role and function of security forces to "cross-border" threats.

Whereas in Germany, explicit amendments to the *Grundgesetz* are being discussed in order to maintain legal certainty, *Bert A. Rockman* and *Eric Waltenburg* observe a silent yet substantial constitutional change in the balance of constitutional powers in the United States. Although the American constitution provides for a system of checks and balances in which congress is the expected source of state authority, the federal executive government has been increasingly asserting itself over the years. Especially in times of crisis and war, American presidents were able to expand their prerogatives, though never without limitations. In the context of the war against terrorism in the aftermath of 9/11, the *Bush-Cheney* administration has taken its presidential authority far beyond the liberal foundations of the constitution. *Rockman* and *Waltenburg* analyse the behaviour of presidents and other institutional actors in a diachronic perspective. In doing so, they not only highlight the political preconditions for enhancing executive powers, but also make a case for a necessary constitutional debate on "rebalancing" the system in the spirit of the founding fathers.

*Guy Carcassonne* comments on the constitutional politics in France and shows that the institutional setting of the Fifth Republic is far less idiosyncratic than most of its advocates and opponents assume. However, the semi-presidential system has re-triggered almost cyclical debates on constitutional change after *Nicolas Sarkozy* was elected to the presidency in May 2007. Currently, the main institutional reform issues include the relationship between the president and the prime minister, the strengthening of parliamentary powers as well as the advancement of the *Conseil constitutionnel* to a fully-fledged constitutional court. In contrast to the other contributions in this section, *Carcassonne* focuses on domestic reasons for constitutional change that obviously remain decisive in the French context. At the same time, he stresses the key significance of agency for the functioning of the governmental system – independently of any change in the formal "rules of the game".

Another classical topic in normative as well as analytical literature on comparative constitutionalism is discussed in the third section: the significance of

constitutional frameworks in the context of economic and political transformation. Especially the transitions from authoritarian rule that took place in various world regions since the late 1980s have given rise to intensified legal and social research on constitutional choices favouring or hindering the institutionalisation and consolidation of new democracies.<sup>24</sup> The case studies highlight how dependent such constitutional choices are on context and point to the need for further comparative analyses of their effects.

According to *László Csaba*, systemic change in Central and Eastern Europe has given social scientists an extraordinary opportunity to apply their theoretical insights to a whole region under quasi-laboratory conditions. However, this opportunity has not really been seized so far, at least not where it concerns constitutional political economy. Therefore, *Csaba* presents an outline for studying the influence of constitutional development on economic change in Hungary and other new EU Member States. His analysis concludes that constitutionalism has not been a formative idea in the Hungarian transformation process, in contrast to what is argued in the neo-liberal academic literature and in the related policy discourse. Furthermore, the domestic impact of Europeanisation, i.e. the adoption of the *acquis communautaire* as “supranational constitutional framework” during the pre-accession period, has been far more limited than most Western observers first assumed.

Likewise, *Yong-duck Jung* and *Cheongsin Kim* stress the weight of historical preconditions in the Republic of Korea in establishing a “constitutional state” in the Western sense. Their analysis reveals that the institutionalisation of parliamentary democracy proved to be extremely difficult. The reason was that the modernisation of the Korean state and society since the late 19<sup>th</sup> century was pursued “from above”, i.e. by political and bureaucratic elites rather than by common people. Given this hierarchical tradition and the cyclical sequence of regime changes since the foundation of the First Republic in 1948, the National Assembly has not been able to take root as an effective body for controlling the state executive, although its increasing reinvigoration has contributed to weakening the authoritarian legacy.

*Richard Balme* and *Yang Lihua* present a very remarkable case in the context of this Special Issue: the People’s Republic of China (PRC), where dynamic policy evolution and substantial socioeconomic change have not been followed by a democratisation process similar to those that many communist regimes have undergone since the early 1990s. Nevertheless, recent policy reforms of the Chinese

24 Cf. *Lijphart, A.*: Constitutional Choices for New Democracies, in: *Journal of Democracy*, 3/1 (1991), 72–84; *Sartori, G.*, op. cit.; *Zielonka, J.* (ed.): *Democratic Consolidation in Eastern Europe*. 2 Vol., Oxford, 2001.

government were accompanied by a series of constitutional amendments which might be interpreted as part of the overall modernisation process in the PRC. However, the empirical analysis of the relationship between constitutional reforms and political development suggests a more differentiated conclusion. On the one hand, constitutional politics in the PRC did not depart from the traditional communist approach, but served as a means to legitimise specific policies initiated by the Chinese Communist Party. On the other hand, the accommodation of the constitution to rule-of-law standards has triggered a self-dynamic process that brings important changes in political culture and may provoke significant tensions within the governmental system in the mid and long term.

After the historical and regional case studies in the first three sections, the fourth section focuses specifically on a core function that each “living constitution”<sup>25</sup> should fulfil: providing government and administration with a precise and effective framework to work with. Under the heading “state structures and constitutional reform”, four comparative analyses address this issue from different angles. As *Arthur Benz* shows, constitutional arrangements have to be constantly adapted to changes in their domestic and international environments in order to maintain state effectiveness. This is especially true for federal polities where the balance of power and the relations between constituent units and their institutions are highly dynamic. At the same time, constitutional reforms in federal contexts are more likely to fail than in unitary ones, because the constellation of central and decentral actors involved in federal policy making may be generally characterised as a “joint-decision trap”.<sup>26</sup> By comparing recent developments in Germany and Canada, *Benz* provides evidence on how federal states can escape this constitutional dilemma. Accordingly, a reform process that is open to social interest groups may form the basis for an evolutionary change of the federal constitution, both in terms of substance and legitimacy.

In a quite complementary manner, *Theo A.J. Toonen* and *Trui Steen* study the operation of constitutional structures in unitary countries. By using the concept of cooperative state, which has so far largely been applied to federal cases only, they point to the complex interrelationships between different layers of governance in traditionally unitary states such as England, Sweden, Denmark, France and the Netherlands. Their analysis shows that it is worthwhile to study historical constitutional “originals” to gain a perspective on contemporary institutional characteristics and current developments. Many constitutional and institutional

25 *Sternberger, D.*: Lebende Verfassung. Studien über Koalition und Opposition, Meisenheim, 1956.

26 *Scharpf, F.W.*: The Joint-Decision-Trap. Lessons from German Federalism and European Integration, in: *Public Administration*, 66/3 (1988), 239–278.

design issues and developments currently discussed under the heading of internationalisation of national constitutional structures have been hotly debated before in the context of the “nationalisation” of local and regional affairs. The comparative analysis suggests that the debate on the institutional meaning of local government autonomy should be revived as – cooperative – multi-level governance within the EU might be of constitutional proportions as well. In designing relevant strategies for institutional reform, a context-sensitive understanding of local government autonomy and problem-solving capacity is required in order to secure an important position for local and regional layers in the emerging European order.

The rules of the game which keep the “*arbeitende Staat*” functioning cannot be confined to constitutional documents only.<sup>27</sup> This general insight is also stressed by *John Halligan*, who deals with administrative reforms in Westminster democracies. Over the last 25 years, Australia, Canada, New Zealand and the United Kingdom have restructured their public administration systems according to the – seemingly uniform – paradigm of New Public Management (NPM). Therefore, this sample of countries provides an extraordinary opportunity to study the long-term impact of extensive public sector reforms. Although the four cases are acknowledged as a coherent group based on common administrative traditions, *Halligan*’s analysis highlights how different the outcomes of NPM reforms have been. While some features have demonstrated durability and continue to be significant, others that were once considered to be “key reforms” have been demoted in significance or are subject to debate again. Nevertheless, it is also apparent that all four countries have had a pragmatic preference for better integrated and more balanced administrative systems. Therefore, the political executives’ need for effective governance – whether for delivering public services or for providing international security – will continue to drive public sector change in Westminster democracies.

At the end of this section, *Tony Verheijen* points to a central feature of state effectiveness that, with some notable exceptions, has hardly been regulated by national constitutional law: a politically impartial, merit-based and professional civil service system. This classical model of personnel management is still considered as a key benchmark and is uniformly applied by international organisations. Still, many states in diverse regional contexts remain stubbornly outside this value system, or even seem to withdraw from it. Comparing the continued

27 Hesse, J.J./Benz, A.: Staatliche Institutionspolitik im internationalen Vergleich, in: Ellwein, T./Hesse, J.J./Mayntz, R./Scharpf, F.W. (eds.): Jahrbuch zur Staats- und Verwaltungswissenschaft, 2 (1988), 69–111, here 70.

stalemate in most of the African continent with recent sobering experiences in Central and Eastern Europe, *Verheijen* provides an insight into why the *Weberian* model does not make inroads outside the OECD world. His analysis shows evident limits to “cross-borderisation” where it concerns normative values beyond the formal-legal level that prove to be fundamental to running the constitutional state. The question is whether these values can be constituted and secured in a different manner, so that they might stick in ongoing transformation processes.

While the preceding contributions focus on the development of national constitutions in cross-border perspective, the fifth and last section explicitly deals with normative and functional problems of constitutionalism beyond the nation-state. In this context, the European Union is currently the only international organisation whose legal framework may be termed “quasi-constitutional”. It is also the only political system beyond the nation-state that has experienced a lasting constitutional crisis after the Treaty on a Constitution for Europe was rejected in referenda in France and the Netherlands more than two years ago.<sup>28</sup> On 18 October 2007, the Lisbon European Council finally approved a reform of the European Treaties, which is again subject to ratification in all 27 Member States. Although many provisions of the draft Constitutional Treaty have been included in the new Reform Treaty, *Gerhard Robbers* argues that the “constitutional crisis” will continue to have enormous consequences for the systematic interpretation of European law. On the one hand, the people in France and the Netherlands have politically decided that the EU should not have a constitution in the traditional sense. On the other hand, the constitutions of the Member States became “divisional constitutions” a long time ago, as Community law precedes national law. Therefore, if the European Union does not have a constitution and national constitutions only cover specific fields, large sections of law will not have any constitutional basis at all. A potential way out suggested by *Robbers* would consist in “Europeanising” the concept of constitution that refers to an evolving order rather than to a fundament of state. However, this solution will only work if the political rejection of the European Constitution is ignored.

The European Union remains the most advanced but by no means the only regional organisation. As *Jan-Erik Lane* shows, in recent years similar regimes have been mushrooming all over the world because they allow flexible responses to the challenges of globalisation. At the same time, uncertainty is a universal feature of such organisations, as participating governments tend to postpone or renege on ambitious plans for far-reaching regionalisation, not knowing the implications. But once a regional organisation engages in a common market project,

28 Cf. ZSE Special Issue, 3/4 (2005), titled “The European Union in Crisis – Where to Go From Here?”

constitutional decision making is called for, as the consequences of economic integration spill over into other fields of state regulation. Against this background, *Lane* elaborates on a typology of regional organisations based on their degrees of political and economic integration, and classifies existing cases according to their “constitutionalising potential”.

While *Lane’s* contribution focuses on functional preconditions for supranational constitution-making, *Michiel Scheltema* discusses normative implications of the internationalisation process. He convincingly argues that as constitutional principles historically developed within the framework of sovereign nation-states, national constitutional law continues to be of crucial significance, but should at the same time “open up” to the international level. He moreover shows that the constitutional conditions for and qualities of international legal decision making are still underdeveloped and very much open to debate. However, international legal regimes for effective enforcement and compliance will remain dependent on the quality of national legal structures and actors for a considerable time to come. Therefore, a transnational legal order is required which will face the crucial challenge of establishing formal procedures through which adherence to constitutional principles in cross-border cooperation can be judged in reliable ways. While national courts will undoubtedly play a key role in this context, they will not be able to exclusively stick to their domestic legal system, but will also have to refer to common constitutional principles to be developed across borders.

In the concluding chapter, the editors try to briefly reflect on the analytical and empirical insights provided by these contributions. They point out the potential to “build bridges” between the different approaches and various contexts as well as to gain some perspective on future directions and points of attention for the academic and applied research agenda. This is methodologically inspired, to say the least, by *Joachim Jens Hesse*, who at many, often very productive, conferences and workshops presented his “ten reflections” on the given topic as a stimulus and point of departure for future activities and “cross-border” cooperation among policy-oriented academics and academically-oriented practitioners. Thus, time and again he succeeded in bringing together seemingly incomparable contributions at the end of fascinating discussions – discussions which crossed the borders between disciplines, national cultures as well as academia and politics, laying the groundwork for inspiring, impressive and fruitful intellectual productivity.