WORK IN PROGRESS: CONSTITUTIONS

MICHAEL METZELTIN, FRANCESCO GARDANI,
PETREA LINDENBAUER

Abstract. The article discusses how authors of constitutions have conceptually developed semantic fields (e.g community, territory, leadership) in their texts. The highest goal of modern constitutions is to avoid suppressing supremacy and to guarantee external as internal sovereignty and commonwealth. The tradition of modern „state organization" goes back to the end of the 18th century. Since then modern constitutions comprise rights of the citizens (e. g freedom, equality, property) as well as duties (e.g fiscal imposition). Nevertheless, the main terms 'freedom', 'property', 'security' or 'resistance', which can be found in modern constitutions, are referentially very indefinite. In the paper a catalogue of twenty-one questions regarding the concept of 'state' will be listed which authors of constitutions should try to answer. Modern constitutions have a traditional typological structure starting from a preamble up to revision regulations. The *Treaty of the European Union*, signed in Maastricht in 1992, however, is the first text that unifies two very different textual traditions: on the one hand the 'international economic agreement' type, on the other hand the 'declaration of human rights' type. In the yet existing version(s) of the European Constitution a series of elements make the text dysfunctional.

1. THE MAIN TOPICS OF CONSTITUTIONS

States are generally made up by a territory (national territory with borders and resources), a population which organises itself for the purpose of wealth and defence (people, nation, citizens, sovereign with rights and duties) and a leadership (with competences). If a (state) community wishes an "organisation Charter" this has to describe:

- the community
- the territory
- the leadership

These are the main issues the authorship of a constitution has to develop.

2. MODERN CONSTITUTIONS

Constitutions are texts written on the occasion of a state foundation. They may establish the tradition of modern state organisations such as the French Declarations of Human Rights of 1789/1791 and 1795, the American Constitution

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of 1787 and the French Constitutions of 1791, 1793, 1795. Moreover, the Spanish Constitution of Cádiz of 1812, the Belgian Constitution of 1831 and the French Constitution of 1848 have an exemplary character.

Modern Constitutions have been compiled since the end of the 18th century. These texts synthesise the political, social and economic organisation of a state. They envisage, on the one hand, rights of the citizens such as freedom, equality, property and security, on the other hand, duties such as, most notably, fiscal imposition.

Modern Constitutions serve several goals: to avoid a suppressing supremacy due to the consensus among the distributed forces of the government; to legitimise or delegitimise those in power, and to control them through regular elections and referenda. Constitutions postulate that the state is sovereign internally as well as externally. Internal sovereignty means that the people are sovereign, *i.e.* they determine the course of the state. "People" means the whole of humans living in the state from a certain age onwards and with a specific political feature namely nationality (mostly by descent). External sovereignty means the independence, recognised by other states, which do not permit an interference of other states into the own state. The sovereignty is representative due to the size of the people, that is, it is realised by selected representatives. The highest purpose of a Constitution is achieving and securing the commonwealth (cf. Aristotle, *Politics*, III, 6). The ideology of the representative, democratic, liberal sovereign state is rooted in the development of natural right and in Enlightenment (Locke, Montesquieu, Vattel, Rousseau). The transmission of the idea of freedom from the individual to communities has promoted their identity and led thus to the emergence of the so-called culture-nations, in which the identity of the population bases rather on a common culture, or state-nations, in which the identity of the population bases rather on the common will of co-operation. The sovereign, representative, democratic, liberal state may turn into a National State, more rarely into a Federal State.

3. WHAT TO DECIDE?

Considering the history of the development of the modern constitutional national states, the main questions about the creation of modern constitutions might be the following:

- How might we define the state (territory, borders, political system)?
- How might we mark the state (designation, national insignias, church/confessions, languages)?
- Who counts as a citizen (conditions)?
- On what citizen rights and citizen duties does nationality base?
- Who is the sovereign?
- Who represents the sovereign (parliament, head of state)?

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- Who has access to the representative office and to the authorities?
- How is the representative office of the sovereign elected (legitimacy of the representative office)?
- Who makes the laws (only the legislature or both legislature and executive)?
- Should the legislature have one or two chambers (simple or double representative office)?
- Who does exercise the executive power (president/king, Prime Minister/chancellor with guideline authority, government)?
- To whom are the representatives of the executive responsible (the parliament, the president/king)?
- What authorities are to be limited and how (the all of them; all but not the king and not the judges)?
- Who is to exercise the judiciary and how?
- How are the representatives of the judiciary be ordered (by election or by nomination)?
- How is the public administration to be arranged (offices, territorial organizations)?
- To whom is the public administration responsible?
- How is internal and external security to be organised?
- Who has the supreme command over the security forces (police, army)?
- How is the organization of the state to be financed?
- Who ratifies the Constitution (people, parliament)?

Depending upon the weight of the legislature and of the executive there exist either parliamentary or presidential constitutions.

4. REFERENTIAL *INDEFINITENESS* AND CENTRIFUGAL ELEMENTS

Larger communities consist of members with partly converging and partly diverging interests. As a norm, these interests must be formulated hyperonymically, rather abstractly, with large intension. The commonwealth is the highest objective of a community. Nevertheless, depending upon different ideologies there are quite divergent conceptions in what the commonwealth exactly consists and how to reach it. The acknowledgment of the European human rights and its development from the Enlightenment onwards offers a certain form of protection from divergences which might be too large and lead to tensions. As early as in 1789 the French declaration ascertains that humans are born free, have the same rights from birth on and that freedom, property, security and resistance against suppression are natural and imprescriptible rights.

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All these terms are referentially very indefinite and have to be defined more precisely. Concretely, there is no freedom, actually there is only the freedom to do (or not to do) something. Thus, the Belgian constitution of 1831 registers the freedom of religion, of opinion, of instruction, of press, of assembly and the freedom of association for the citizens (art. 14–20). The Swiss Federal Constitution of 1999 encompasses even eleven kinds of freedom (art. 15–24). The detailed description of these rights confers a strong descriptive character to constitutions, which stands in competition with their actual narrative deep structure. Constitutions may be traced back to a transformative text base. A certain community in a certain territory decides to live in a certain way. Its purpose is everyone's commonwealth (cf. also Aristotle, *Politics*, III, 6) to be guaranteed as extensively as possible. The commonwealth does not exist to the desired extent yet or may be endangered. In order to reach or to secure it, certain premises are to be respected. These premises are the rights to freedom, equality, property and security. In order to reach the commonwealth through these premises, all members of the respective community must agree that they recognise these rights for all and that, accordingly, determined preventive measures and certain services are agreed upon. This is carried out by the legislation and realised by the executive.

Beside the centrifugality of descriptivy and transformativity there is also a centrifugal relationship between the four fundamental ideas, *e.g.* between freedom and equality.

From an anthropological perspective, humans might come up to the term "freedom" through the perception of the hindrance of their movements. This counts as a fundamental idea of the natural right: "The Right of Nature, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature" (T. Hobbes, *Leviathan*, I, 14). This term came to be more deeply elaborated through theological considerations about the freewill regarding a preceding or accompanying grace. This issue has been presented as a drama by Pedro Calderón de la Barca in his famous first monolog of Segismundo in *La vida es sueño* (1636). The individual freedom must apply to all by virtue of the postulated overall equality, thus implies the prohibition of slavery and in addition a conventional self-restriction. The enforcement of too personal diverging interests is likely to strongly damage the freedom of the others, as the authors of the *Déclaration* of 1789 had recognised:

"Art. 4. – La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui: ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi.

Art. 11. – La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi."

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In *Etat de la France* (London, 1727) the French politician comte de Boulainvilliers had very concisely argued that freedom is the opposite of equality. Freedom means intervening in the rights of the others. Actually, our social organisation systems limit our liberties. The question rises in how far public ruling can intervene in the individual life; the range varies from the totally suppressed to the free person. Nonetheless, probably there will remain a more or less strong tension between reason of state and personal luck, as represented in different operas Verdi's. The American sociologist Charles Wright Mills (1916–1962) denounces that, despite constitutions, power irresponsibly concentrates on an elite composed of the prominent representatives of the state, of the economy and of the military (*The Power Elite*, 1956).

5. THE TYPOLOGICAL STRUCTURE OF TRADITIONAL CONSTITUTIONS

The authors of the traditional constitutions based on the French declarations of the human rights might have intended the implementation of the citizen rights within a representative national state as the primary, although mostly not explicitly mentioned objective. This is asserted in Article 2 of the Declaration of 1789:

"Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression."

Therefore, they define the territory, describe in detail the rights but not or scarcely the duties of the citizens, determine as exactly as possible the competences of the government authorities, give some particulars on the national budget, do not give clue on economy. Due to these principles and the appropriate text production primarily in the 19th century the structure of traditional constitutions may be typologically analysed as follows:

- preamble (objectives, principles)
- general conditions (in particular the territory, the peculiarities, the insignias)
- the citizens (their rights, later also their duties)
- the government authorities (general)
- the legislature: the chamber of deputies
- the legislature: the senate
- the executive: the head of state
- the executive: the government
- the judiciary
- finance
- the army
- revision regulations

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6. TOWARDS THE EUROPEAN CONSTITUTION

The traditional constitutions which were produced from the end of the 18th century up to World War Two originally have to be traced back to the efforts of the civil elites to overcome the absolutist corporative state by introducing overall citizen rights. So doing, the subjects became free citizens with same rights and duties, the population became the nation, the rulers turned into legitimised government authorities, and the country into the territorially defined and constitutionally governed national state. However, the horror of World War One and especially of World War Two has shown that the national constitutions are no sufficient instrument for configuring and securing the commonwealth. In particular, the dictatorships, the genocides, and the enormous destructions have clearly shown that also the commonwealth of the national state is supranationally dependent.

After World War Two the elites in Europe and in America made clear that in order to achieve and conserve a certain commonwealth, without neglecting the overall citizen rights and the representativeness of the government authorities, the dignity of persons, the security and the development of the economy as the basis of the commonwealth have to be more strongly focussed on. These aspects may no longer be conceived only intranationally but also supranationally. Thus, new supranational *textes fondateurs* arose and served as guidelines for the new conception of state organisations. The most important ones might be:

- The *Pacte de la Société des Nations* from 1919 that focuses upon peace and security.
- The *Universal Declaration of Human Rights* from 1948 that focuses upon dignity and basic rights.
- The *Treaty establishing the European Economic Community* (*Treaty of Rome*) from 1957 that focuses upon the harmonious development of the economy, the economic expansion, the stability and the enhancement of living.
- The *Final Act of the Conference on Security and Cooperation in Europe* (*Helsinki Final Act*) from 1975 that focuses upon security and cooperation.

In the early fifties of the 20th century the European elites have developed different concepts for the economic and political integration of the Western European states in order to promote a supranational, cooperative, peaceful reconstruction, to avoid the errors of the Contract of Versailles, and to bind West Germany to the West. Drafts for a European common defence, a European political community and a uniform single European market were undertaken. At that time the predominant mentality was still very nationally oriented, so that only economic supranational co-operation was defined in a developed statute, namely in the so called *Roman Treaty* with which the European Economic Community (EEC) was created in 1957. Despite its basically economic character the contract stipulates the

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European parliament, the Council, the Commission, and the Court of Justice as the bodies of the Community (Art. 4), which puts on the political principle of several representative authorities. The view of an integrating European political co-operation became stronger only in the seventies. The *Single European Act* from 1986 is an important step in this direction: The member states "shall have as their objective to contribute together to making concrete progress towards European unity" (Art. 1) and therefore decide a set of regulations for the European co-operation in the foreign affairs (Title III). The European Union is given substantial new dynamics in the conception of the state organization particularly by the efforts of the commission president Jacques Delors to prepare the plan of an economic union with common currency. However, it was pointed out from several sides that a common currency required clearer common economic policies and this on its turn a clearly structured political union. The textual outcoming of these efforts was the *Treaty of the European Union* which was signed in Maastricht in 1992 and became effective in 1993.

For the first time this text shows the unification of two conceptionally very different text traditions: on the one hand it is the text type of the international economic agreements, on the other hand it is the text type of the declarations of the human rights and of the democratic constitutions. The *Maastricht Treaty* was based upon the *Treaty establishing the European Economic Community*, a text into which elements of the declarations on the overall human rights and the democratic constitutions are woven. As these are quite different text types, they come across as centrifugal and aggravate the coherence. Their composition strikes as artificial. The main objective is the establishment of a Common Market (Art. 2). Prior to that an article on the respect of the national identities and the fundamental rights is posted. Culture is suddenly interposed in Article 127, focussing on the policies to promote professional training. In addition, the text is overloaded with protocols (18) and declarations (34). In sum, it strikes as a collection of texts rather than a single text. The lacking of text coherence reflects the scarce coherence conditions within the union. The development of the text seems to depend on the development of these conditions. This is the production history of the *Treaty of Amsterdam* (1997/1999), the *Treaty of Nice* (2001), and the *Consolidated version of the Treaty of the European Union* (2002).

The convention under the presidency of the former French president Valéry Giscard d'Estaing marked a new substantial step towards the creation of a proper constitution by compiling a new text draft (2003), the *Provisional consolidated version of the draft Treaty establishing a Constitution for Europe* for ratification. The text consists of different parts:

- a preamble with reasons, objectives and delegations;
- a part I without title on definition, objectives, values, fundamental rights, symbols, competencies, institutions and bodies, affiliation which is centrifugally structured (Articles 1–60);

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- a part II *Charter of Fundamental Rights of the Union*, an already existing text including a preamble, which was prepared and accepted by a convention in 2000 (Articles 61–114);
- a part III *The Policies and Functioning of the Union*, which essentially deals the economic and security policies of the Union, as prepared in preceding contracts (Articles 115–436);
- a part IV *General and Final Provisions*, that contains 36 protocols and 2 appendices;
- a final act, containing among other things 50 declarations.

This register and the amount of the articles in the respective parts show that the contents and the organization of the text are still rather disparate. Furthermore, despite the presence of the not really integrated Charter of the fundamental rights of the union, the focusing prevails on the economic integration.

7. FORECAST

Constitutions are guidelines and action patterns. For the communities they are as necessary as the great myths. Their basic elements are constant, their narrative and descriptive design depends on the always changing circumstances of a respective community. Constitutions are therefore typical cases of *work in progress* with dynamic moments and static periods. The European Union needs a Constitution, for its citizens to conceive it as a state organization. For the today's citizens of the member states to perceive it as a Constitution, the last submitted text needs to be further elaborated. From the point of view of text linguistics the following points should be accounted for:

The citizens have to decide between a co-operation contract between the member states of a federation – with the maintenance of a large variety – and a genuine constitution – with a more or less strong standardization. A text can hardly be a treaty and a constitution at the same time.

In a constitution, the overall objectives, the identity of the community including the territory and the rights and duties of the citizens are in the centre of attention. It must be decided then, wherein the cultural inheritance of Europe lies (Art. I-3 (3)) and how the territory may be delimited (what are the European states? cf. I-58 (1)).

The current text still exhibits a high semantic centrifugality. *E.g.*, the rights of the citizens occur isolated in a first part before and after the description of the bodies to the union and then again systematically in a second part in their own Charter. They should be rather put together before the description of the bodies of the union.

Each longer text needs a certain redundancy. However, this may occur not too extensively and unsystematically because it may be confusing. *E.g.*, the term "freedom" is mentioned in many articles across the text but frequently in other

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contexts and with other specifications, so that the term remains fuzzy. Only in the second part, in the *Charter of Fundamental Rights* (title II), the traditional civil freedoms are indicated (security and property are not summarised under them in a clear-cut way). Already in one of the first articles of the text (I-4 (1); cf. also III-133 (1)), in prominent place, under the heading "basic freedoms" it is determined that "[t]he free movement of persons, goods and capital, and freedom of establishment shall be guaranteed within and by the Union, in accordance with the Constitution". Here persons are put on a par with services, goods and capitals. One could interpret that in the view of the authors of the text economic freedom is the primary freedom, whereas the heavily fought civil liberties are secondary.

If the citizens wish a constitution, then it has to be understandable for as many citizens as possible. Thus, the text must be so formulated and structured that every high school degree citizen is able to understand it. Then the current text would have to show a clearer structure (*e.g.*, 1. Identity of the union; 2. Objectives; 3. Fundamental rights; 4. Relationship between union and member states; 5. Education policies; 6. Economy policies; 7. Welfare policies; 8. Infrastructure policies; 9. Environmental policies; 10. Home policies; 11 Foreign policies; 12. Bodies of the union). Many terms and sentences were to be given a clearer reference (like the cultural inheritance of Europe). Article I-2 points out that the society of the union is characterised by "pluralisms, non-discrimination, tolerance, justice, solidarity and the equality between women and men". This list sounds like the result of a brainstorming on the question which terms occur to one's mind when talking about equality. If one reads on, one finds the reference in Article I-4 (2) that each discrimination for reasons of the nationality is forbidden. Was this the meaning of non-discrimination? The following sentence (Part III, Art. III-125) might be hardly understandable for a common citizen: "If action by the Union should prove necessary to facilitate the exercise of the right, referred to in Article I-10(2)(a), of every citizen of the Union to move and reside freely and the Constitution has not provided the necessary powers, European laws or framework laws may establish measures for that purpose." The current text contains particularly in the third part too many regulations on economics and labour law which belong to texts of lower rank.

In the *Provisional consolidated version of the draft Treaty establishing a Constitution for Europe* article 1 claims: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen." If the citizens of the union wish a constitution, not only does it have to be understandable and comprehensibly formulated for all. The citizens, not the parliaments, have to decide whether or not they accept the Charter which will determine their everyday life.

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