



CONSTITUTIONALISM: PAST – PRESENT – FUTURE *

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I. *The Constitution as Novelty*

The essence of constitutionalism is mostly described as submission of political rule to law. This is certainly correct, but it is not sufficient to characterize constitutionalism. Submission of politics to law existed long before constitutions emerged. However, the laws that pursued this goal were not called “constitution”. The word existed, but had a different meaning. It designated the factual condition of a political entity as shaped by its geographic situation, economy, power structure, its laws. In this sense, it was a descriptive, not a prescriptive term. Laws that referred to political power were mostly called *leges fundamentales*, whereas the term *constitutio* designated certain laws enacted by the Emperor, like the *Constitutio Criminalis Carolina*. The *leges fundamentales* usually

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had a contractual basis. They were the product of agreements between the ruler and privileged classes of society. As such they presupposed the ruler's right to rule and were confined to limiting it in certain aspects. They were valid only among the parties to the compact, not generally.

Systematic ideas about legitimate rule and the construction of government were developed in natural law theory. Starting from a fictitious state of nature where all individuals were by definition equal and free, natural law theories usually insisted on popular consent as legitimacy basis of political rule and protection of natural rights as purpose of a political entity. They were of a normative character, but did not have the quality of positive law. They were philosophy and stood in contrast to the existing law. They rather served as yardsticks for determining the legitimacy of existing polities. Political rule was considered legitimate if it could have found the consent of the governed. But with the exception of Emer de Vattel, none of the authors in the natural law tradition had pushed these ideas forward to the postulate of a constitution in the modern sense of the word.

Modern constitutions are a rather recent phenomenon. They could build on elements of natural law theory, but it needed two successful revolutions against traditional rule toward the end of the 18th century in the English colonies in North America and in France for them to emerge. These revolutions differed from many upheavals and revolts in history in that they did not content themselves with replacing one ruler by another. The revolutionaries rather made a plan of legitimate rule based on the ideas developed in natural law and endowed it with legal validity before calling certain persons to power. Not the content of the constitution was new, but its transformation from philosophy into law. Only law had the capacity to dissolve the rules from the historical moment of adoption and from the actors involved, make them binding and extend them into the future. Political rule was regarded legitimate only if exercised on the basis and within the limits of these rules. It is this set of rules that was henceforth called "constitution". In its modern sense, it designates not what is, but what ought to be.

What distinguishes constitutions from the previous forms of submission of political power to law? Five elements have to be mentioned. (1) The modern constitution is neither

an empirical description of a political entity nor a philosophical system, but a set of legal norms. (2) Their purpose is to regulate the establishment and exercise of political power. Different from the *leges fundamentales*, they constitute the right to rule instead of merely modifying it. (3) This regulation is comprehensive. It does not only regulate the exercise of political power in this or that aspect but in a systematic and coherent way. (4) Constitutional law can fulfill its function only if it enjoys primacy over all other law. The validity of government acts depends on their compatibility with the rules of the constitution. (5) As rule that establishes and regulates government, constitutional law cannot emanate from the government. It antedates government and has its source in the people. Every form of legitimation other than popular sovereignty would endanger the supremacy of the constitution. The constitution thus appears as a special and particularly ambitious form of legalization of political power.

Apparently, constitutions in this sense could not emerge at any time. Their emergence depended on some preconditions that were not always given in history. First, the political order had to become a matter of decision. This was not the case during the Middle Ages where the worldly order was believed to be God-given and thus not at man's disposal. Next, the comprehensive and systematic regulation of political rule presupposed an object capable of being regulated in that way. Such an object was missing before the modern territorial state emerged as a response to the religious wars in the 16th and 17th century. Finally, a demand for thorough submission of politics to law was necessary for the constitution to evolve. It came to the fore only after the absolute state had completed its historic mission so that absolute power no longer seemed plausible. Once these conditions existed, it needed a historical moment for the break-through of the constitution. This was the case in the two great revolutions of the late 18th century, when the revolutionaries whose call for reforms had been ignored, broke with the traditional rule and filled the power vacuum left behind by the revolution with the constitution.

This is not to say, however, that constitutions can only emerge from revolutions. Once the modern constitution had been invented it became immediately attractive outside the countries of origin and was adopted without a prior revolution, albeit often in a diminished form. Not every constitution that followed the prototypes showed all five characteristics of

modern constitutionalism. Once the modern constitution had taken shape, it became possible to use the form without adopting all of the features that were characteristic for constitutions in the sense of the revolutions. The first constitution to do so was the French one under Napoleon. The five characteristics describe the *achievement* of constitutionalism. There were and there are many constitutions that lack one or more features. Yet, to the same extent that these features are missing, constitutions fall short of the achievement and are deficient forms of constitutionalism.

The 19th century was a period of struggle about constitutions all over Europe and also in Latin America. Only at the end of the 20th century an almost universal recognition of constitutionalism has been reached after many detours and backlashes in the first half of the century. Moreover, the readiness to enforce the requirements of the constitution increased considerably toward the end of the century. Many countries introduced judicial review by general supreme courts or specialized constitutional courts. However, the external culmination coincides with an internal erosion whose roots have long been overlooked. Erosion in this context does not mean the decline of some countries' constitutions. There will always be constitutions that do not matter or are disregarded when they stand in the way of politics. Erosion rather refers to the fate of constitutionalism in general. Constitutionalism is not guaranteed for ever. Just as it emerged at a certain historical moment under certain historical conditions, it can also disappear or change its meaning if these conditions are no longer given or largely modified.

II. *The Erosion of Constitutionalism*

The erosion of constitutionalism has several sources. I will concentrate on the two most important ones.

1. From Liberalism to the Welfare State

The first is the emergence of the welfare state. Historically, constitutionalism broke with the traditional paternalistic state and associated itself with liberalism. The fundamental

belief of liberalism was that civil society has the capacity to produce a just social order by way of self-regulation. The basic instruments to reach this goal were freedom of contract and freedom of property. If they were guaranteed, not only more wealth, but also more justice would be the result. Therefore, the law no longer imposed substantive standards of behavior on individuals but guaranteed everyone equal freedom within the borders of the same freedom of everybody else. Obligations existed only as a product of free will of individuals. This appeared to be a far better mechanism to reach a fair balance of interests than state regulation. Without the strict limits of the feudal and corporatist system, the position of every individual in society would depend exclusively on individual talent and zeal. It did not exclude individual poverty, but under the condition of equal freedom poverty could be regarded as the individual's own fault and thus not as unjust.

In spite of society's capacity of self-regulation, the state did not become obsolete, but was reduced to the task of guaranteeing the pre-conditions of societal self-regulation, which civil society could not maintain itself because of lack of public power and legitimate physical force. Only the state was able to protect individual freedom and societal self-regulation against aggression, criminality and disruption, and only the state had the means to enforce contract obligations if they were contested or disregarded. Thus, private law became the centerpiece of the liberal order while constitutions had to guarantee that the state remained within its borders and used its powers only in the interest of civil society. Keeping the state within its limits was the function of fundamental rights. Securing its commitment to the interests of society was the function of parliamentarianism and the rule of law. The order was thus based on a clear separation of state and society and a clear distinction between public and private.

However, it turned out soon that liberalism was unable to fulfil its promises. Wealth increased, but its distribution was not just. Freedom of contract will produce a just balance of interests only if the contracting parties are more or less in the same bargaining position. This precondition was lacking from the beginning and the situation deteriorated with the industrial revolution. Within the societal sphere that had been freed from public power, private power structures developed which were not less onerous than the burdens of the old system. As a consequence, the problem of justice, which liberalism had formalized,

materialized again. The answer to this insight was a gradual return of the state into society. The state could no longer content itself with securing a pre-established social order, but was again called upon to shape this order in the interest of social justice. It did this first by eliminating the most obvious abuses of individual liberty, then by attempting to solve the social problem by establishing a system of social security for the needy and finally by protecting society from all sorts of risks, particularly those produced by scientific and technological progress.

The result was a change of statehood, which could not leave constitutional law unaffected. While securing a pre-established social order against disturbances is a reactive task that lends itself easily to legal regulation, shaping the order is a pro-active, future-oriented task much less susceptible to legal regulation. In the first case, the law defines what counts as a disturbance of the order and then determines the means the state may employ to restore the order. In the second case, the law is largely constrained to determine the goals of state activity and to name viewpoints that have to be taken into account in pursuing the goal. To the extent that the state assumed new tasks, constitutional law lost determinate force. Fundamental rights illustrate the difference. Negative rights are highly determinate. They define what the state ought not to do. If it transgresses the limits, there is but one remedy, the act is cancelled. Positive rights leave many possibilities of implementation. The constitution does not dictate the result, but only marks a framework within which the state enjoys discretion how to act. Furthermore negative rights do not depend on resources. Omission is not scarce. Positive rights, to the contrary, can be implemented only to the extent that resources are available.

Moreover, most of the new tasks cannot be fulfilled by using the specific means of the state, namely command and coercion. In some cases, coercive means are prohibited. In others, they are not effective. Economic growth, technological innovations, mentalities cannot be ordered. In some cases they may be allowed and efficient, but are not recommendable because the implementation costs are too high. As a consequence, the state has to resort to indirect means to reach its ends, mostly financial incitement or deterrence. However, to the same extent the state becomes dependent on the cooperation of private actors. They win bargaining power that, in turn, prompts the state to enter into negotiations

with the causers of problems. The power they gain can no longer be described in terms of influencing collectively binding decisions, the private actors rather participate in state decision making. The distinction between public and private, on which constitutionalism was based, is thereby blurred. The price is paid by the constitution. Fundamental constitutional safeguards such as democracy and the rule of law are undermined.

2. From the Nation State to the Member State

The second source of erosion is the internationalization of politics and the emergence of a supranational public authority. When constitutions came up in the late eighteenth century all public power was concentrated in the state. States were the only political actors on the international level. No public power existed beyond the state. The object of constitutional law was the state as the exclusive power-holder. Above the states there was no lawless zone. Here public international law applied. But as all actors on the international scene were sovereign states, international law did not have a superior legislator. It was treaty-based law and as such a voluntary self-limitation of states. Neither was there an enforcement mechanism for international obligations. Consequently, war could not be excluded as a legal means to enforce treaty obligations. Since international law was based on the principle of state sovereignty, it did not take any effect within the state, while the impact of constitutional law ended at the state border. Both existed independently from each other.

The situation changed fundamentally after World War II, beginning with the foundation of the United Nations. In order to avoid future wars and to guarantee respect of human rights, states were ready to create an international system more effective than the League of Nations founded after World War I. They began to establish supranational organizations that differed from the traditional leagues and alliances in that they not only coordinated the state activities but regulated their behavior. To this end the states transferred certain public powers to supranational organizations, which these organizations exercised in their own right irrespectively of the will of the states and if necessary by using military force. The century-old identity between public power and state power thus dissolved. There is now public power also beyond the state.

Again, this development could not leave the state constitution unaffected. The five characteristics of modern constitutionalism may help to determine the impact of modern international law on state constitutions. The legal character of constitutions remains of course unaffected. Also their purpose to organize and regulate establishment and exercise of public authority is unchanged, however, only insofar as the public power is still state power. As a consequence, constitutions do no longer regulate public power comprehensively. There are now acts of public power that claim validity within the state without being submitted to the constitution of the state. Constitutional law still enjoys supremacy, but only regarding domestic law, whereas international law is not submitted to national constitutional law. Finally, the people is still the source of constitutional law, but no longer the source of the entire public power that takes effect within the state.

Hence, the national constitution can no longer fulfill its claim to regulate all public power exercised on the territory of the state. It continues to regulate state power, but state power is not the only power exercised within the boundaries of the state. Regarding international public power, the state constitution still regulates the transfer of national powers to international organizations. But once transferred, these powers are exercised irrespectively of the national constitution. The full constitutional picture of a country can only be obtained if national and international rules are seen together. More, because of the transfer of state power to international organizations, certain provisions of the national constitution are no longer true, but rather superseded or modified by international law. The national constitution shares its function with law from a different source. Next to the borderline between private and public which was constitutive for the achievement of constitutionalism, the borderline between inside and outside that was equally constitutive is blurred.

States are no more sovereign in the way they were sovereign before World War II. This is true for all states. Only the degree varies according to the supranational organizations a state has joined. Membership in the WTO leaves the national constitution almost unaffected. Membership in the UN may affect the national constitution severely. But this will happen only if a member state gives the UN a reason to intervene. And even then, the members of the Security Council are immunized against UN actions because of their veto

power. However, nowhere are national constitutions more affected than in the European Union where state powers and Union powers are intermingled to such a degree that it is increasingly difficult to clearly distinguish between the national and the European level.

III. *Compensation for the Loss*

It is therefore no surprise that the question for compensation of the erosion of constitutionalism began in Europe. For, what is in need of being regulated is not state power but public power, and if supranational organizations have gained a share in public power, the need for a submission to law extends to them no less than to the state. In this situation it is quite natural to think of elevating the achievement of constitutionalism to the international level. As a matter of fact, the EU was the first supranational organization whose statute was regarded as a constitution or where attempts to replace the Treaties with a constitution were undertaken. Is that possible? To be sure, there is no lack of legalization of international public power. Every supranational organization that holds public power has been established by a legal act, a treaty. The treaty defines the purpose and the tasks of the organization, it determines its structure, allocates its competencies and regulates its procedures – all matters that within a state would be regulated in the constitution.

Does this mean that the demand for a constitution is already met and only the name is missing? The initial considerations of this article show that legalization and constitutionalization are not the same. Most importantly, the legal foundations of supranational organizations lack the democratic origin. Its sources are agreements of states. There is no supranational constituent power. The legal foundation is not an act of a society or a citizenry, public power is not even attributed to the people living on the territory where the organization fulfills its function. If citizens are involved in Treaty-making, they are involved as citizens of their state and decide, either directly by referendum or indirectly by parliamentary ratification, on their state's membership in and on the transfer of public powers to the supranational organization.

Would the treaties, agreements or statutes qualify for constitutionalization in the sense of the national constitutions? To answer this question it may help to remember which

conditions had to exist before modern constitutions could emerge. The constitution presupposed the emergence of the modern territorial state that was characterized by a concentration of the public powers, previously dispersed among many independent holders and exercised not over a territory but over people. Only the accumulation of prerogatives to the public power in the singular created an object capable of being constitutionalized and, later on, also the need for legal regulation. Are these preconditions given on the international level? The need can be hardly denied. Public power is always in need of being regulated, regardless of the holder. As far as the object is concerned, a distinction between the most advanced supranational organization, the European Union, and other supranational organizations that hold public powers like the UN or the WTO seems necessary.

Because of the number of public powers and the density of its organization the EU is a unique supranational organization, somewhere between traditional international organizations and a federal state, but closer to the latter than to the former. It is without doubt a suitable object of constitutionalization. This would require that the member states gave up the constituent power that they still hold and transfer it to the EU itself. This transfer would make the EU a self-supporting entity that no longer receives its legal foundation from the member states but decides itself about its existence, purpose, powers and procedures. By this very act, it would become a state, whether or not the member states are aware of this or intend it. Hence regarding the EU, the question is not whether constitutionalization in the strict sense is possible, but only whether it is desirable – a question that I do not pursue in this article.

The current constitutional situation of the EU is ambivalent. Its legal foundation is a treaty under public international law. But this treaty was endowed with effects of a constitution by two revolutionary judgements of the ECJ of 1963 and 1964. According to these judgements, the treaty enjoys direct effect within the member states as well as primacy, not only over secondary European law, but also over the law of the member states, including their constitutions. American observers labelled this “constitutionalization of the Treaties”, meaning that the legal foundation of the EU kept its legal nature as a Treaty, but acquired functions of a constitution. This has the effect that everything that has been regulated on

treaty level is withdrawn from political decision making. As this is the intended effect of constitutional law, constitutions are usually limited to fundamental provisions about the basic principles and the organization of structure of the state, whereas the various policies of the state are regulated on the level of ordinary law. The constitution, in other words, regulates political decision making but leaves the political decisions themselves to the democratic process. This distinction is crucial for constitutionalism.

In the EU, however, this distinction is levelled. The Treaties are full of legal provisions that would be part of ordinary law in all member states. In the EU, they enjoy constitutional rank and are thus not open to political decision making. Their application is implementation of constitutional law and thus not open to the democratic process. The executive and judicial institutions of the EU remain among themselves, whereas the democratically legitimized and accountable institutions of, the Council and the European Parliament, are not only excluded, they cannot change the decisions of the Court either, except by an amendment to the treaties, which is practically unavailable. The very nature of the European Treaties turns the so-called constitutionalization into an over-constitutionalization. This is not only a matter of constitutional aesthetics, as many believe. It is a matter of democracy. Europe's over-constitutionalization is one of the most serious sources of the European legitimacy deficit, but at the same time the least noticed one.

Nothing like this peculiar situation can be found with other supranational organizations. There is not *the* international public power in the singular, but a number of supranational organizations. They differ from states mainly in that they are usually one-issue organizations. They exist for a single purpose and have exactly those public powers that are necessary to fulfill this purpose. They are far from holding the public power in the singular that was characteristic for the modern territorial state. Even if one takes into account that the states no longer enjoy the plenitude of public power, they still hold so many powers that they remain a suitable object of a comprehensive and systematic regulation by a constitution. State power is functionally concentrated, but territorially fragmented, and on its territory the state has the monopoly of the legitimate use of physical force. International public power is territorially comprehensive, but functionally fragmented and no

international organization disposes over physical force. If physical force is needed to enforce decisions, it must be borrowed from the states.

This means that there is not the international public power that could be regulated comprehensively and systematically like state power in form of a constitution. Rather there are many independent actors with specific tasks such as peace keeping, economic development, human rights protection etc. They are unrelated and often exercise their power irrespectively of the consequences for other institutions and sometimes even contradictory. Insofar they do not constitute in objects suitable of constitutionalization like states.

It is completely open how this power could be rooted in a citizenry capable of leading a public debate and forming a coming will. In short: it is not visible how international public power could be legitimated in a democratic way. When we nevertheless speak of constitutionalization of international public power, this is an extremely thin notion that identifies constitutionalization with legalization. It ignores that constitutionalization is a particularly ambitious way of legalizing public power. The talk about constitutionalization hides that this has little in common with the achievement of constitutionalism on state level. It would therefore be better to improve the legalization of international public power than to think in terms of constitutionalism. This would mean before all to submit international public power to fundamental rights which is still not the case. Constitutionalization, to the contrary, creates the impression that what is lost on the level of national constitutionalism, can be regained on the international level, which is clearly an illusion.