

1 Introduction: Time, Constitution and Democracy

Time, even social time, is often understood as if it were already there: We look *into* the future; we remember the past. This happens *in* the present. Like space, future seems to lie in front of or past behind the observer, or to signify the observer's location. But this is a quite un-temporal, merely spatial understanding of time. Accordingly, even in political science, we tend to speak of a quantitative time, which we have more or less of, which passes faster or slower.¹ It is somewhat more temporal when we understand the future as something that is not yet, the past as something that is no longer, or the present as something that is taking place. According to this, only the present is real, unreal both future and past. Objections can also be raised against this view: Is then the present truly real or is it not rather only the point of transition between future and past? Above all, however, future and past are unreal in different ways. The future is possible. It can still change, is uncertain, but also contains potentials. The past is no more and therefore unreal. But it can no longer be changed if we do not visualize it. Precisely in this way, it provides security and orientation. In this way, traditions can emerge, identities can be formed. The present, however, is real because the actor now visualizes the future and the past as prerequisites and possibilities of his actions. The present itself is this will to want to realize something.²

This is not fundamentally different in law, even if the relationship to the time dimensions is specifically shaped.³ Legal certainty aims at the limitation of possibilities and thus at future commitment. Even where possibilities are opened up, for example in the case of permissions or powers, these possibilities for action are nevertheless subjected to limits and tied to conditions. Even the past does not simply appear to exist and is thus fixed. Rather, it must be secured in its closure — *nulla poena sine lege praevia*, no punishment without law; no retroactivity, etc. The norms of which law is composed are directed toward future commitment.⁴ Therefore, the actor in law is not completely free in time in his actions, but is bound to the norms as future commitments. He cannot change them at present, but only for the future of his action. In return, legal protection awaits him in his expectations both of the possibilities of action granted to him and of the reactions of legal authorities to their violation. In normativity, then, law uses the past to constrain the future, and it uses futurity to make the past specifically changeable. Law, however, is a norm whose enactment and enforcement is normative.⁵ Thus, as long as the law is not changed in the procedures provided for it, the legal will applies in an extended present. In the extended present of its validity, the law is timeless - for time, namely until it is repealed.

Constitutional democracy also fits into this legal structure, as will be shown in the following.⁶ In constitutional democracy, law has the task of ensuring the rationality of the democratic process. It guarantees the elaboration of this rationality through fundamental rights of opinion, communication, association and integration of opinions, and participation in the formation of public will in elections. The law then orders the exercise of the democratically

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¹ Riescher 1994; Schedler/Santiso 1998, pp. 5 ff.; Scheuermann 2004; Chesneaux 2000, pp. 407 ff.

² Looked at from the perspective of a theory of social systems, one could generalize this observation: "If one assumes that operations are self-produced, it follows that everything that is happening is happening in the present. This also means that everything that is happening is happening at the same time. Also past and future are always, and only, relevant at the same time, and are discernible as such only in the present. Their recursive linkages are established in their actual operations. Therefore, the requisite structures are also only presently in use — or they are not in use. The system oscillates from operation to operation with the help of these structures — and it does that, *at the same time*, with an extremely varied array of performances", Luhmann 2004, p. 82.

³ Kirste, 1998, pp. 351 ff.

⁴ Kirste, 2002, pp. 36 ff.

⁵ Kirste, 2022.

⁶ Schedler; Santiso 1998, p. 8.

legitimized will by the competent public bodies in orderly procedures and within legal limits.⁷ Thus, the socially advised grounds for public authority can be translated into the legitimating conditions of authority. In this way, law transforms the democratic will, formed on the basis of public deliberations, into public rule, which is divided between the powers and divided according to terms of office and legislative periods. Without absolute truths, beliefs expressed and developed in political deliberation are relative. The time limits of democratic rule take this into account. Autocrats and populists who want to ignore these temporal limitations typically claim to be in possession of immediate truths.⁸ Power is always also power over time.⁹ In a constitutional state this power is limited by the rule of law, securing the inner rationality of democracy. The public authority stands for the present will; but “No member of the majority in any sphere of life has the long-term security of not belonging in the future to the to belong to the minority in need of protection...”.¹⁰

Pure democracy is a temporally symmetrical act of political autonomy of the citizens of a state: Detached from legal ties of the past, they decide at a particular moment in their history to adhere to a certain order in the future. However, this political self-determination of the citizens, who therein become a people, is very presuppositional. It itself requires a procedural order in which it can articulate itself. The interests, convictions, values and other issues on which binding decisions are to be made must be able to be considered, deliberated and integrated beforehand. This deliberative process requires legal and institutional protection through fundamental rights and courts in which these rights can be enforced against threats.¹¹ Only in very special historical situations will it be possible, without such safeguards, to form a will that can then stabilize democratic decision-making for a sufficient period of time. Because of these necessary preconditions democracy necessarily connected with the rule of law.¹² Both are expressions and safeguards of the citizens’ autonomy and are therefore founded in freedom.¹³ Democracy is therefore constitutional democracy.

In the temporal free space of the extended present of its validity, law orders the present, the future and the past in a — according to its own criteria — just way and synchronizes it with other social times.¹⁴ Constitutions also bind future political processes to such temporal constraints. To be sure, they not only mark the boundary of the political and the legal system;¹⁵ they are also at the boundary between the temporally unbound political autonomy of citizens at the moment of constitution-making and the ongoing democratic self-determination practice of citizens limited by the future-binding norms of the constitution. Their preambles show that every beginning must position itself in the right time. Legal texts are no different. However, depending on their character, they do it in a different way. While constitutions are true legal documents, not bound by the legal norms of the legal order they intend to found, others are bound and must recognize the obligations in force. This means that these texts do not necessarily begin anew, but modify the legal situation under a temporal asymmetry. Constitutions thus transform temporally amorphous, revolutionary events into the enduring present of the governing law and its structural prescriptions for democracy. This temporal structure of constitutional self-determination and thus self-determination of democratic participation is often interpreted in the preambles of these constitutions themselves. It is necessary to follow this up a little in the following.

⁷ Riescher, 1994.

⁸ Kirste, 2021, pp. 42 f.; for the temporal dimension of populism Kirste 2022a, pp. 276 f.

⁹ Madison, *Federalist* Nr. 52, p. 259: “It is a received and well founded maxim, that, where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration; and, conversely, the smaller the power, the more safely may its duration be protracted”.

¹⁰ Müller, 1992, p. 100.

¹¹ Kirste, 2016, pp. 5 ff.

¹² Habermas, 1996, p. 132 ff.

¹³ Kirste, 2016, pp. 26 ff.

¹⁴ Kirste, 2002, pp. 38 f.; Kirste 2011, S. 297 ff.

¹⁵ Luhmann, 1990, p. 193.

2 Temporal Notions Expressed in Preambles

2.1 The Temporal Perspective of the Preambles

Constitutions do not necessarily have preambles. They may consider themselves as a technical ordinance. However, often they tell histories, confess values, express the goals of a new fundamental order of a state. They thereby link the legal text of the constitution to its social background. One may assume that this function of preambles is to present an ideology or a myth¹⁶ for the legal fundamentals of the state or in a more prosaic understanding, they provide a hermeneutical horizon for the interpretation of the constitution. Be this as it may, they express aspects of the framing of the constitution the constituent power deems important. It is quite striking that among the aspects of the preambles the three dimensions of time — present, past, future — play an important role. This mentioning of the three temporal dimensions is not specific to constitutions; on the contrary, many preambles or introductions to constitutions contain references to their past, future and present. However, these time dimensions are not simply admitted. Rather, the constitutions relate to them.

Unlike reforms, revolutions are always aimed at a new beginning. This is why constitutions that emerge from them also emphasize this innovative achievement of the newly founded legal order. However, it is also possible that social values, historical and political circumstances have changed so much that it is no longer sufficient to amend the constitution, but that a total revision or even its re-enactment becomes expedient. In this way, constitutions give a new direction to the development of law. The legal future is thus constructed anew.¹⁷

Constitutions do not simply accept the past, but interpret it, specifically comment on it, and create past narratives in the preambles. In this way, they themselves construct the historical foundations of the legal order. The preamble of the 2009 Constitution of Bolivia goes back the farthest, even referring to the natural history of the country and letting cultural history emerge from it.¹⁸ They “respect”¹⁹ and profess the past when a positive tradition is to be renewed or maintained²⁰ and feel inspired,²¹ learn and preserve their histories thereby creating continuities with a historic past. Successful revolutions²² or other achievements in history should be included in the collective memory.²³ Constitutions distance themselves from the past when it is described as “sad.”²⁴ In their principles and rights, constitutions protect the cultural heritage in the form of traditions of minorities, the history of the nation and its lessons and places of remembrance of them, as well as historical landscapes. Thus, they contribute

¹⁶ Dworkin, 1986, p. 348, calls interpretive questions about the identity of the constituent or legislative power and the time of its action “mysteries” that “are spawned by a single domineering assumption: that their solutions must converge on a particular moment of history, the moment at which the statute’s meaning is fixed once and for all, the moment at which the true statute is born.” Such a static return to the moment of constitutionalization is not necessary, however, as will be shown later in this paper.

¹⁷ Preamble of the Constitution of Bolivia, para. 6: “We found Bolivia anew...”. It also emphasizes the achievements of the people “who have made this new history possible”.

¹⁸ Beginning of the preamble in an almost lyric tone: “In ancient times mountains arose, rivers moved, and lakes were formed. Our Amazonia, our swamps, our highlands, and our plains and valleys were covered with greenery and flowers. We populated this sacred Mother Earth with different faces, and since that time we have understood the plurality that exists in all things and in our diversity as human beings and cultures. Thus, our peoples were formed, and we never knew racism until we were subjected to it during the terrible times of colonialism”.

¹⁹ Preamble of the Lisbon Treaty.

²⁰ “the constitutional traditions and international obligations common to the Member States”, Preamble of the Charter of Fundamental Rights of the European Union; Preamble of the Polish Constitution, “Recalling the best traditions of the First and the Second Republic... Obligated to bequeath to future generations all that is valuable from our over one thousand years’ heritage”.

²¹ Preamble of the Bolivian Constitution; preamble of the Constitution of Cuba of 2019.

²² Preamble of the Chinese Constitution; Preamble of the Iranian Constitution; Preamble of the Constitution of Portugal.

²³ Preamble of the Constitution of Peru of 1993, “remembering the sacrifice of all the preceding generations of our land”; the successful completion of German unification in the new preamble of the Basic Law. For other examples, see Häberle 1998, p. 922; for law and memory cf. Stephan Kirste: O direito como memória cultural: Revista Mestrado em Direito de Universitário Fieo. Direitos Humanos fundamentais, Bd. 8 (2008), S. 125-143 and Stephan Kirste: A Contribuição do Direito à Memória Cultural. In: Cadernos da Escola de Direito e Relações Internacionais da UniBrasil 7 (2007), S. 319-344.

²⁴ See, for example, the preamble to the Iranian Constitution.

to cultural memory.²⁵ Another example are the treaties founding the European Union. According to them European development should be “mindful” of the fragmented past, as the Maastricht Treaty put it. Europe’s “cultural, religious and humanist traditions” are understood as an inherited source from which to draw for a future for the European Union, as the draft constitutional treaty put it. The protection of this cultural diversity is then effected not only through individual and group rights, but also through participation opportunities for representatives of these traditions in various political decision-making processes.

Preambles anticipate the future if they contain a commitment to values, a recognition of fundamental rights²⁶ and their realization as the central perspective of a state. The orientation toward goals,²⁷ purposes²⁸ and hopes²⁹ of the state also gives political action a future orientation.³⁰ The constitutionally formed state will commit itself to prevent in all future the revival of a terrible past,³¹ in order to “secure” the positive achievements for “our posterity”.³² The responsibility for future generations is accepted.³³ The public powers undertake to “protect national and public unity.”³⁴ It is precisely this future component that has been a defining feature of the European Treaties from the outset, which seek to promote progressive integration.³⁵

Finally, in the temporal form of the verbs (“guarantees”)³⁶ and the expression of “will” or “determination”, but also in relation to the actual developments in society, they refer to the present.³⁷ This present in different ways as the very moment of framing, as a continuity of the present constitution with history and possibly with future or even as an “eternal” present that certain provisions of the constitution may be valid unaltered and forever. Therefore, the present constitution may be constructed as a continuity with the past,³⁸ by decidedly bridging the history with the future of a country in the act of framing. Transitory provisions intend to provide for some continuity with the past. An extended present in the sense of Henri Bergson is invoked by the strive for substantive continuity of values, of identity or by the promise to “carry forward” certain intentions.³⁹

²⁵ Cf. the Constitution of Ecuador of 2008, art. 379.

²⁶ Preamble of Brazilian Constitution; French Constitution of the Fifth Republic, “...commitment to the rights of man and the principle of national sovereignty as defined in the Declaration of 1789, reaffirmed and supplemented by the Preamble of the Constitution of 1946.” Preamble to the 1997 Polish Constitution, “... guarantee the rights of citizens for all time”.

²⁷ “successful completion of German unity” in the old preamble of the German Basic Law; the realization of a peaceful future (preamble of the Charter of Fundamental Rights of the European Union); The preamble of the Constitution of the Russian Federation.

²⁸ Preamble of the Brazilian Constitution; Preamble of the Irish Constitution: “...with a view to promoting the common good”.

²⁹ Preamble of the Iranian Constitution “They may then hope for success in building an ideal Islamic society that can be a model for all people of the world and a witness to its perfection (in accordance with the Qur’anic verse ‘Thus We made you a median community, that you might be witnesses to men’ [2:143])”.

³⁰ Preamble to the U.S. Constitution, “We the People... to form..., establish..., promote...”.

³¹ Japanese Constitution of 1947: “determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government... We, the Japanese people, desire peace for all time.

³² Argentinian Constitution, Constitution of the USA; very similar to the Constitution of Japan.

³³ Art. 225 of the Brazilian Constitution; preamble of the Constitution of Venezuela; Art. 75 of the Cuban Constitution; Art. 47 of the Constitution of Uruguay; Preamble of the Bolivian Constitution; Art. 41 of the Argentinian Constitution.

³⁴ Preamble of the old German Basic Law.

³⁵ Already the preamble of Treaty founding the European Economic Community and the Art. 33-8, 49, 93.

³⁶ Preamble of the Constitution of Venezuela, also claiming “exercising their innate power”.

³⁷ Preamble of the Charter of Fundamental Rights of the European Union.

³⁸ Preamble of the Bolivian Constitution from 2009: “construct a new State in memory of our martyrs”.

³⁹ Like in the preamble of Cuban Constitution of 2019.

Individual constitutions exempt certain provisions of the constitution from amendment. For example, Art. 60 par. 4⁴⁰ or Art. 79 Par. 3 of the German Basic Law⁴¹ stipulate that certain constitutional principles cannot be completely abolished.⁴² Paraguay declares itself “forever free and independent”.⁴³ The Argentinian Constitution refers to “everlasting” rights.⁴⁴ Therefore these entrenchment clauses are also called “eternity clauses” or “cláusulas pétreas”. What serves to protect democracy, however, could nevertheless be problematic for democratic self-determination. The legislature amending the constitution is prevented from allowing the people to determine themselves by amending the constitution. In fact, however, the constitution itself is an expression of the citizens’ autonomy. It is a determination of the self, namely a limitation, a concretization of ideas, the citizens’ conception of what is good for them. Its possibilities for amendment are also determined by the constituent power of the citizens themselves. If it is to be changed outside these rules of amendment, this can only be done by the constituent power reorganizing itself and wanting this new constitution. This power does not need a legal right to revolution; it takes all rights into its hands. It cannot be limited in this by the old constitution. Eternity clauses are therefore not an anti-democratic instrument. Rather, the constituent power of the citizens itself establishes the basic material norms of the constitutional order that it deems indispensable. This eternity thus ties in with the Greek concept of *aión*, the age of life or time.⁴⁵ These eternities are not simply calculable periods of time. Rather, they designate epochs that are characterized by a certain value-laden quality. It is precisely the material eternity clauses that ensure that certain identity-forming principles can be concretized but not abandoned. Thus, in addition to the formal amendment rules that provide for certain quorums for constitutional amendments, they are a piece of self-perpetuation of the constitution and further evidence that law constructs its own time.

Most clearly, the preamble of the Constitution of Ecuador shows what many constitutional preambles try to achieve: based on “a profound commitment to the present and to the future” they attempt to integrate the three dimensions of time: past, future and present by reconstructing them in the law.⁴⁶ In this way, the constitutional fathers express their historical situation, their intentions and their will to realize these plans now.⁴⁷ This will is the integration of the three temporal perspectives: The past is not simply to continue, but to be explicitly received, envisioned, and purposefully made part of the present order. It is not simply preserved, but taken up as a source of present learning or constructed as the Other from which the present is distinguished. The commitment to fundamental rights is not only the recognition of moral obligations, but is accepted as a legal perspective for all state actions. And both are united in the will to self-commitment.

⁴⁰ §4 “No proposed constitutional amendment shall be considered that is aimed at abolishing the following:

- I. the federalist form of the National Government;
- II. direct, secret, universal and periodic suffrage;
- III. separation of powers;
- IV. individual rights and guarantees”.

⁴¹ “Amendments of this Constitution affecting the division of the Federation into States [Länder], the participation on principle of the States [Länder] in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible.” Basic principle in Art. 1 is human dignity and the recognition of human rights and their obligating force towards all public authority, in Art. 20 is the rule of law (Rechtsstaat), federalism, democracy including the sovereignty of the people, republic, social state and — if not already considered being part of the principle of the rule of law — separation of powers.

⁴² Other examples are art. 110 of the Greek Constitution, art. 89 of the French Constitution, art. 374 of the Constitution of Honduras, art. 288 of the Constitution of Portugal.

⁴³ Art. 1 para. 1 of the Constitution of 1992; cf. also Art. 2 of the Constitution of Uruguay of 1966, reinstated in 1985: “It is and always shall be free and independent of any foreign power” and art. 3 “It shall never be the patrimony of any person or of any family”.

⁴⁴ Argentinian Constitution, Transitional Provision Nr. 1 “everlasting sovereignty over the Malvinas, South Georgia and Sandwich Islands”.

⁴⁵ Kirste, 1998, pp. 41, 70 f., 338.

⁴⁶ Preamble of the Constitution of Ecuador of 2008.

⁴⁷ Almost in contrast, Peter Häberle argues that “preambles are the attempt to keep the constitution in time: between cultural heritage and the future, between tradition and progress, etc..... The constituent force integrates itself into larger temporal continuities and does not see itself as ‘autonomous’” Häberle 1992, p. 198; also Häberle (note 9), S. 923.

2.2 The *Kaiρός* of the Constituent Power⁴⁸

The temporal structure of the preambles would not be adequately described without mentioning a specific dimension of the preambles' presence. In their introductions, many constitutions express the opportunity, possibility, or even necessity of the people to give them a constitution "now."⁴⁹ They emphasize the good moment that has come⁵⁰ — perhaps the last for a long time⁵¹ — a moment that will not last forever⁵² and that may not return. This moment is to decide on the general structures of the political community.

They also emphasize the opportunities of the moment and its unique possibilities in anticipation of the times to come, times that might in turn be critical of the legitimacy of a constituent power imposing norms on a self-governing people — we will return to this later.

The emphasis on the *Kaiρός* of the entry into force of a constitution does not necessarily lead to a subjective, historical interpretation that refers to the will of the framers. Conversely, by adopting the constitution, the constituent power establishes a more or less coherent system of principles and rules to bind the future. Most constitutions provide for procedures for amendments, but some constitutions exempt some of the most fundamental principles. By accepting subsequent amendments within this framework, the constituent power accepts that formal changes may shift the meaning of the overall system, and thus of individual provisions, over time. With abstract principles, it also recognizes informal changes in the concretization and interpretation of these norms. All in all, the intentions of the framers are to find a system of values, "not in an abstract, crypto-natural law-like... schematism of unyielding inclusiveness," but as an "immanent structure of meaning".⁵³ Interpretation then need not be objective in Dworkin's sense,⁵⁴ that it might refer to morality, but in taking the system seriously.

2.3 Non-temporal Explanations and Temporal Constitutions

Preambles do not have a normative but a descriptive structure: they do not order but tell. They do not prescribe, but profess.⁵⁵ Many preambles express the notion of the framers that their present is an exceptional moment in the history of a people, one that has not yet occurred in their history and is not likely to occur again in the coming future. Only in such moments does a temporally symmetrical act of self-government seem possible.⁵⁶ In normal times, on

⁴⁸ Kirste, 2013, pp. 103 ff.

⁴⁹ A telling example is the Declaration of Independence (1776): "When in the course of human events it becomes necessary for a people to sever the political bonds by which it has been connected with another, and to take a separate and equal place among the powers of the earth, to which the laws of nature and of nature's God entitle it, decency and respect for the opinions of the human race require that it should show the causes by which it is impelled to the separation".

⁵⁰ Iranian Constitution: "Now, at the threshold of this great victory, our nation, with all its being, seeks its fulfilment".

⁵¹ As with the American Revolutionaries, Ackerman 1993, pp. 169 and 179.

⁵² Ackerman 1993, p. 288, "Nothing lasts forever, certainly not a mobilized majority of private individuals. Soon after, the popular mind will return to other things".

⁵³ Hollerbach 1960, p. 255.

⁵⁴ "Thus, in my opinion, there is a third kind of interpretation between one "organized around the determination of a sovereign's will" and a second one "organized around the pursuit of reason, justice, wealth maximization, or some criterion of the right thing to be done", Rubinfeld 1998, p. 208.

⁵⁵ Preamble of the Constitution of Antigua and Aruba: "assert their conviction".

⁵⁶ Brugger, 1999, pp. 36 ff. differentiated this situation in terms of an ideal (axiological) and a "realistic" (sociological perspective) and integrated them into the metaphor of an "anthropological decision cross". Here, the temporal dimension is the horizontal line and the dimension from facts to the highest ideals is the vertical one. In relation to the idea of *Kaiρός* just mentioned, we would only add a kind of orthogonal dimension or speak with Hegel: "the rose in the cross of the present" as an image of the consciously seized moment of framing (cf. Georg Wilhelm Friedrich Hegel: *Grundlinien der Philosophie des Rechts oder Naturrechts und Staatswissenschaften im Grundriss. Mit Hegels eigenhändigen Notizen in seinem Handexemplar und den mündlichen Zusätzen.* Hrsg. und eingeleitet v. Helmut Reichelt. Frankfurt am Main - Berlin - Wien 1972, Vorrede, S. 13; und Anmerkung 24).

the other hand, the temporal asymmetry of norms enacted in the past that bind the future dominates.⁵⁷ It is not surprising that some preambles contain an “*invocatio dei*” for this project.⁵⁸

In summary, the act of constitution-making is not the declaration of an idea, a pure act of cognition, but a free decision in a present experienced as particular. We find such “declarations” for instance in the “*Declaration de droits de l’homme et du citoyen*” of 1789 or in the Virginia Bill of Rights.⁵⁹ When the Declaration of Independence postulates “We hold these truths to be self-evident,” it does not establish a normative text, but the ethical and, above all, the axiological basis for such texts.⁶⁰ Such texts would then in fact be expressions of philosophical knowledge, not the imposition of rights and duties that are the content of norms. Accordingly, there is no need to change them. They are apparently eternal.

Constitutions differ from this. They are acts of the will of the constituent power.⁶¹ The moment they come into force, they are expression of the political autonomy of the people. In their texts, they contain obligations for the entire public authorities and, to some extent, for society. The preambles are the hinges between timeless ethical truths or declarations and normative texts. This can well be seen in the preamble of the French Constitution of 1947, which was only made binding by case law. Since they do not themselves contain obligations, they prepare the reader for the fact that in the following constitution the axioms and values of the declarations are transformed into the principles and rules of the normative part of the constitution. They also shed light on them for their interpretation. In addition to its technical sections, the framing of a constitution transforms the values developed in extra-legal processes, whether in declarations anchored in traditions, in political pamphlets, or in careful systematic philosophical treatises, into binding constitutional law.

Philosophical essays may elaborate values in a visionary, not only u-topical, but also u-temporal form like the Platonic systems of the Renaissance humanists. They may be called for in pamphlets of struggle for contemporary politics, as in the *Cahiers des doléances*. Crucially for the legal perspective, the framers of constitutions do not necessarily put eternal values into a temporal form, but rather modify their temporal structure. While their representation in customs, political or philosophical texts depends exclusively on the will of the acting people, activists or philosophers, in constitutions they are given a form that can only be changed by the constitution itself. As norms, these values become binding for the future. However, their content can be further developed not only by the constitutional legislative bodies, but also by civil society dialogues, if this is presupposed by the constitution.

3 The Political Autonomy of the Constituent Power and Time

Constitutions are expressions of self-determination or self-government of a people.⁶² Self-determination is neither pure self-reflection nor a determinate act. In the perspective of constitutional declarations the political autonomy of the people remains in the form of self-reflection in an a-temporal form and does not make it into a historically beginning legal norm. As long as the acts of the constituent power of the people are expressed in this

⁵⁷ Kirste, 1998, pp. 360 f.

⁵⁸ Preamble of the Brazilian Constitution “under the protection of God”; preamble of the Argentinian Constitution “invoking the protection of God, source of all reason and justice”; preamble of the Columbian Constitution; Preamble of the Constitution of Paraguay of 1992; Preamble of the Constitution of Peru of 1993; Greek Constitution: “In the name of the Holy and Consubstantial and Indivisible Trinity” Preamble of the German Basic Law; End of the Declaration of Independence; Preamble of the Constitution of Ireland; Preamble of the Polish Constitution of 1997.

⁵⁹ Dreier, 2008, S. 7 ff.

⁶⁰ Dreier, 2008, S. 15 f.

⁶¹ Expressly the Constitution of Venezuela: “Article 347: The original constituent power rests with the people of Venezuela. This power may be exercised by calling a National Constituent Assembly for the purpose of transforming the State, creating a new juridical order and drawing up a new Constitution.”

⁶² Rubenfeld, 1995, pp. 1143 ff.

form of declarations such as the Declaration of Independence⁶³ or the Declaration of the Rights of Man and Citizen,⁶⁴ they remain, in a sense, timeless. They declare what already exists and is “evident” as truth, that is, only forgotten or, in any case, not observed in political practice. They therefore invoke principles of natural law that were regarded as timeless by the Enlightenment. In this way they create a cognitive basis for the new constitution. Citizens as authors of these declarations canonize the validity of these values and principles themselves by declaring them “sacred”. They are therefore supposed to be a basis of legitimacy for the political self-determination of citizens that has taken place.⁶⁵ Accordingly, both powers of the constituent authority and rights of citizens are derived from these truths. Without a legal obligation, citizens promise themselves these rights in a social contract.

In the act of self-determination, the self develops alternative actions, concretizes them into motives, chooses between them, and then willingly implements them. The self is the agent determining and choosing itself.⁶⁶ According to what we have said in the introduction about the characteristics of the three time dimensions, an unfree self is determined by the past: its actions are determined by what cannot be changed for it. The specific character of future, on the other hand, does not consist already being determined, but in having alternatives. A purely future-oriented behavior would therefore also not lead to an action and would rather remain in the possibility horizon.⁶⁷ In this sense, the declarations of rights are characterized by futurity: they do not intend to establish future commitments in the form of norms. Present is the will to decide for an alternative action among the decision possibilities of the future and on the basis of the non-changeable past. Now, this or that is not to remain possible, but a certain motive is realized; also, not everything is to remain the same, but to be changed.⁶⁸ Self-determination in temporal terms rather means to decide for a past (for a history or a biography) as a basis of the self as well as to choose from different futures or to design them for oneself. The act of determining the self through the self thus lies in the realization of both time dimensions.⁶⁹ The self liberates itself from the past by understanding it as possible determinations; from the future, it frees itself by choosing among the possibilities and determining itself through its autonomy.

Laws are autonomous acts and norms. Autonomous acts are temporally symmetrical behavior in the sense just mentioned: in the act of temporalization⁷⁰ past and future are made present. The constituent power is not bound to a legal past⁷¹ and integrates future, past and present in the act of framing a constitution. Norms are sentences of ought. They are intended to oblige or permit the addressee of these norms to do or refrain from doing something. In their obligations as duties, prohibitions and permissions they establish temporal asymmetries; they are future-binding. In the case of legal norms, their legal existence is based on decisions that are legally legitimized by rules of change. But how about the framing of a constitution? In the case of constitution-making, there is no obligation imposed by a superior or prior law. The declarations of rights that may precede them contain precisely no future obligation. It seems that the act of constitution-making is paradoxical: as an autonomous act, it is symmetrical in time, not bound by a past, but in turn integrating future and past in a historically particular moment in the extended

⁶³ Declaration of Independence of 1776: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights...”.

⁶⁴ Declaration of the Rights of Man and of the Citizen: “The representatives of the French People, formed into a National Assembly, considering ignorance, forgetfulness or contempt of the rights of man to be the only causes of public misfortunes and the corruption of Governments, have resolved to set forth, in a solemn Declaration, the natural, unalienable and sacred rights of man, to the end that this Declaration, constantly present to all members of the body politic, may remind them unceasingly of their rights and their duties...”.

⁶⁵ Declaration of Independence of 1776: “... to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them...”.

⁶⁶ Kirste, 2015, pp. 65 ff.

⁶⁷ Hegel thus understands the French Revolution with its many constitutional changes, but above all in its reign of terror. Like a Kronos, it eats its own children, so to speak, does not want to commit itself to any real order and thus becomes the “fury of destruction.” Hegel 1988, pp. 285 f.

⁶⁸ Kirste, 2002, pp. 26 f.

⁶⁹ In this sense, for example, also Kaufmann 1976, p. 101.

⁷⁰ On the concept of temporalization, see Koselleck, S. 338 f.; Kirste 1998, S. 383 ff.

⁷¹ If they confess such an obligation like the preamble of the Argentinian constitution (“in fulfillment of pre-existing pacts,”) then this obligation is assumed voluntarily and not already bound by the very same constitutional order the framers want to establish.

present of its validity. At the same time, constitution-making is not just any autonomous act of democratic self-determination, but a legal act that contains a commitment to the future. Since something cannot be temporally symmetrical and temporally asymmetrical at the same time and in the same way, we seem to have a paradoxical situation. Luhmann therefore assumed that the constitution has this paradoxical structure.⁷² At the beginning of a constitution, either normativity or self-government or even both are missing.

As we have seen in the analysis of the preambles — assuming they properly express the constituent power — the temporally symmetrical act of self-government is to produce the law out of its best moral intentions-however morally imperfect they may ever be. The constituent power means to produce laws as a system of norms that can be changed only by observing rules of change. People as constituent power are wise and moral enough to provide means for their own moral imperfection: the possibility of change. The act of the constituent power must therefore be called *transformation*.⁷³ Moral and other social norms are transformed into legal norms.

In the case of the constituent power, this is an act bound to previously valid (moral or even legal) norms and also a temporally symmetrical act of self-government. It is bound to the past because it has committed itself to act on the basis of previously binding non-legal norms or voluntarily recognizes norms of another legal order. At the same time, the constituent power acts symmetrically in time, from the present intuition, because the existence of the form in which these non-constitutional norms are cast is only the result of a free autonomous action and, if necessary, the free and unbound acceptance of these norms. Within the framework of the normative system of law, self-regulating, temporally symmetrical actions are limited to certain forms of democratic participation. The import of moral norms follows — if at all — predetermined paths. The act of constitution-making forms and determines these paths. The difference between morality and law does not disappear when we recognize the moral obligation to enact a constitution, since this obligation has a different form than that of the constitution yet to be created. The people are bound when they democratically act within the framework of law, and they can understand themselves as normatively bound in the act of constitution-making. They can recognize their moral duty (or one assumed in the form of other norms) only through a temporally symmetrical act of self-government, though. If law is a normative system based on an act of self-government, we can fulfill our moral duty to codify moral norms only through a free act.

If we understand the creation of a constitution as an autonomous transformation, it can be understood that it is symmetrical in time and bound at the same time. The difference between the constituent and constituted powers and their actions is that they are not bound by a previous legal norm, since their meaning is to create a legal order that does not exist before their actions. In this respect, the framing of a constitution is a temporally symmetrical act. What it has in common with the actions of constituted powers is that it can be bound to earlier norms, and in this respect it acts asymmetrically in time.

The transformation of constituent power into constituted power and of moral and social norms, traditions, customs and other patterns of behavior into legal norms is then the beginning of the law: the constitution is the beginning of the law. Transformation does not put an end to the constituent power⁷⁴ nor to morality. Transformation is the foundation of a new order. Constitution-making is therefore neither a temporal *creatio ex nihilo*, as Carl Schmitt thought, nor is a fictitious or hypothetical basic norm in the sense of Hans Kelsen, which is always to be presupposed, necessary for its explanation: constitution-making is therefore not an act out of nothing, because it often already voluntarily binds itself to moral norms in terms of content for the sake of moral legitimation; it is not

⁷² Luhmann, 1990, p. 188; Luhmann 2004, p. 406: An “autological text” is one “that is, a text that prescribes itself as being part of the law. This can take the form, for instance, of a collision rule, but occurs above all in the form in which the constitution exempts itself from the rule that new law breaks old. In other forms of this the constitution regulates whether and by whom there is a review of how law conforms to the constitution, and finally that the constitution itself contains the proclamation of the constitution and externalizes this symbolically by a reference to the will of God or the will of the people.” - It is surprising that Luhmann does not see that the constitution does not regulate “its” immutability, but the possibilities of a constitutional change of its norms. It cannot control their replacement by another constitution.

⁷³ Not in the sense of Ackermans as the ongoing process of amending an existing constitution (note 51).

⁷⁴ Cf. Böckenförde, 1991, p. 99.

a basic norm, because constitution-making can be a normed standardization and in this respect can be understood as law out of norms.

4 Self-Determined Democracy

By enacting a constitution, the constituent power does not subject itself to a legal obligation. Its autonomy is not legally terminated. There are still moral, political or historical ties of self-obligation, but no constitutional restrictions. Otherwise, the act of framing would indeed be self-contradictory or paradoxical. As noted earlier, the constituent power is free to enact a new constitution—and to abolish it and start the framing anew. Only, it cannot do so legally; therefore, its freedom is not legal freedom. Constitutional clauses that prevent the change of fundamental rights or other provisions oblige only the constituted power and not the people themselves. What such substantive or formal limits on constitutional change preclude is only constitutionality of an amendment of the constitution. The intrusion of the future is thus norm-hierarchically limited.

Since the constitutional power is continuous in transforming moral and other social norms into laws, it is not exhausted in constitution-making. Unlimited autonomy by the people remains possible, though not attractive and hard to organize. The constitution, however, makes a better offer of a secure and orderly balance of powers and their changes. Constitutional constraints can thereby strengthen democracy.⁷⁵ “What man loses because of the social contract is his natural liberty and an unlimited right to anything that tempts him and that he can attain; what he gains is civil liberty and property in all that he possesses”.⁷⁶ This applies no less on a people as a collective actor. Democracy becomes the constitutional democratic principle, limited by other principles such as the rule of law and the codified fundamental rights. Changes in moral and political beliefs will not lead to constitutional change, but can be transformed according to the rules of change. This representation of change in the legal system may be delayed if procedural hurdles have been set too high (“Countermajoritarian Difficulty”),⁷⁷ but this is a synchronization problem,⁷⁸ not a problem of a general impediment of constitutions to self-government.⁷⁹ Since constitutional self-government is only one form of political autonomy — important, efficient, secure as it may be — the Constitution does not preclude direct self-government.

5 To sum up

At least one final set of questions remains: Is it not a chimera to think of a people without legal constraints in order to be able to act as a constituent power? Are not a people without an effective constitution as a means of self-government nothing more than an “amorphous heap”,⁸⁰ incapable of acting? Doesn’t an efficient democracy require normative, especially procedural, bonds?

If constitutions make self-government effective, isn’t it the weakest power that we trust most when we rely on the constituent power? If Stephen Holmes, who asks these questions, were right and we had to answer them with his deliberately paradoxical concept of “constitutional pre-commitment”, then we would actually have not one but two paradoxes. One he obviously thought was necessary: People increase their power when they constitutionally bind themselves.⁸¹ But he does not mention the other: if constitutional constraints were a necessary condition

⁷⁵ Ely, 1980.

⁷⁶ Rousseau, 1900, Book I, Chap. VIII, p. 167.

⁷⁷ Bickel, 1962, S. 16-23.

⁷⁸ Kirste, 2002, pp. 23 ff. Even in the case of severe asynchronization, however, there can be no statutory “right of revolution,” unlike Kay 1998, p. 34.

⁷⁹ “In managing its exchanges with the social environment ..., it [die Rechtsordnung] aims to equilibrate the needs for security and innovation in the most efficacious way possible. To do this, it plays not only with time itself in regulating the moment of its coming into force (transitional law) by accompanying its prescriptions with various time-scales, modes of prescription, amendment procedures, and provision for matters of urgency, but also modulates its own temporal constitution by harmonizing the multiple legal temporalities or rhythms by which it is characterized.” Van de Kerchove/Ost 1994, p. 163.

⁸⁰ Holmes, 1995, p. 156.

⁸¹ Holmes, 1995, p. 157.

for democracy, there would be no democratic decision about the Constitution, since there are no constitutional bindings before the Constitution. But if they are not necessary conditions of constitution-making — and Holmes mostly cites political, pragmatic, and moral reasons — then the constitution-making power is bound by them only for political, pragmatic, and moral reasons; not for legal, especially constitutional, reasons. The paradox resolves itself if we stick to the formal difference between constitutional law and other norms or reasons (which can give structure to a people capable of acting) and to the adoption of a constitution as a transformation. This transformation is then the beginning of constitutional obligations. It can be democratic if it follows democratic rules, whether these are constitutional or non-constitutional.

Holmes is right, however, that democracy is weak without the constitutionally ordered procedures. Constitutions strengthen democracy by binding it. If these bonds do not exist, as at the moment of constitution-making, then special forces and favorable circumstances must take the place of the constitution, as we have seen in considering the preambles, in order to make this moment (Καίρως) an expression of successful democracy, in which a people determines itself through a new constitution and thereby orders its future.

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