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# Constitutions as Symbolic Orders

## The Cultural Analysis of Constitutionalism

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Constitutions are hermaphrodites. They are politics and they are law. They are created by political forces and must prove themselves in political power struggles. At the same time, they appear in the medium of law and attempt, using written norms, to provide the political process with direction and boundaries. In consequence, the question of the 'normative power' of constitutions becomes a focus of the theory and analysis of constitutionalism. How do law, politics and society relate to each other; how does power influence both the process of legislation and the implementation of law; and which empirical factors ensure the real validity of a constitution? How is the supremacy of constitutional law over ordinary statutory law justified? The normativity of modern constitutions may well arise from the democratic act of their creation, but their validity over time is not so readily derived from their genesis. How then can the normative power beyond the development and justification contexts of a *pouvoir constituant* be understood and empirically explained? And what is the status of the constitution in different societies? What follows is the presentation of an approach that attempts to develop the question of the normativity of constitutions in a theory and analysis of the validity mechanisms of constitutional orders. The normativity of a constitution is generated through social and cultural processes, and, in these processes, it is symbolic forms of communication and appropriation that give a constitution validity, and a constitutional jurisdiction interpretative power. As a first step, positions of legal positivism are criticised, before the foundations of the institutional analytical and cultural-scientific approach developed here are outlined. As a result, the question of the normative power of constitutions becomes an empirical one: Attention is focused on the social practices of dealing with and interpreting constitutions, whereby at the same time perspectives are opened up to capture the

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ideal types of the historical varieties of European constitutionalism. Not all political societies define and legitimate themselves in constitutional grammars and even when they do so, the semantics differ. Constitutions, therefore, show how societies see themselves.

## Constitutional Positivism and Its Critique

Legal positivism, which attempts to justify normativity through the legislative act, has for a long time dominated the debate, in particular in German-speaking continental Europe. However, ultimately, it has been unable to provide a satisfactory answer to the question of the empirical validity of constitutions (for the following cf. Vorländer 2006a). Where the clear separation of law and politics was seen to be 'the noblest task in the field of genuine constitutional law' (Laband 1877: V–VII; Gerber 1869), constitutions were thought to be interpretable as one of two forms: as law or as politics. The constitution is either a framework of fundamental legal norms or an expression of the political balance of power. Both points of view reflect not only the development of different disciplines – a science of legal norms and a social science–based science of reality; they also reproduce a theory about the two sides of the state (Jellinek 1959: 3ff., 50; Kelsen 1928: 105), according to which a legal side is separated from a political one. Academic perspectives on the constitution are differentiated along these lines. Law stresses the juridical normative decision-making character of the constitution, the legal norms of which set standards for the resolution of conflicts. Political science and sociology see in the constitution the result of the act of drawing up a constitution and, at most, the heuristic framework for the empirical analysis of institutions, structures and processes of the system of government. Here, the normative character of the constitution is disregarded; it is solely the constitutional reality that is of interest. In law, the normativity of the constitution is presupposed, and it must then be respected by actual politics. However, how the 'normative power' of the constitution is created and maintained, and also applied in case of conflicts, how in light of the factual political balance of power the validity of the constitution is not just presupposed, but consolidated, remains a desideratum in both perspectives. Each side of the fundamental differentiation of law and politics thus constitutes only half of what makes up a constitution. Here the theory and analysis of the constitution are stuck in an impasse.

The detachment of law – and consequently the constitution – from its philosophical, ethical and social environment was already fundamentally

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criticised in the discussion of German constitutional law in the Weimar Republic. Doubt was rightfully cast on the view that the constitution was valid simply because it was in force. Problems with respect to validity could not be resolved with a simple reference to the constitution as being the 'fundamental norm' (Kelsen 1925; 1960). Rudolf Smend, Hermann Heller and Carl Schmitt were united in this criticism, but, on the other hand, in terms of the conceptualisation of a constitution, their views differed momentously. Carl Schmitt's approach, based in sociological decisionism, did not really make a great deal of progress with respect to validity issues. Function and validity of the constitution were derived solely from the political act of creating and bringing a constitution into force; the constitution as the 'overall decision about the type and form of the political unity' (Schmitt 1970: 20, 75) broke up the 'connection between normativity and existentiality' (Heller 1970: 264) at the expense of normativity and in favour of an existential decision. The constitution was valid by virtue of a decision, by virtue of the power and authority of the force drawing up the constitution. The constitution, according to Schmitt (1970: 21), 'has its meaning in its political existence . . . the particular type of political existence cannot legitimate itself and nor does it need to'. Schmitt's 'constitutional lack of understanding for the normative element of the state constitution' (Heller 1970: 264) offered him no solution to the validity problem. In Schmitt's concept of a constitution, orientated towards basic existential decisions, there was then no room for assessing the normative validity issues of a constitution put into force at a certain point in time but which claims to be valid and binding for the foreseeable future.

Here Heller and Smend pointed to other ways of resolving this problem. Heller himself understood the constitution as the legal order of organised social interaction. The state was the 'organised entity for decision-making and action' (Heller 1970: 228), and the legal position represented 'the normative plan of this continual interaction' (Heller 1970: 264). The constitution ensures the normality of behaviour, the consolidation and the continuation of individual and societal conduct. The constitution in this respect has a 'normative normality', it is 'unity in time' (Heller 1970: 265): constitutional norms 'have the function of providing validity for a positively evaluated normality, namely that of conduct which fulfils the constitution, despite changing times and individuals' (Heller 1970: 263). In his arguments against Schmitt, Heller accentuated repeatedly the 'unbreakable connection between normativity and normality' (Heller 1970: 268), and in his arguments against Kelsen

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he underlined repeatedly the connection between 'existentiality and normativity' (Heller 1970: 279). This clearly illuminates the dual relationship between norms and the reality of constitutions: Firstly, the 'context of a legal norm is a legal referential context, because it is intended to serve a real ruling authority'; secondly 'the objectivised legal constitution only exists once it is continually taken back into the human subject, and continually renewed by people' (Heller 1970: 266, 269). Thus, according to Heller the normative validity of the constitution is based on the policy formation and decision-making process, on the conduct of political and social actors in a ruling association, but then also on forms of intersubjective recognition and social practices.

Like Heller, Smend (1968: 131) proceeds that is based in analysis of the 'reality of the state'. However, Smend's approach differs from Heller's in that it is primarily orientated towards the human sciences. The fact that, at a methodological level, he follows Theodor Litt's philosophy of life means that he approaches the state by examining the 'reality of the mind', the creation of a uniform 'system of meaning and values', and a 'hermeneutic' process of social and state integration. For Smend, the states is also the 'real association based on will', and integration is defined as the 'fundamental vital process of the state' (Smend 1968: 127, 136). It is from this 'core process of state life' that the determination of the constitution's functions arises. On the one hand, the constitution is the legal order of the integration process; on the other, it is the expression of a system of values and meaning, which makes the process of state integration possible in the first place. The constitution is 'integrating reality'; it continuously establishes the life processes of the state-political community (Smend 1968: 187). Above all, what Smend calls 'objective contents' – the principles of the form of government, the preamble, the fundamental and human rights – promote the state integration process (Smend 1968: 162, 198, 260). For Smend, a completely integrated state community is one that is 'integrated through a world of values, which it symbolises and represents and which is essentially not discussed' (Smend 1968: 220) and in which it is above all fundamental rights, which 'proclaim' a certain cultural system and system of values. Although Smend's value monism and 'life totalitarian' idea of integration are problematic, and the integration process itself also remains vague, his insight that it is only with reference to a cultural system and system of values that a constitutional order can show its validity to be legitimate remains important. Consequently, Heller and Smend opened a perspective on the

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constitution which does not view its normativity solely as the result of a political act of decision-making and the constitutional process. Instead, the normativity of the constitution is understood to be an ongoing validity problem. In this respect, they also broke open the purely juridical-normative narrowing of constitutional theory and showed a path for a more complex understanding of constitutions and the precondition of their validity.

## Analysing Constitutional Orders

A change of perspective in the analysis and theory of constitutions can be established and developed through reflection on the more recent institutional-theoretical and cultural scientific approaches in the social sciences, and also in the fields of constitutional law and history.[1] More recent approaches in institutional theory and analysis emphasise ways in which all forms of institutional stability are tied to processes and interactions. In this perspective, which avoids functionalist and structuralist macro-explanations, institutions can be understood as social and political order arrangements, the guiding principles of which are symbolically represented. Institutions can therefore be understood to be orders which form meaningful interfaces between guiding principles and structures of action and communication. Institutions are thus distinguished – in contrast to mere organisations – by an implicit meaning and value structure; that is, by their significance. Yet, this needs to be made explicit in some form – medial, emblematic, ritual, mythical, narrative – in order to give the order arrangement permanence. As a result, institutions should under no circumstances be understood to be timelessly valid, anthropologically constant, pre-stabilised entities. It is only the interplay of interpretations, practices and symbolic representations that gives institutional stability to communication and action structures and to social order arrangements. The process character of all institutional phenomena, which also means that they are analytically accessible, reveals the historicity of the institutional order arrangements, and it

[1] For institutional analysis cf. Rehberg 2014; Göhler 1997; Melville 2001; Melville and Vorländer 2002; Vorländer and Melville 2002. For cultural analysis cf. Schwelling 2004; Brodocz 2003; 2004; Seibel 1997; for cultural analysis of constitutions cf. Häberle 1996; 1998; Stollberg-Rilinger 2003; 2004; 2008; Blänkner 2002; Fisher 1988; Alexander 1998; Whittington 1999; Scheppele 2004; Schmidt 2012; 2015; Frankenberg 2006; for New Institutionalism cf. Clayton and Gillman 1999; Gillman and Clayton 1999; for the following cf. Vorländer 2006a.

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can shed light on the complex requirements for institutional validity, stabilisation and destabilisation.

Such an understanding of institutions shares common ground with theories of New Institutionalism, but here those aspects are given a cultural studies twist. In New Institutionalism (Hall and Taylor 1996), institutions, as well as constitutions as institutional orders, need to be seen as having serious implications in their constitutive and formative significance for individual, social and political conduct. They are not to be explained simply as orders which can be derived, determined by social, economic or political power configurations. Institutions possess formal structures, which give them independence, and also autonomy, and which enable them to function as collective actors or to be seen as such. They influence the behaviour of other individuals, groups, and institutions either implicitly or explicitly, in that they make their behaviour predictable, or, in the framework of a calculation management, they occupy the 'strategic ground', which conditions the set of possible alternatives for decisions (Clayton and Howard 1999: 31). The constitution and constitutional jurisdiction 'affect' other political actors both prohibitively and anticipatively, even when they do not 'take action'. Their very existence creates the expectation of compliant behaviour.

Such effects of institutions can be described within the framework of economically orientated rational-choice approaches of New Institutionalism. Using Historical Institutionalism, the genesis, the development, and also the behaviour patterns of institutions (including the constitution and the constitutional jurisdiction) can be reconstructed. In both approaches, however, the informal, intersubjective and communicative processes in the formation of institutional structures receive too little attention. Sociological institutionalism is able to isolate exactly these social interactions and structures, the forms of communicative behaviour, and the development of knowledge structuring. However, in doing so, it does not consistently follow interpretative-understanding theoretical approaches. The use of such approaches, however, is necessary to bring about for a change in perspective on institutional and constitutional theory, and it is required to make possible the conceptualisation of the constitution as a symbolic order. Ultimately, it is vital to comprehend and reconstruct the hermeneutics of the constitution in two respects (which can only be separated analytically): first, in the dimension of meaning, the guiding principles and normative ideas which connect a political community with its constitution; second, in the praxeology of conduct guided by rules, which consists of conduct which follows the rules and the

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interpretation thereof. Only the two together make the constitution valid as an institutional order.

In proposing this analysis, the following are taken as guiding assumptions: Politics constitutes a social activity that takes place in contexts of meaning constituted by society, through which it experiences preferences, limitations and orientations, and even contributes to symbolic and normative, interpretative and action-guiding interpretations of the world and environment, and consequently to the political way of life. The social meanings of a society manifest themselves in political cultures and the contexts of meaning emerge from politics. It is only political culture that makes institutions and social practices what they are: 'No institution or practice is what it is, or does what it does ... for institutions and practices are always partially ... constituted by what certain people think and feel about them' (MacIntyre 1984: 263). Semantic worlds, contexts of meaning and political cultures are expressed in language, discourses, texts, practices and institutions, thus combined in different symbolic forms (Cassirer 1994). These symbolic forms are the mechanisms of orders of understanding and of generation of meaning. The constitution itself is one of the symbolic forms in which the political worlds of meaning, the supporting and guiding ideas of order of a political community are represented and condensed into a set of rules laying claim to a binding normativity. Hence, regardless of whether a constitution is written or transmitted, it refers to the guiding principles and ideas of order attributed to it, the rules of behaviour and communication and the goals and procedures of a political community. The symbolic forms, in which these processes of reference and representation take place, can of course differ. Symbolisations can take place in the process of text interpretation, just as they can occur in the experience of a celebration of the constitution, the transmission of a founding myth or in cognitive, habitual and affective appropriation based on the experience of constitutional practices. Nonetheless, the condition for the instrumental function and also the integrative dimensions of the constitution is always the successful symbolic representation of the guiding principles. It is not until the constitution can be successfully represented or envisioned through experiences and past experience, practices and interpretation, that it can achieve the structuring, action-guiding and community-founding effect which is expected of it.

In this analysis, it becomes clear that constitutions are not established orders; constitutions make *claims of order* and *claims to validity*, but they cannot honour these themselves. In consequence, the meaning of

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a constitution as a symbolic order does not arise because a normative-regulating power is inscribed into it when it is drawn up – this is a positivist short circuit and a nominalistic fallacy. On the contrary, it results from the fact that prominent, fundamental ideas of order and guiding principles are *attributed* to it and that an instrumental-guiding function is *expected* of it.[2] The constitution thus only gains validity through a complex process of recognition and acceptance in a space of potentially competing – legal, political and social – interpretations and political-social practices. It is only the interplay of statutory, thought and lived order that makes the constitution a valid order. In this respect the problem of constitutional validity can be conceptualised as a *process of emergence*.

## Emerging Constitutional Orders

Accordingly, constitutions should by no means be understood as institutions which have reached the end of their possibilities for development once they come into force. On the contrary, many constitutions were never able to develop a formative or regulative power, others were breached by political forces, and some served solely to conceal the political balance of power. Where constitutions are able to take on constituting and legitimating functions, they then evolve. This is not only determined by changes to the wording of constitutional texts. It is also determined by forms of silent, creeping constitutional change, and by fundamental changes which arise over time, and transform the original document to the point that the original constitution is barely recognisable. The wording may in fact remain unchanged, but altered political circumstances and social contexts give the terms a different meaning, so that their interpretation represents an act of adaptation to the changed reality. These adjustments and alignments to current reality are carried out by political forces and social interpreters, the medial public and the citizens themselves. However, these constitutional metamorphoses become even more obvious where there is an authoritative interpreter of the constitution that makes binding decisions. In this respect, over a longer period of time, it is constitutional courts in particular which determine the meaning, but by no means the wording, of a constitution.

[2] Cf. Vorländer; 1999; 2002a; 2002b; 2004a; 2006a; 2006b; 2009. For the symbolic and instrumental functions of constitutions cf. Corwin 1936; Gebhardt 1995; Vorländer 1987; 1988.

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Constitutional Courts adapt the original constitution to altered circumstances; they bring constitution into line with contemporary reality by way of interpretation. The idea that there was an original act which created the constitution and that it then remains unchanged and valid can be dismissed by the observation that constitutional courts function like 'permanent constitutional conventions' (Woodrow Wilson as quoted in Arendt 1974: 258). They change the constitution, the norms it contains and the current meaning of their central provisions: *the constitution is what the judges say it is* (Hughes 1916).

Two examples shall serve to illustrate these points. In 1948/1949, the German *Grundgesetz* (Basic Law) had come into being in a manner that was remote from a participating public. It was only gradually, not lastly through the equally bold and consistent judicature of the Federal Constitutional Court in the matter of fundamental rights and freedoms, that the Basic Law obtained recognition in the West German population. A decisive role in the acceptance of the Constitution of the Federal Republic of Germany as a common foundation for political disputes was also played by the major constitutional conflicts – first about rearmament, then about the Emergency Constitution. In this setting, it became apparent that "integration by constitution" was possible even by way of adoption of the constitution through conflict and the notions of order symbolically expressed through it (Frankenberg 2002; Vorländer 2002a). The Federal Republic of Germany had adopted the Basic Law in a protracted process. The constitution had only gradually obtained the recognition and acceptance which was necessary for its claim to validity and for the implementation of its instrumental-regulative function. The validity of a constitution, its actual normativity must, thus, above all, be described as the product of a development over time.

Second, a quick look at the development of the American constitution also reveals enormous changes, both silent processes of adaption to current realities as well as eruptive constitutional revolutions. From Marshall's bold surprise coup in *Marbury v. Madison* in 1803, intended to reclaim for the Supreme Court the power to test the constitutionality of acts of Congress, to the constitutional race philosophy expressed in *Dred Scott* and *Plessy v. Ferguson*, to the socially conservative economism of the period between the Civil War and New Deal, through to the progressive fundamental right activism after 1950, the American Supreme Court shaped politics, and played an active role in fundamentally changing the constitution. Although the prestige of the Supreme

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Court had its basis in its *courtness*, its role in many cases was that of the political constitutional revolutionary (Vorländer 1987).

In the USA, the 1920 minimum wage and restrictions on working time were still classed as unconstitutional. Any form of social legislation was rejected by the Supreme Court for being incompatible with the basic principles of economic freedom. In consequence, in the 1930s when the then American President F. D. Roosevelt attempted to push through his New Deal, in which he planned a new social security as well as a law on trade unions, he initially encountered resistance from the Supreme Court. Subsequently, however, not even a single word of the constitution needed to be changed in order for Roosevelt to be able to pass, for example, the Social Security Act or the National Labor Relations Act as constitutional. The Supreme Court had decided overnight that these items of proposed legislation were in fact in accordance with the constitution. The Supreme Court played a similar role in and for the American Cultural Revolution in the last sixty years. So, in a sense, the American Supreme Court was the actual cultural revolutionary. In 1945, the American Constitution still allowed racial segregation, it did not protect the voting rights of blacks, allowed official prayers in state schools, and it only gave inadequate protection for the rights of political minorities. At the beginning of the 1970s the same constitution prohibited racial segregation, protected voting rights, officially banned prayers in state schools and now provided special protection for the rights of political minorities and the freedom of speech. Finally, the Supreme Court also invented a new right of privacy when it allowed abortion – unlike, for example, the Federal Constitutional Court of the Federal Republic of Germany. Cass Sunstein sums up the constitutional revolution which occurred in the Supreme Court as follows: 'If American citizens in 1948 were placed in a time machine, they would have a hard time recognizing their Constitution nearly twenty-five years later.' (Sunstein 2005: 32).

Constitutions are, therefore, not valid as they were created. In developed constitutional democracies, most particularly, the institutions that interpret the constitution have gained a constitution-developing role, which has replaced the original legislative right to make formal amendments. Its own interpretative history is superimposed on the constitution. This history, although connected in its validity to the wording and the original meaning of the constitution, also has a life of its own; it creates its own time and avails itself of validity resources of its own, in order to gain recognition for its interpretations and

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acceptance for its judgements. Constitutional courts lead such an independent existence that they generate their own institutional interpretative power, and one of their most important power resources is the trust of the general public (Vorländer 2006b; Vorländer and Brodocz 2005; Brodocz 2009; Vanberg 2009). The institution of the constitutional court explains its actions as a direct interpretation of the constitution; it does this in order to avoid losing its basis of legitimacy and endangering the recognition of the other political powers, such as the plaintiffs and complainants. Through self-presentation and self-staging the constitutional courts let there be no doubt about their authority as the binding interpreter, whilst presenting themselves as the mouthpiece of the constitution, as *la bouche de la constitution*, apparently without power, but in full accordance with the original constitution.[3]

## The Symbolic Representation of Constitutional Orders

Constitutions provide institutional orders for political communities. Constitutions do this by explicitly representing the guiding ideas and validity claims of political action and communication. The text preserves the ideas of order: it retains them, and makes them available. The constitution gains its significance as a depository of order if it is effective as a rulebook for the political sphere. The relationship between effect and validity is again crucially dependent on the practices of mediated representation and direct realisation. Symbolisations may result from the process of textual interpretation, from the experience of a celebration of the constitution, from the passing on of a foundational myth by, or from experiential, cognitive, habitual and affective appropriation through constitutional practices. It is only when the constitution becomes successfully represented or realised through experience, practice and interpretation that it will become effective as the structuring, action-guiding and community-building force it is expected to be.

On this basis, we can distinguish different symbolic forms with which the constitution fulfils (or may fulfil) its ordering role and with the help of which it creates its own validity.[4] On the one hand, there is public discourse, the community of interpreters of constitutions. Constitutions do not live through the text alone, but through their

[3] Montesquieu speaks of 'la bouche des lois' (Montesquieu 1979: S. 301); for the 'institutional mechanisms' of constitutional courts, cf. Vorländer 2004a; 2005, 2006b.

[4] For the following cf. Vorländer 2012a.

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realisation, through the adaption and interpretation of their norms within the public discourse. Apart from these communicative-discursive forms of representation of the constitution there are expressive, narrative, performative and ritualistic forms of realisation of the constitution (Vorländer 2010). Constitutional ceremonies, celebrations and festivals are examples of the ways in which the constitutional narrative, the creation, the development and the present form of the constitution are made visible and can be experienced. This realisation lets the past, the period of constitutional founding and the constitutional development appear as if it were identical with the present, actual constitution. This distinctive history of the constitution from the absence of its creation to the presence of its valid application constitutes the reservoir for the symbolisation of the specific ideas of order ascribed to the constitution.

We can find plenty of examples to illustrate this. Consider, for example, the 'staging' of the American constitution, the Declaration of Independence and the Bill of Rights in the Rotunda for the Charters of Freedom in the National Archives on the National Mall in Washington, DC. Here we can observe a distinctive effect of cultural staging, the sacralisation of the constitution and founding documents; they are presented as the Holy Scripture of the US-American civil religion. Another staging of the constitutional imagery, in much the same vein, can be found at the National Constitution Center in Philadelphia, the place where the Constitutional Convention drew up the still valid constitution. This is a place where expressive and narrative types of representation are combined; the centre becomes a locus of experience where the history of key constitutional moments – the Civil War, race discrimination, freedom of religion, civil rights – is told and presented as a history of a conflictual, but eventually successful, incorporation and recognition of the constitution. Through ritualistic practices, such as memorial services, constitutional festivals and parades, the content of the constitution is brought to light, while at the same time the community of citizens integrated into the constitution is performatively created and reinforced. In Vormärz Germany, in many regions, there were festivals and parades at which, amongst other things, the constitutional document was carried through the streets, in a manner akin to a religious procession.[5] People gathered around "constitution columns," as in the Bavarian village of Gaibach or the Saxonian village of Zittau. But also in the twentieth

[5] Cf. Blänkner 1996; 2002; Nolte 1993; Stollberg-Rilinger 2003.

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century there were numerous large constitutional festivals on the day of the constitutional founding, at which hundreds of thousands of people marched for the democratic principles enshrined in the text. As the history of the Weimar Republic shows, these expressive forms of memorializing constitutional founding moments have not always led to a lasting stabilisation of the political community. Evidently, not every expressive constitutional practice generates the normative force necessary for the stability of a constitutional order.

Modern constitutions, incidentally, also cannot survive without forms of constitutional ritualisation. What is generally presupposed is that their normative validity depends on their legal character, that their authority is based on the fact that they are written, and that their legitimacy is grounded in the democratic act of constitutional founding. In this context too, however, rituals, as 'symbolic acts realized in agency' (Rehberg 2014: 213), create constitutional ties and obligations, they make it possible for people to experience the purpose of a constitutional order, and they create a framework for interpretation and expectations of political action and the constitution. Consequently, even elections can be seen as ritualistic moments which give symbolic expression to the democratic order. Elections can be seen as *rites de passage*: as power being authorised, transferred and constrained. The act of electing makes the body of the demos visible.[6]

## Constitutional Cultures Differ

Constitutional cultures differ substantially. Firstly, they differ according to their respective principles of political order and their interpretations, which are strongly influenced by cultural and historical contexts. Furthermore, they differ with respect to the question as to whether constitutions rely more strongly on written documents, codifications (that is, on the medium of script) or whether, instead, they rely on interpretation, rules of habit and oral reproduction, that is, on its orality. Finally, they differ as to the symbolic status the constitution has for the integration of a political community. Not all democracies would describe themselves as constitutional communities, some draw their identity from the idea of the nation, the republic or, as history has shown, from ethnic or other cultural guiding ideas. Moreover, the constitution itself can also become a guiding and integrating idea for the community. A clear case of

[6] Cf. Manow 2008; Vorländer 2010.

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this, one that is referred to frequently, is the United States (Vorländer 2012a).

In the case of Great Britain, we find the – apparently – paradoxical situation that the constitution matters, despite, with the exception of Cromwell's short-lived *instrument of government*, there being no – single codified – constitution: constitutional symbolism without a formally unified constitution.[7] The British always lived under the image of having a constitution even though they did not have a constitution ordered in one single document: 'it is a characteristic of the British political tradition that the constitution is simply assumed to be present' (Foley 1999: 13). This idea can be traced back to the early seventeenth century and the idea of an 'ancient constitution' (Pocock 1987; Burgess 1992). It persisted across centuries, survived the revolutions and still had integrative consequences when the democratisation of electoral law began in the nineteenth century. It was only during the crises of the early twentieth century, in conflicts about the People's Budget, the Parliament Bill and the Irish question that the inadequacy of the integrative power of the constitution became apparent.

What makes the British case so interesting and relevant for the question of the validity of constitutions is the fact that a constitution requires neither the character of a single written document nor the foundational moment of the constitutive act by which it is created, for it to become recognised as a symbol of legitimate political order. This is possible only because the English constitution was able to function as a symbol of a consensus on fundamental questions of political order (Schröder 2002). The conviction of having a constitution brings together the shared conceptions of the foundations of political order. These conceptions possess a historical dignity and legitimacy, they are the result of a shared, albeit conflictual, history. They are transmitted, developed discursively by elites in political disputes, and accepted across classes. The English constitution is the symbolic vanishing and identification point of social and cultural conceptions of order, of laws, institutions and habits, 'derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed'[8]. Where the constitution as a system of rules is considered to be natural and embedded into an

[7] For the following cf. Vorländer 2002a.

[8] Bolingbroke in his article *Dissertation upon Parties*, which was published in a series of articles in 'The Craftsman' in 1733/1734; quoted in: Armitage 1997: 88.

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organic and traditional political culture, no explicitly codified written constitutional document is necessary.

The British constitution, therefore, has become the sum of an arrangement of constitutional conventions, the integrative power of which is by no means weaker than those of scripturally fixed constitutions. The non-constitutionally fixed form of self-binding in the English case 'could seem superior, since it is evidence of "self-control" and corresponds to the unarticulated taken-for-grantedness of gentlemen's behaviour' (Schröder 2002: 192). Furthermore, the lack of a written fixation of the constitution had the advantage that conceptions of order and conventional rules could be interpreted differently, albeit within a common frame of reference. Thus, the integrative power of the constitution consisted in the possibility that conflictual discourse around the constitution could lead to the development of a shared constitutional language while at the same time retaining the variability of the constitutional content: 'However it was interpreted, however far back it was dated, and regardless of whether it was regarded as complete or still incomplete, it provided "a language and a set of themes upon which endless variations could be played" '. The shared constitutional language made it possible to see the political opponent 'not as the enemy but as the other in the sign of commonality' (Schröder 2002: 158, 179). At the same time the indeterminacy of the constitution provided space for a popular socio-cultural constitutionalism. The 'invocation of the constitution,' a kind of 'formula of concord', at several points offered governments and elites the opportunity to 'mobilize a form of constitutional patriotism, and keep up stability through ideological rather than violent means' (Schröder 2002: 203). This is a – historically observable – side effect of the high symbolic status of constitutions and, as such, also in evidence in the case of the US. The English case in particular, namely of a constitutional symbolism without a codified constitution, makes it clear that constitutions manage to describe a symbolic space within which a debate about the fundamental ideas of political order can take place and have an integrative effect.

## Towards a Typology of Constitutional Cultures

For an epoch-spanning, systematic-theoretical and comparative-analytical perspective, constitutional orders can thus be defined as orders in which specific rules and guiding principles are attributed a prominent, fundamental significance, and they are expected to perform stabilising,

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orienting and regulative functions. Their validity can be described as the product of successful praxis over a long period. Using this concept of constitutional order as an emergent order, it is possible to observe transnational, regional and global processes of constitutionalisation (see Kumm 2009; Dobner and Loughlin 2010; Teubner 2011; 2012; Thornhill 2011). Moreover, it is possible to describe the historical varieties of European constitutionalism, and, on this basis, to establish to whether a normative, constitutional order with a comprehensive regulative claim to validity is attributed to them (Vorländer 2012b; 2014). In this respect, the analytical perspective shifts from the constitutional *state* to constitutional *culture*. The cultural and historical contexts are the locations where constitutional orders develop, and the rank, status and validity of constitutions result from them. Consequently, constitutional cultures can be understood as those consolidated collective ideas and practices that have existed for a long time and which normatively distinguish the semantic contents and the fundamental and guiding principles of a political order. For Europe, we could speak in this regard of distinct constitutional cultures, in which three development paths and ideal types of European constitutionalism are expressed in a historically consolidated manner.[9]

First, there is *historical-evolutionary* constitutionalism. In this model, constitutional orders are developed in a long historical process. Their regulations are based on custom and convention. Whatever makes sense proves itself and survives the historical change. This understanding of order is equally historical and political. It is less legal and normative, the constitution is not a statute, and not constitutive for a political community. The constitution is however the expression of a concrete historical-political status of a community and as such is the expression of existing and historically proven laws, morals, customs and habits. It is thus a descriptive constitutional concept; the constitution draws its normative power from its capacity for making the factual be normative. A constitution of the historical-evolutionary type thus at best codifies what already exists. The historical-evolutionary concept of order is especially ingrained in the English constitutional tradition. England does not have a codified constitution; it has nonetheless always assumed that it does have a *constitution*. The legal normativity of this *constitution* is low, constitutional law has practically no precedence over

[9] Cf. Vorländer 2009: 7, 34; Preuß 1994; Abromeit 1995; Wyrzykowski 2001. For the following, cf. Vorländer 2007.

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politics. The parliament has political sovereignty, the legitimacy of the political order is the result of firstly the recognised and proven established rules and conventions, and secondly the parliamentary system strictly based on majority rule. Political identity grows historically.

Second, one needs to differentiate between historical-evolutionary constitutionalism and the *rational-voluntaristic* concept of order. The constitutional order can be traced back to an act of will on the part of the power that created the constitution. In contrast to the historical-evolutionary tradition here the constitution has not grown naturally; instead, it has consciously been drawn up and put into force. Hence, the constitution of this type also has a constitutive significance for the institutional and procedural order. The constitution is an expression of the unity of the political community; however, it is not the constitution that causes the political unity. Herein lies a certain similarity with the historical-evolutionary constitutional concept. It is the ideas of a nation or republic and the associated notions of order that provide the legitimation resources for the political system. The constitution then takes on an instrumental function in this context; it is the rulebook for the procedures and institutions, and it is only within this framework that it gains its normative, regulative legal power. The French development acts as a paradigm for this constitutional conception. Legal constitutions were always of a relatively short duration, they were seldom more than pure *instruments of government*. The central notions of order were connected with nation and republic, but not with the constitution. Legitimation and identity of *République* and *Nation* resulted from their revolutionary tradition, going back to the ideas of 1789. Sovereignty was expressed in the will of the people and the laws they made and always remained tied to the unifying and identity-shaping framework of the French nation.

The constitution receives a completely different, more prominent significance in the *rational-juridical* tradition. In this model, the legal constitution provides the foundation for the unity of a political community; it constitutes a new order. Here, too, constitutions are consciously created, most of the time *uno actu*. They are also the expression of a will to draw up a constitution. The difference between this and the rational-voluntaristic tradition is to be found in the prominent legal status of the constitution. Constitutions here represent the legal form of the political unity; they have a high normative legal quality. These constitutions also normally take legal precedence over the political decision-making process, which is reflected not least in the establishment of constitutional courts with the authority to decide on the constitutionality of the laws of

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the democratic legislator. Constitutions on this pattern are mostly created after historical upheaval, revolutions or fundamental revisions. They stand for a new beginning. The political community created by the founding legitimises itself by taking recourse to the act of creating the constitution, and even after the founding it refers to the constitution as the central concept of order (Vorländer 2002b). The fundamental order referred to as the constitution becomes legally binding and is at the same time the unity-guaranteeing scope of political activity. In contrast to both of the previously characterised conceptions of order, this model of the constitution has an edge in terms of sovereignty, because popular sovereignty and parliamentary sovereignty must also give precedence to the constitution. The constitutional regulatory framework confers legitimacy on the political activity and the decision-making process. And where the constitution moves to the centre of the political and social self-reflection discourse, constitutions also have the function of shaping identity. Thus, along with their instrumental significance, constitutions on this pattern also possess a great symbolic significance for the constituted political community.

The US-American and the Federal German tradition are paradigmatic for the rational-juridical concept of order. Constitutions justified the formation of independent states in the former colonies in North America and a constitution was the foundation for the West German democracy after World War II. After a revolution and historical upheaval respectively a new political system was institutionalised through the creation of a constitution. Most central and East European states after the revolutions of 1989/1990 went through the same experiences. Here too the constitutions are the expression and result of a comprehensive transformation process. The constitution is ascribed, not only a prominent constitutive, but also a great normative-legal creative power. It is the – juridical – legal status in particular with its binding, regulative claim to validity that characterises these constitutional conceptions, which are also, as far as possible, underpinned by institutions of the constitutional jurisdiction.

## Path Dependency and Hybrid Constitutional Cultures

On one hand, development paths establish dependencies for further development, as they restrict the scope of possible changes. On the other hand, it is not the case that a path dependency makes it impossible to change a constitutional order and the ideas and guiding principles that

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support it; nor does it rule out convergences between distinct constitutional cultures. Firstly, the different constitutional cultures have changed and also opened themselves to external influences. Secondly, from the second half of the twentieth century the beginnings of a European legal culture, and a pool of common European ideas of order have developed, which in turn have impacted back on the nationally consolidated constitutional traditions. These relationships are just as obvious in the developments which have been observable in Great Britain for several decades as they are in the constitutional culture of France. Convergences through the mutual effects of national ideas of order or the overlap of common European ideas of order have led to both a hybridisation of the constitutionalisms of national states and also to a constitutionalisation of a transnational, multilevel political area. These mutual influences and interdependencies can however also generate resistance to constitutional orders drawn up by the state and call into question the process of progressive European constitutionalisation, as shown not least by the failure of the draft Constitution of the European Union in 2005.

In Great Britain there has been an ongoing debate about the *British Constitution since the 1980s*, which has taken a critical look at the transmitted principles of the British constitutional order[10]: the unwritten constitution, the institutional order which has been handed down, the Westminster model, the powerful status of parliament and the prime minister and his/her cabinet, the undemocratic character of the House of Lords and the centralism of the United Kingdom. The calls for a comprehensive revision of the constitution grew louder and with them also the demands for a uniform written constitutional document. Great Britain's traditional constitutional culture was thereby called into question. A formal constitutional change, termed *devolution*, had the same aim; its objective was a quasi-federal opening of the British unitary state. A system of quasi-federalism effectively arose through this process, something remarkable for this British tradition, as it now also relativised the principle of the sovereignty of the Westminster parliament and the entitlement of the British parliament to be able to define the destiny of the United Kingdom alone and without restrictions. The British system of majority democracy had to accept restrictions for the first time – for example through the new electoral system brought in below the central government level. Whilst these changes could still be interpreted as following the traditional model of an incremental constitutionalism, of

[10] Cf. Kastendiek 2001; Foley 1999. For the following cf. Vorländer 2007: 171.

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'muddling along with the great unwritten constitution' (Vibert 1999: 62), the scope of the formal written constitution had now been considerably expanded.

The integration of the European Convention on Human Rights into British law was then a further significant step in the creeping constitutional change on the island. When the Human Rights Act came into force it meant much more than a mere update of the English constitutional tradition, because now, for the first time, a uniform, coherent, and written catalogue of fundamental rights enforceable by law had been included in the English constitutional tradition.[11] The British constitutional order thus opened itself (to a limited degree) to supranational legal principles and, at the same time, to a certain extent revoked Westminster's exclusive legislative supremacy. In addition, European Union law also finds its way into the constitutional order of Great Britain via the English courts and case law. Not only has the economic constitution become fundamentally Europeanised through rulings of the English jurisdiction, fundamental rights, such as for example the freedom of expression, have also been interpreted in accordance with European Union law and made binding for the British legal order.[12] Finally, the changes to the constitution in the Constitutional Reform Act, adopted by parliament under the Blair government in March 2005, were also an indication of the change in the constitution as well as the thinking about it.[13] For one, the office of the Lord Chancellor was fundamentally reformed. In addition, the traditional constitutional order was however probably even more radically changed by the fact that the institution of the Law Lords was also transformed into a new institution, into a Supreme Court. Although the institution created is not yet a supreme court following the American model or a constitutional court with a catalogue of competences as comprehensive as in the Federal Republic of Germany, judicial independence has nevertheless been significantly increased through the creation of a new, independent constitutional body and the sovereignty of the Westminster Government has been thereby further relativised by constitutional limitations.

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[11] For the impact of the Human Rights Act cf. Robert Hazell and David Sinclair 1999; Loveland 1999; Schieren 2001: 273.

[12] Cf. *R. v. Secretary of State for Transport, ex parte Factortame Ltd.* [1990] 2 AC 85 and (No. 2) [1991] 1 AC 603; *Derbyshire County Council v. Times Newspapers Ltd.* [1993] AC 534.

[13] Cf. Carnwarth 2004; Maer et al. 2004; Prince 2004.

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So the tradition of the slow, evolutionary adaptation of the British constitution to changing times seems to be called into question by the changes to the constitution in the past decade, the sum of which is considerable: Conscious change and textualisation are taking the place of transmission and convention. The supremacy of historically proven practices and governmental policy-making is restricted by rational-voluntaristic constitutional acts and the expansion of the mechanisms for the protection of fundamental rights. Parliament and elected executive are increasingly bound by the state judiciary, while the sovereignty of the central government powers is increasingly restricted by the restriction of the power of the unitary state by creeping quasi-federal processes. So the paradigm of a constitutional democracy, which has already long since triumphed in continental Europe, could appear on the horizon of the British constitutional change (Vorländer et al. 2003) – if the force of inertia of the handed-down constitutional thought were not so strong and the political resistance to the process of European integration did not return with great regularity.

In the Fifth Republic in France, a constitutional change has also taken place. The sum of the changes reveals a convergence towards the rational-juridical constitutional concept of the North American and German type (Vogel 2001; Schulz 2004). Above all, the *Conseil Constitutionnel*, installed in the constitution of the Fifth Republic, has developed a role in the past decades which comes very close to that of an autonomous constitutional supervisory authority. According to constitutional law it tests the constitutionality of laws within the framework of the normal legislative process, thus before the promulgation of a law. However, in terms of functionality – and not least after the constitutional amendments of 1974, in which the application rights were expanded – the Constitutional Council has slowly grown into the role of a constitutional jurisdiction, with the claim to be the protector of the constitution even in the face of democratic majorities.

In the 1970s the articles of the 1789 Declaration of the Rights of Man and of the Citizen were included in the constitutional case law of the *Conseil Constitutionnel* for the first time. This interpretation, which activated fundamental rights, had become possible because the preamble of the constitution from 1958 explicitly invokes the declaration of 1789. Since then, the *Conseil Constitutionnel* has on numerous occasions examined whether the laws of the National Assembly conformed to the norms of the constitution and, where necessary, it has also rejected them. The Constitutional Council is thus increasingly restricting the

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sovereignty of the legislator and the notion that sovereignty is expressed in the law: 'La loi n'exprime la volonté générale que dans le respect de la constitution.'[14] The constitution and Constitutional Council demand supremacy over political majority decisions, which means nothing short of a renunciation of the traditional concept of a constitution with its strong political-instrumental emphasis. The term 'bloc de constitutionnalité' captures this development, which has led from the rediscovery of a genuine juridical constitutional concept, to the growing autonomy of constitutional law – and its disciplinary differentiation at universities – through the promotion of a rational-juridical constitutional concept, in which the clear supremacy of the legal constitution is established and with it a new constitutional paradigm.[15]

As a result, convergences between the three development paths are definitely becoming evident. The overall trend of these changes leads in the same direction: textualisation of the constitution and the acts in which it can be revised, supremacy of the constitution over ordinary statutory law, the prevalence of fundamental- and human rights, limitation of political power by judicial mechanisms in the state, and *last but not least* the establishment of an authoritative and binding authority for interpretation of the constitution in the case of conflict – in other words, of a constitutional jurisdiction. These developments are however only trends, which can of course be reversed, in particular as a result of anti-European sentiment in the member states.

The development towards a constitutional democracy of the rational-juridical type takes place in the first instance within national and sovereign constitutional states. Therefore, in principle, this convergence development is also compatible with the retention of traditional national claims to sovereignty, particularly as the democratic principle itself is traditionally dependent on clearly defined enclosed political spaces at first. Consequently, the hybridisation of national constitutionalisms by no means leads directly to the constitutionalisation of a transnational political space. The compatibility of historically distinct constitutionalisms, which through their development have converged, does not yet mean there has been a qualitative leap to a genuine European constitutionalism.

[14] Décision n° 85–197 DC, 23 août 1985 Loi sur l'évolution de la Nouvelle-Calédonie, Recueil, p. 70; RJC, p. I-238 – Journal officiel du 24 août1985, p. 9814. Cf. Rousseau 1997: 38; Vogel 2001: 206.

[15] Cf. Colliard and Jégouzo 2001; Denizeau 1997; Favoreu 1990; Rousseau 1990; 1999a; 1999b. Cf. also the debate on new constitutionalism that took place in Le débat 64 (Rousseau 1999a).

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## Transnational European Constitutionalism?

When the European Union is spoken of as an organisational form *sui generis* – that is, neither as a federal state nor as a confederation, nor, increasingly, as a union of states – this indicates just one dilemma: assigning a name which corresponds to the conventional paradigms of statehood to the complex multilevel political and economic entity which knows both intergovernmental processes and supranational-community institutions and politics. This is also the case with the characterisation of the legal order. It is still relatively undisputed that it exhibits constitutional traces, even though it is not a constitution in the continental European sense. However, the assessments of the degree and the quality of constituationalisation – sometimes overlapping with politics – vary considerably. While some analytically deny and normatively dispute the constitutional character of the EU, others see a pragmatically developed *working constitutional settlement* (Moravcsik 2006: 220), with structures either analogous to or the same as a constitution. The positions are marked by their differing relations to the paradigm of modern constitutional statehood. A change of methodological perspective, namely moving away from the idea that there is a constitutive requirement of closed statehood before constitutional orders are even conceivable or possible, will allow a different interpretation of processes of European constitutionalisation (Vorländer 2012b; 2014).

The model of the constitutionalisation of Europe basically follows the English pattern of emergent constitutional orders. In a gradualistic-incremental manner, a legal order has developed, one which at first was based on intergovernmental treaties, but which then however also included general legal principles, above all those which the European Court of Justice assumed were shared by the member states. Crucial in this respect was the fact that this legal order experienced constant further development and interpretation through its contractual genesis, performed not solely by political bodies in the strict sense, by Council and Commission, but also, very crucially, by the European Court of Justice. As a result, a de facto constitutional order of the European Union developed, which had left the original basis of the treaties behind and in its dynamics had definitely obtained the transformative quality of a genuine European constitutionalism (Weiler 1991; Weiler and Wind 2003).

Eventually, this form of evolutionary constitutional order evidently reached its limits of legitimacy – not least due to the expansion of the

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community to currently twenty-eight members – at the moment when the gradualist method of step-by-step consolidation of the integration process created far-reaching political problems, which demanded a comprehensive institutional, indeed, new constitutional foundation *uno actu*. Consequently, the project of a European Constitution therefore also had to be viewed as the attempt to expand the very limited segmental community of lawyers, judges and 'Brussels-Europeans' through the act of drawing up a genuine European Constitution. The constitutionalisation of Europe was to become the European Constitution. Even if the draft of a European constitution essentially 'only' brought together the previous treaties to make an institutional reform possible, the semantics changed significantly and thereby so too did the symbolic referential connections. Discussion was focused on a constitution, a declaration of fundamental rights, defined objectives and European symbols (a flag, an anthem), which appeared to give Europe something which so far had been reserved for continental European nations: a 'fully valid' constitution, which to date had only appeared conceivable in symbiosis with modern statehood. However, that created opposition.

The draft of the European Constitutional Treaty, especially because it made the European Union visible as a 'constitutionalised' transnational area, served as the ideal target for national defensive reflexes. The symbolic surplus in significance, which resulted from the constitutional project, was the European Constitutional Treaty's downfall. The citizens of France and the Netherlands, whatever the concrete reasons may have been, rejected the ideas of integration and guidance of a supra- and transnational political area, which were symbolically connected with the constitution. The Lisbon Treaty then followed the supranational and intergovernmental two-tier structure characteristic of the European Union, thereby consolidating a constitutional order arrangement. It did not only achieve this in a purely empirically descriptive sense of a European constitutional structure. It also achieved this in the sophisticated understanding of a normative order that at least partially transcends nation-states, and is capable of generating those regulative functions and effects which are conventionally solely attributed to state constitutions.

The emergence of European constitutionalism may be seen as another empirical case, where the basic ideas of political order do not necessarily require the form of a document such as a written constitution, or even a legal form generally. Unwritten conventions, as well as single laws,

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statutes or treaties, can reach the status of a constitution and be described as such. Thus, we have established a concept of constitution and constitutionalism that escapes the narrow legalistic and positivist analysis. After all, it is not only the legal constitution that contains the fundamental ordering principles of the political; we also have to consider those collective imaginations, shared meanings and social practices within which those principles and their recognition are developed and which ensure the normative status and validity of the constitution that is necessary for its regulative power.

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