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Generations

The First Generation of Monarchical Constitutions

At the end of the sixteenth and seventeenth centuries, rules and documents emerged that start to resemble what we would now call a constitution. Written documents with norms codified as legal rules on the functioning of government – rules on power and its exercise. They were not conferred by a divine being or handed down as tradition but promulgated by people in the present for people in the present. Representations of a new beginning in a man-made order, contained in a written document. The earliest instances – the Union of Utrecht and the Act of Abjuration in the Netherlands, and the Fundamental Orders in Connecticut – are still highly instrumental in nature: nuts and bolts of government operation. We would not really recognise them as fully fledged constitutions nowadays. As we saw at the end of the previous chapter, they are 'instruments of government'. These instruments were primarily focused on who does what in government administration and were less concerned with 'why' and 'for what'.

Even England once had a written constitution of this kind. The *Instrument of Government* was the English Protectorate's state regulation under Oliver Cromwell, in force between December 1653 and May 1657. The forty-two articles, drafted by the Parliamentarian Major-General John Lambert, laid down the principles of state administration. After the execution of Charles II in 1649 and the dissolution of the monarchy, the leadership of the Commonwealth of England (also called the English Republic) had to be arranged post-haste. The provisions of the *Instrument of Government* mainly attempted to restore order after the turmoil of the English civil wars. For this reason, the *Instrument* is more like an emergency state regulation than a modern constitution. It hardly makes mention of relations between government and citizens, apart from rules on the composition of a single representative body. Words like 'individual' or 'freedom' are nowhere to be found, and are similarly absent in its successor, the *Humble Petition and Advice*, which gave Lord Protector Oliver Cromwell even more powers from May 1657 onwards. Yet, they certainly contain the germs of the modern constitution: they are written, temporal

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legal rules for a legal system and leadership with territorially delimited authority. In a certain sense, the Union of Utrecht (1579) of the Dutch Republic (after 1581), and the Treaties and Constitutions of the Zaporozhian Sich in Ukraine (1710) can also be regarded as examples of written, early modern constitutions of this kind.

The first written early-modern constitutions, with their emphasis on strong government, engendered a reaction in the legal doctrine: the idea that government is always subject to 'fundamental laws'.[1] The idea, partly derived from mediaeval natural law that government power by its very nature is always limited by inviolable, natural rules and laws, was shared by a number of influential lawyers in this period.[2]

This idea of legally constraining governmental power with fundamental rules is reflected, for example, in the Swedish *Regeringsform* (Instrument of Government) of 1634 – a written constitution promulgated by the *Riksens ständer* (Riksdag of the Estates; a kind of parliament or assembly of the estates). For instance, Article 5 of this constitutional regulation stipulates that the Privy Council must ensure that the king rules in accordance with the law of the land and there must be 'constant care for the rights, dignity and advantage and welfare of King and People'.[3] In the subsequent *Regeringsform* of 1719, the power of the Swedish king was further curtailed. He became more or less the chair of a collegiate council of ministers whose members were appointed by the *Riksdag* (parliament). Sweden is also one of the very first countries in the world to enact a law on the freedom of the press (1766), the rules of which by their very nature restrict governmental power. It's still a cornerstone of the current Swedish constitution.

The idea of fundamental laws with rights of citizens limiting government is also clearly reflected in the English *Bill of Rights* (1689). After King James II was replaced with the co-regency of King William III and Queen Mary II in what was called the Glorious Revolution, in 1688, governmental power was permanently bound to the law and limited by citizens' fundamental freedoms in the *Bill of Rights*. The example of binding of royal power to the law (no longer as a royal favour in the form of privileges) was imitated in many European kingdoms in the seventeenth and eighteenth centuries. A series of constitutional arrangements of this kind were promulgated. It is the first generation of real – that is to say, recognisable to us – constitutions that the American constitutionalist Stephen Holmes calls 'monarchical constitutions'.[4]

[1] '[…] the aftermath of the Reformation in many societies saw the formulation of a strong doctrine of fundamental laws (*leges fundamentales*), which, often sustained by ideas of natural law, was used to express the form and content of state power. This theory, based in the claim that states were defined and constrained by a distinct and stable body of inviolable legal norms, clearly had its origins in the judicial ideals of the Middle Ages, and it reflected the mediaeval belief that regal power was curtailed by customary rights and privileges.' Thornhill 2011, p. 103.

[2] For example, the Englishman Richard Hooker and Frenchmen Jean du Tillet, Innocent Gentillet, Pierre Rebuffi and Théodore de Bèze. Cf. Thornhill 2011, p. 105–110.

[3] Thornhill 2011, p. 135.

[4] Holmes 2012, p. 200–201.