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What Are the Lessons of History?

What does the history of constitutions teach us? That is a very difficult question. Can the past teach us anything at all?[1] Probably not.[2] But perhaps that is not the primary importance of historical analysis. Historiography is not so much about how things once were, but more about who we now are and how we now view things. Histories are always representations of the past to which we assign significance ('important', 'explanation', 'valuable', 'related to', 'explanatory', and so on) relevant to the present. Stories[3] about historical events show how what is self-evident today was not always so. Historically, it is far from self-evident that people must live in states or organise their cooperation around written constitutional rules. Neither was there any historical necessity for us to develop in this way. Constitutions are the product of historical contingency – series of incidents that are not necessarily linked building on one other.[4] Constitutions are not the result of historical laws or enlightened revelations that teach us history's intentions for humanity. As what 'is' does not automatically follow from what 'ought to be', neither does what now 'is' necessarily follow from what once 'was'.

[1] 'History does not repeat itself, it merely rhymes.' This aphorism is attributed to Mark Twain, despite not being found in his work, which does not make it any less true, of course.

[2] Burckhardt for one is rigorous in his assessment of history, whilst offering solace: 'history is actually the most unscientific of all the sciences, although it communicates so much that is worth knowing.' Burckhardt 1979 (orig. 1905), p. 121.

[3] Currie and Sterelny note that 'we take it as obvious that historians and historical scientists construct narratives'. Currie & Sterelny 2017, p. 15.

[4] Cf. Sterelny 2016. Sterelny elucidates how contingent historical development is not the same as a series of successive random events. Relationships and patterns can certainly be discerned in which one event or development is decisive for another. This is the case in path dependency in which past choices or events influence the course of subsequent developments, mainly because the initial choice precludes or hinders certain options.

So, none of that. Nevertheless, the long history of constitutions does exhibit patterns. Its earliest roots were in the Middle East and Europe, and they have now spread to all corners of the earth. We live in a world filled with constitutions.[5]

A close examination of the long history of constitutions does reveal more clearly what constitutions actually do. Invariably they proclaim rules on leadership and social organisation, and give rules on a legal system as well. They breathe life into the phenomenon 'law' and create a legal order with 'meta-rules'.[6] Law greases the wheels of societies; it supports large-scale cooperation by creating artificial trust which can be derived from all manner of abstractions and assumptions. Such as assuming that you and others must adhere to important suprapersonal, common standards. Or that people in a society (ought to) have different roles and positions and that the rules of the law can 'create' these roles and positions in the form of institutions, authority, offices and rights. Constitutions perform the magic of the law; they impart the collective belief in its operation and value. The story of constitutions symbolises the world of law – a story told as a written text. Constitutions, law and written language go hand in hand nowadays. And, whilst it is certainly not impossible that unwritten ones existed, there are no longer large-scale legal systems based purely on oral traditions. Written constitutions are far more durable and less vulnerable to information loss during transfer.

The long history of constitutions also shows 'how' they effect the leap of faith from the here and now to the world of law. This vault always starts with the definition of a 'we', however implicit, which is indispensable. Large-scale communities that exceed the Dunbar number do not arise spontaneously. 'There are no societies', the political economist Elster remarks, 'only individuals who interact with each other.'[7] Collaborative communities, such as those associated with a legal system, a market or a state, are proclaimed or declared. They need a convincing story, an appeal that touches members' hearts, to maintain collaboration and the trust this requires. If you scratch beneath the surface, it soon becomes apparent that constitutions are much more than collections of arid legal rules. They are social mobilisation vehicles that combine clever blends of fiduciary institutions, recognition and recognition mechanisms (how does an individual relate to the community?[8]) in a

[5] Cf. Lane 1996 for more on the global trend impelling countries to codify their constitutional law in a single written constitutional text.

[6] The rules on legal rules, so to speak. 'Rules of recognition', according to the British legal theorist Herbert Hart. Kelsen calls them *Grundnormen* ('basic norms' in German). Meta-rules should not be conceived of as a list of regulations or rules (codified or not) but rather as a complex of abstractions and ideas necessary for the recognition of the concept of law. In other words, the abstract recognition that law exists and has the capacity to influence relationships and behaviour and create institutions – in short, the idea that law exists and is *in force*. A basic concept of this kind is essential to a legal system. Cf. Kelsen 1961 (orig. 1945), p. 110–111 and Hart 2012 (orig. 1961), p. 92.

[7] Elster 1989, p. 248; Smilov 2013, p. 630–633.

[8] Cf. Chapter 6 for more on this topic.

convincing story to forge human collaboration. This story functions as communal 'cement',[9] telling us who we are, why we belong together, and how we collaborate (according to which structure). Constitutional rules can designate abstract, collective norms (precepts and prohibitions) as constitutional norms or rules to which everyone in the community is bound.

The history of constitutions also shows how constitutions originally appealed to the combined 'we' of the religious community and the political community (tribe, kingdom, city or region) for the acceptance of the authority and binding of the law.[10] Early constitutions needed a great deal of proof for law to be accepted and binding. This is aptly illustrated by the emphatic tone and style of Hammurabi's stele, and the 'story' of the Law of Moses. The way these rules were promulgated also illustrates legislators' desire to convince the population: they are recorded on imposing structures in prominent locations (a marketplace, central square or something similar), for everyone to see, read and behold, often accompanied with pomp and ceremony.

The role of religion as the connecting element of a legal community's 'we' diminished over time. The legal community's new 'we' first became the state community, then the political state community (nation), and finally the human (global) community. These various forms of the 'we' do not succeed each other discretely. There is no clear 'end' of one period and start of a 'new' period – they are often interwoven and blend into one another. Many of the world's constitutions contain elements and features from various periods; they consist of layers, although different periods certainly have specific accents. Accents that I have highlighted and used to show the genesis of constitutions over succeeding generations.

Over time, constitutional norms have increasingly become a collaborative platform: a locus where normative notions of leadership and law are forged into large-scale cooperation. Thus, optimally employing a society's energies and – by creating a stable political society and effective legal order – offering advantages and better opportunities in the perennial competition between human groups. This has become increasingly depersonalised and more and more efficient over time: notions of normative cooperation have grown more abstract and shifted more from the physical to the imagined world. The functioning of law, democracy and the judiciary, the authority of legislative bodies, holding elections, the reprehensibility of nepotism and corruption, the importance of transparency, depersonalised government in the form of symbolic offices with powers (ministers, mayors, financial watchdogs) are just a few examples of the process of political and legal abstraction. We accord meaning (authority, etcetera) to things (institutions) that do not exist in the physical

[9] *Ibid.*

[10] Finnis 2011 (an adaptation of a previous article published in 1984). Finnis demonstrates that legal theory is also part of social and political theory in this respect. As is the converse: 'Law is one of the paradigms of political authority'. Finnis 2011, p. 61.

world, which we nevertheless accept as fairly self-evident conditions for our own lives and coexistence in society.[11]

The history of constitutions is above all a history of ideas. Ideas matter: they are a formative force and often drive events.[12] And they rarely simply fall out of the sky. Like historical developments, ideas are contingent. Thoughts, notions and theories respond to, build on, and mix with each other. The Enlightenment and Enlightenment political thinkers' ideas moulded the history of modern constitutions. Sets of political ideas about the source of state and governmental power, the essence of humankind, contract theory, individuality and fundamental freedom.[13] Enlightenment ideas can be reduced to one core concept: every person is endowed with the capacity to think and reason, which enables everyone to contemplate their existence and shape their destiny. This world view, known as 'rational humanism', wrests control of destiny from God and places it firmly in the hands of humankind.

Baruch Spinoza (1632–1677) is an important, perhaps the most important, nexus in this history of ideas, despite his occasional absence from annals of the great 'philosophes' of political theory.[14] Spinoza connects the mediaeval idea of a universe controlled by God and the associated concept of natural law – as a reflection of divine law – with Descartes' idea of a thinking, independent 'I': *cogito ergo sum*.[15] I think, therefore I am; therefore, I can devise everything I can or want to be. Spinoza combines these ideas: our mind is the result of a divine spark. Like Prometheus, we have all received the divine fire. Everyone can use reasoning to discover for themselves how God and nature work, what kind of order they form, and what this order signifies.[16] The longer and more coherently we think, the better we can understand

[11] As Thornhill puts it: 'If we assume that modern differentiated societies demand, and in fact can only effectively utilise, power as an autonomously abstracted and replicably inclusive phenomenon, the institutions of legitimate constitutional rule can be observed as normative principles that the political system of modern society produces or externalises *for itself* in order to heighten the societal abstraction of its power and to fulfil the complex requirements for positive statutory laws and rulings that characterise modern societies. The primary norms of constitutional order are thus best explicable within an exclusively internalistic and sociological paradigm.' Thornhill 2011, p. 373.

[12] Pinker 2018, p. 349. 'There can be no better proof of the power of ideas than the ironic influence of the political philosopher who most insisted on the power of vested interests, the man who wrote that "the ruling ideas of each age have ever been the ideas of its ruling class." Karl Marx possessed no wealth and commanded no army, but the ideas he scribbled in the reading room of the British Museum shaped the course of the 20th century and beyond, wrenching the lives of billions.'

[13] Yaron Ezrahi considers the idea – the fiction – of the human being as an individual detached from the group the basis of the evolution of the whole idea of liberal democracy and its associated moral and legal order. 'Disembedded individualism is a necessary fiction for the evolution of liberal democracy and its moral and legal order.' Ezrahi 2012, p. 34.

[14] For instance, there is no reference to Spinoza in Rosenfeld & Sajó 2012.

[15] Spinoza 2008 (orig. 1677), *The Ethics*, particularly part V (*Of the Power of the Understanding, or of Human Freedom*). Cf. Spinoza 2002.

[16] Spinoza concludes in his theo-political treatise that 'revealed knowledge has no overlap with natural knowledge' and that 'each person must be allowed to make up his own mind, being

this meaning. Spinoza's 'rational (legal) humanism' enjoins a journey of discovery in our own brain, with the implicit promise of linear development towards a better 'I' and a better 'we'. This is thinking and reasoning as a secular form of prayer; hunting for treasure using the secret map concealed in your head. It is a very powerful idea – amenable to a wide audience. The currents of colonialism, world conflicts and globalisation helped it on its way and spread this belief to all four corners of the world.

The history of constitutions also shows that processes of state formation and constitutional formation only started to coincide as a fixed set in the past century. It is very tempting to read all sorts of laws or patterns into this observation. Some modern observers are adamant that states cannot exist without a constitution, or vice versa. Or that there must be at least a sense of community, a people, a *demos*, a nation, an idea of shared destiny that precedes any notion of a constitution. Others argue that sovereignty and self-determination come before everything. Many contemporary constitutions may well be built on the foundations of sovereign states, or notions of nations or peoples, but this does not imply that something like a constitution is per se dependent on this. That constitutions do not as yet exist outside or above states does not prove it is not possible. The past teaches that constitutions – as rules about a community's leadership, social organisation and legal system – once existed separately to the 'state' or '(popular) sovereignty'. Besides, the history of constitutions does not dictate what constitutions 'ought to be', or the minimum conditions required to promulgate one. Joseph Weiler pokes fun at muddled normative approaches of this kind, saying that:

> […] in many cases, constitutional doctrine presupposes the existence of that which it creates.[17]

Constitutions, like states, are belief systems. Therefore, if we were all to believe that a stateless (global or otherwise) constitution was a good idea and an appealing story, then it would surely be feasible to devise one. Many international treaties already contain traditional constitutional elements, such as fundamental freedoms, an independent judiciary and notions of the binding nature of law.[18] Whether we would (or ought to) want to live according to these non-state constitutions is another matter.

enabled to interpret the foundations of the faith according to his own understanding.' The 'freedom that the revealed divine law grants to everyone' implies that 'this freedom can be granted without harm to the peace of the State or the status of the sovereign, but further that it must be granted, and can't be taken away without great danger to peace and great harm to the whole republic.' 'I begin with the natural right of each person. […] No law of nature obliges anyone to live according to someone else's understanding; everyone is the defender of his own freedom.' Baruch Spinoza, Preface, in: *Treatise on Theology and Politics* (Original title: *Tractatus Theologico-Politicus*). Cf. Spinoza 2017 (orig. 1670), p. 7 and p. 11 ff. Cf. Spinoza 2002.

[17] Weiler 2001, especially p. 56.

[18] De Wet 2012.

There are more and more constitutions – in reality, every state in the world has one – and they are growing increasingly similar. There seems to be convergence. The historical overview shows three main models. The first is the 'theistic' constitution, based on the idea that a community, empire or state (in short: a polity) is governed by God's will and laws, whether or not through human mediation. The second model is the 'socialist/communist' constitution as a set of rules for the journey to communist utopia via the dictatorship of the proletariat. Finally, there is the 'liberal-democratic' constitution. This model has become dominant in the past thirty years. Theistic and socialist constitutions are on the wane nowadays, becoming exceptions. Most countries have liberal democratic constitutions, which increasingly seem to resemble each other. The Australian constitutionalist Jeffrey Goldsworthy even sees a common model emerging:

> […] the migration of constitutional ideas through judicial borrowings has facilitated the emergence, in a variety of jurisdictions, of a *common liberal democratic model* of constitutionalism.[19]

Certainly since the Second World War, the idea of a liberal (democratic) constitutional structure[20] has been increasingly espoused. This idea, or ideology, vests faith in a leadership and justice system bound by law and recognising, with minimal variation, universal human dignity, and a government that protects individual rights and freedoms as 'pre-positive' freedom axioms. The maximal variant uses the mechanism of elections to accord individual members of society a meaningful role in leadership selection and participation in allocating public funds (liberal democracy). Many states with liberal-democratic constitutions fall short of these ideals, but it is telling that so many states nevertheless endorse – or at least aspire to – this ideal and model. What other reason would there be for them to keep a constitution of this kind in the books? The provenance of liberal-democratic constitutions is unambiguous: they are the product of humanist (legal) rationalism, specifically liberal humanism as it developed in Western Europe from the seventeenth century. This is not an interpretation or form of cultural determinism, but a factual observation. Just as there are countless opinions on Hollywood films, and we know that many Hollywood films do not even come from Hollywood in Los Angeles, but it is indisputable that Hollywood is where the format comes from.

Clearly, various generations exist in modern constitutional history – periods of development of the rational-humanist constitutional model in which certain (new) features emerge or acquire a particular accent.[21] This is not only of academic

[19] (Jeffrey) Goldsworthy 2006, especially p. 115. My italics.

[20] Cf. Chang & Yeh 2012.

[21] My classification and categorisation of periods and constitutions differ from the economist and political scientist Jon Elster's waves of constitution making cited above. He discerns eight waves of constitution making, starting in 1780. These waves largely correspond to my generations, but he excludes monarchical and imperial constitutions. His waves also refer to

interest. As already observed, the idea of these generations enables a better understanding of modern constitutional history through its phases. It does not imply that every constitution exclusively bears features of the period in which it was promulgated. The Constitution of the United States is a revolutionary constitution, but it has also been a liberal and essentially a democratic constitution from its inception. Most constitutions have various features and layers, rather like layers of sediment from various periods.

moments at which various constitutions in the period were written, but he is not always conscious of the substantive features and similarities of the documents concerned. Elster poses an important question: why does there seem to be a rhythm in constitution making? Why do countries appear to decide to promulgate constitutions (of a certain kind) simultaneously? Elster 1995, p. 368–370.