Re-Thinking the Concept of the Constitution As a 'Grund Norm' in Democratic Societies: Experience for Ukraine

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"A constitution 'marries power with justice'"
Donald S. Lutz[1]

"The founders of the United States were not merely technicians setting up an administrative framework and a set of rules. They had pondered long and hard over the lessons of long-term history as to why republics had always seemed to fail and how governments had tended over time to become tyrannical.
Barry Rubin[2]

Even the best constitution cannot pave a road or build a sewer; it cannot manage a clinic or administer a vaccine; it cannot educate a child or take care of an elderly person. Despite these obvious limitations, constitutionalism is one of the crowning achievements of human civilization.[3]

The term "constitution", like many other legal concepts, originates from ancient Rome. The Latin word "constution" means "order". During the Roman Empire important state documents were labelled "constution".

Emperors of Rome named there decrees "constution". During the Middle Ages this term was used in some countries to refer to the privileges of feudal lords. In 1710 Hetman Philip Orlyk named the original document he developed "Covenant and the Constitution, laws and liberties of the Zaporizhzhia Army", often called the Constitution of Orlyk. The content of this document was quite democratic, the document had never came into force, and Hetman Orlyk was then Hetman in exile.

Constitutions have been made or amended in major ways in more than half of the countries of the world in recent decades. Constitution is correctly called the principal,

[1] Lutz, Donald S., Principles of Constitutional Design (Cambridge: Cambridge University Press, 2006).

[2] Rubin, Barry, Why the Constitution is Relevant Today (PJ Media, Jan. 6, 2011), <https://pjmedia.com/blog/why-the-constitution-is-relevant-today/>.

[3] What is a Constitution? Principles and Concepts (International Institute for Democracy and Electoral Assistance, 2014).

the fundamental law of the state. If we imagine the numerous regulations in force in the country in the form of certain organized and interdependent whole, a system; constitution is a basis, essence and also the source of the whole body of law. The value of the constitution is that it limits the formal power in the state. It specifically lays down the competence of each body of law in the state so that no authority may go beyond the limits of its competence established in the constitution. One may say that the state power assumes this so-called self-restraint while accepting the Constitution.

It is known that every constitution has certain characteristics.

First, an important feature of the constitution is its rule, which is manifested in two aspects: the constitution is applied to the whole territory of the state; and the constitution has the highest legal force. This means that no other normative act (a presidential or governmental decree) can not contradict the Constitution. In such a manner every state may exercise its inherent rights – *imperium* and *dominium*; it can rely on the constitution in doing so when pursuing its goals.

Second, the constitution is the basis for all legislation in force. The Constitution contains the basic principles that are developed in different fields of law. Thus, various branches of law are developed on the basis of the constitution, both traditional that existed in the past and new ones, which emerged in the course of the economic, social, political and cultural development of a particular society.

The third feature of the constitution is its stability. The stability of the constitution requires long-term effect of the constitution without the inclusion in the text of amendments and additions. The Constitution contains the pillar stone, basic principles, and therefore it does not need constant change. Thus, the stability of the constitution is manifested in the fact that it is designed to last and serve long, to stay in force whatever happens. The constitution has a special procedure for the adoption and introduction of amendments.

Fourth, the norms of the constitution have a direct effect, which means that constitutional provisions may be applied without any specific approval by any state authorities or officials.

Fifth, one of the peculiar characteristic of the constitution is its so-called “down to earth” approach, it is a real document. The reality of the constitution suggests the possibility of implementation of its standards, their embodiment in social relations.

Sixth, the legitimacy of the constitution is its another essential feature. It implies the recognition of the constitution as a fundamental law by the citizens of the state.

Thus, on the basis of the objective and nature of the characteristics, one may divide

them into two key categories: legal and social, with the rule and direct effect being legal ones and reality, stability and legitimacy – social ones.

One may even claim that constitution may be a living document, which evolves with the development of a particular society.

A very large number of constitutions have been made across all regions of the world since the fall of the Berlin Wall just over 20 years ago. At least 100 new Constitutions were put in place over this period, generating a wealth of comparative constitutional experience.[4] Much of this was the consequence of regime change (central and eastern Europe; South Africa; Indonesia) although some were also associated with the creation of new states (Timor Leste, Montenegro) or were the product of particular local factors (Bhutan, Hungary, Myanmar). And this creative constitutional phase is not over yet. Constitution-making processes are presently underway in, for example, Nepal, Southern Sudan, Iceland and Fiji. A new wave of constitution-making has recently been kick-started by successive popular uprisings in Arab states: Morocco, Tunisia, Egypt, Jordan and Libya.[5]

However, considering the fact that every state today has a constitution, why do we still talk about such a severe inequality of states? Can we blame it to some extent on the quality of their constitutions? It is a well-known fact, that countries that have succeeded in establishing and maintaining constitutional government have usually been at the forefront of scientific and technological progress, economic power, cultural development and human well-being. In contrast, those states that have consistently failed to maintain constitutional government have often fallen short of their development potential.

Despite the proliferation of nominally democratic constitutions, only a minority of states have so far succeeded in maintaining a lasting democratic constitutional order. There is little benefit in having a constitution that can be ignored with impunity or changed unilaterally by those in power, or one that is so framed that the democratic nature of the constitution can be undermined by ordinary laws or by exclusionary political practices. Likewise, if the rule of law is weak, such that the constitution is selectively applied, this will undermine the achievement of a constitutional order.[6]

A constitutional order, in this sense, represents 'a fundamental commitment to the norms and procedures of the constitution', manifest in 'behaviour, practice, and

[4] IDEA, Constitution Building After Conflict, Policy Paper, May 2011, 9.

[5] Saunders Cheryl, Constitution-Making in the 21st century (International Review of Law, 2012:4 http://dx.doi.org/10.5339/irl.2012.4).

[6] What is a Constitution?.., supra note 3.

internalisation of norms'.[7] The constitutional order is much broader than just the constitutional text. It can include customs, conventions, norms, traditions, administrative structures, party systems and judicial decisions that are integral to the practical workings of the constitution. This deep cultural internalization of a constitutional order is very hard to achieve.[8] It is embodied, ultimately, in the political culture and in the 'free and civic way of life' of people.[9]

It is important to admit at the outset that building a democratic constitutional order is a long-term process. Drafting the constitutional text is only a small part of the challenge; it is also necessary to establish institutions, procedures and rules for constitution-making (preparatory stage); to give legal effect to the constitution (ratification and adoption) and, crucially, to ensure that the spirit and the letter of the constitution are faithfully implemented. Each stage of this process depends for its success on the agreements reached at the preceding stage: a poorly conceived drafting process is unlikely to yield a successful text or to serve as the basis for a viable, stable and legitimate constitutional order.[10]

It is interesting to examine how exactly this Grund Norm "coexists" with the state and society. One of the theories suggests looking at the role of the constitution through the lens of the game theory with the constitution establishing the rules of the game: "imagine two teams playing a game of football. If the team in possession of the ball could change the rules of the game and appoint its own referee, then the game would hardly be fair. One team would always win, and the other would lose –or simply stop playing. This is like political life without a democratic constitutional order. The party, faction or group in power makes up the rules, and those in opposition are excluded from a game that is rigged against them. A democratic constitutional order acts like the rules of the game, and its guardians – for example, a constitutional court – is like the referee. It makes sure that everyone can play the 'political game' fairly".[11]

This is because constitutional government ensures 'the fair and impartial exercise of power'; it 'enables an orderly and peaceful society, protects the rights of individuals and communities, and promotes the proper management of resources and the development of the economy.[12] In other words, constitutionalism empowers legitimate authorities to act for the public good in the **management** of common concerns while

[7] Ghai, Yash, 'Chimera of constitutionalism: State, economy and society in Africa', lecture, 2010, <https://web.up.ac.za/sitefiles/file/47/15338/Chimera_of_constitutionalism_yg1.pdf>

[8] ibid

[9] Viroli, Maurizio, Republicanism (New York: Hill and Wang, 2001.

[10] What is a Constitution?.., supra note 3.

[11] What is a Constitution?.., supra note 3.

[12] Ghai 2010, supra note 7.

protecting people against the arbitrary power of rulers whose powers would otherwise be used for their own benefit and not for the public good.

In providing fundamental rules about the source, transfer, accountability and use of political power in a society, a constitution introduces a separation between the permanent, enduring institutions of the state, on the one hand, and the incumbent government, on the other. The constitution ensures that the government does not own the state: it simply manages the state, under the authority of higher laws, on behalf of citizens.[13]

In this sense, constitutionalism is the opposite of despotism. Despotism is a system of government, where the governing authorities are a law unto themselves. Many states around the world have historically been despotic. They are not bound by any higher law that restricts how they rule, for example, by protecting the fundamental rights of the citizens or by ensuring their accountability to the people. As a result, despots govern only for their own good, or for that of a privileged minority that supports the ruling class, and not for the common good of all citizens. Not all despotic governments are intolerably oppressive. In practice, despotism may be self-restraining, and outright oppression may be restricted to those who visibly oppose or threaten the rulers or their interests. Nevertheless, the defining characteristic of despotism is that it is arbitrary.[14]

Despotic rulers – whether an all-powerful monarch, a sovereign parliament, a military junta or an authoritarian president – can make laws, and can determine right and wrong, through their own unilateral decisions, without requiring broader consent or public approval, without being restrained by balancing institutions and without being held to account by the people. In choosing to adopt constitutional government, people are choosing to say no to despotism and to the precariousness of living under rulers that can act arbitrarily. They are choosing to acknowledge that certain rights, principles, values, institutions and processes are too important to depend on the arbitrary will of those in power: they should be entrenched in a way that makes them binding on the government itself. In such a system, the people live under a government of universal rules that are based on broad public consent, and they have freedom from the arbitrary acts of the rulers.

One should now turn to the experience of Ukraine is claiming itself as a democratic and legal state. The development of Ukraine confirms the general rule of our time: every country that considers itself civilized, has its own constitution. And it is natural. The

[13] What is a Constitution?.., supra note 3.

[14] What is a Constitution?.., supra note 3.

adoption of the Constitution of Ukraine in 1996 marked the completion phase of the development of contemporary Ukrainian state, which is characterized by the preserving of significant elements of the Soviet regime, combined with borrowings of the achievements from world constitutionalism and the beginning of a new phase, which can be roughly characterized by an oft-repeated thesis belonging to an unknown author that "our Constitution is one of the best in Europe". However, one would agree that such an assessment is an obvious exaggeration, as in spite of containing achievements and progressive clausula of Western constitutionalism, the rudiment elements of Soviet times that it contains as well often lead to distortion of its contents. In addition, these achievements may not meet the condition of society, ahead of its development. [15] For example, it is difficult to correlate with reality the labeling of Ukraine as a social and legal state despite everything the Ukrainians have been through.

Despite everything, the Constitution of Ukraine of 1996 was generally a standard document within the meaning of the basic law, adopted within the post-Soviet area, which is associated with the Commonwealth of Independent States. In 90s a separate type of constitution was developed in this area that introduced a form of government, which only simulates adopted in several European countries mixed republican form, or, by definition of a French lawyer and political scientist Maurice Duverger, semi-presidential republic, and stipulated a wide range of social and economic rights, but with sufficient safeguards and without proper social and individual capabilities and capacities (low level of legal culture and economic prosperity) to implement them. However "simulators" of a mixed republican form of government did not take into account that in the countries with genuine mixed republican form there are well-established political system, stable democracy and parliamentary traditions and trends to weaken "the presidency". It is known that the 1996 Constitution introduced the presidential-parliamentary republic form of government and later the law "On Amendments to the Constitution of Ukraine" adopted on December 8, 2004, introduced both parliamentary and presidential form of government. However, these forms have not been specifically defined, the respective concepts have not been legally explained and developed, therefore, there are abstract. In addition, they divert attention from the state

[15] Шаповал, Володимир, Конституція України: життя "складного підлітка", 2016 <http://gazeta.dt.ua/internal/konstituciya-ukrayini-zhittya-skladnogo-pidlitka-_.html> (Shapoval, Volodimir, Konstitucija Ukraïni: zhittja "skladnogo pidlitka", 2016 <http://gazeta.dt.ua/internal/konstituciya-ukrayini-zhittya-skladnogo-pidlitka-_.html>) [Shapoval, The Constitution of Ukraine: a life of a "difficult teenager"].

of specific issues that can and should be strictly regulated at the constitutional level.[16]

In addition, when it comes to examining the essence and meaning of some provisions and articles of our Basic Law, a lot of experts and scholars make the same conclusion - legislators either did not realize the deep meaning and purpose of the norms they incorporated, without understanding their content or not concerned about their further practical application. To provide just a few examples: the Constitution of 1996 sometimes confuses the terms the people of Ukraine and the Ukrainian nation (Preamble, Art. 11); establishes the responsibility before God of a legal entity - the Verkhovna Rada of Ukraine (Preamble); prohibits any abuse of a child (para. 2 of Art. 52), which literally makes it unconstitutional for parents to take their child from a playground against their will; no ideology shall be recognised as mandatory by the state (para. 2 of Art. 15) and some more.

Therefore, one should agree that the Grund Norm of Ukraine has been developed mainly as a central symbol of the general political and legal 'décor' as very few people thought about how to apply such constitutional provisions in practice. The Ukrainian elite has not understood the deeper meaning of either 1996 Constitution or the political reform of 2004 aimed at changing the constitutional order, which is proved by the fact that none of the involved has plunged into the process (otherwise someone other than a judge of the US Federal Court of Appeal Bohdan Futey would have paid attention to the fact that in order to incorporate such changes in Ukraine's legislation, a referendum pursuant to Art. 5 of the Constitution should be held).[17]

Indeed, the Orange Revolution and most importantly the Revolution of Dignity strived for consolidation of the nation on some crucial basis, one of which should be a solid and legitimate constitution. The nation fought to protect and enforce two crucial principles, which were promised by the Grund Norm but in most cases neglected and ignored 1) the representative government, enabling citizens to participate in public affairs and hold their government to account; and 2) the protection of rights (especially the due process of law, freedom of speech and religious tolerance), through which citizens are insulated from abuses of power. Not surprisingly, democratic constitutionalism, a global norm, is found on the above principles.

These principles of representative government and the protection of rights can be expressed in terms of inclusivity and

[16] Ibid.

[17] Речицький, Всеволод, Прості цінності конституціоналізму, 2010, <https://krytyka.com/ua/articles/prosti-tsinnosti-konstytutsionalizmu> (Rechic'kij, Vsevolod, Prosti cinnosti konstitucionalizmu, 2010, <https://krytyka.com/ua/articles/prosti-tsinnosti-konstytutsionalizmu>) [Rechytski, The simple values of constitutionalism].

contestation,[18] notions that have gradually broadened and deepened over time. During the 19th and early 20th centuries, the right to participate in public affairs was extended, usually after long and sometimes violent struggles, to all men, and finally to women as well. New forms of public participation were also developed or popularized during the 20th century, such as proportional electoral systems and mechanisms of direct democracy. Similarly, during the 20th century, the rights provisions of new constitutions typically became: (i) more expansive, with economic, social, cultural and environmental rights being increasingly recognized in addition to the basic civil and legal rights of earlier texts; and (ii) more directly enforceable, with an expanded role for independent judiciaries in upholding them. Modern democratic constitutionalism has spread around the world in subsequent waves of democratization.[19]

During the second half of the 20th century, it successfully took root in many parts of the world beyond its old North Atlantic and Western European core. Democratic constitutionalism is now embedded in the most widely recognized international declarations and conventions, including the UN Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966). The list of states with credible claims to having a stable and sustainable democratic constitutional order now includes countries on all continents and in all regions of the world.[20]

Of course, establishing a democratic constitutional order is not easy, especially considering the Soviet past of Ukraine. For instance, the post-Soviet countries adopted constitutions and laid down a wide range of socio-economic rights, but with sufficient safeguards and without proper mechanism and capacity to implement them. In the context of the liberal concept of human rights and freedoms the nature of social and economic rights in light of the protection in courts is inevitably raised, although today this concept is objectively adjusted by social function of the state. Obviously, the fact that the failure to include the provisions on social and economic rights in the text of the 1996 Constitution of Ukraine, would cause a lot of political speculation and accusations. Having this in mind, the drafters of the document left this problem for politicians to decide. Thus, in the opinion of the Venice Commission on the Constitution of Ukraine, published back in 1997, stressed that "in the former socialist countries there is a tradition of preserving a large number of social rights in the constitution, and society is very committed to this tradition".[21] It is illustrative that in 1996-

[18] Dahl, Robert, Polyarchy: Participation and Opposition (New Haven, CT: Yale University Press, 1973).

[19] What is a Constitution?.., supra note 3.

[20] ibid.

[21] European Commission on Democracy Through Law, Opinion on the Constitutional Situation

2016 there was no draft law on amendments to the Constitution with respective recommendations to amend the title "Human and citizen rights, freedoms, and duties".

At the same time, only a minority of states have succeeded throughout the history. Those set themselves the task of establishing such a constitutional order must be mindful of the social and political, as well as the technical and legal, challenges they face. In almost every human society, there are distinctions of wealth and power. In most societies, two broad groups can be identified. First, there is a relatively small number of people who possess both wealth and power in abundance. Second, there will be a much larger number of people who do not possess wealth or power in abundance. These are the non-elites. What distinguishes the elite from the non-elite, in constitution-building terms, is access to economic and political power: elites rule, non-elites are ruled.[22]

By establishing a democratic constitutional order, a society is attempting to do something that can be considered remarkable – to impose rules on rulers. This means, at a minimum, that the ruling elites are limited by rules that the non-elites have approved, and are accountable to non-elites for their conduct. The people's right to exercise a periodic choice between competing parties ensures that ruling elites are at least minimally responsible, and responsive, to the governed. Leaders who consistently fail to satisfy the demands of the majority will be replaced by competitors at the next election. Elites are trustees of the people. More radical visions of a democratic constitutional order go further, seeking to place power under rules that erode distinctions between elites and non-elites, making office-holders mere delegates of the people.[23]

In posing such a challenge to the elite rule, a democratic constitutional order can expect to encounter resistance from those elites who are jealously protective of their power, privileges and wealth, and who resent the fact that democratic constitutionalism, as a minimum, places limits on their greed and lust for power. The current Ukraine's authorities should keep in mind, that the rich, powerful and well-connected, those who control resources, and those who have high social status in their communities are often those who have gained or kept most under despotic rule, and who could see their advantageous position eroded by a move to a more democratic constitutional order. These people, if unchecked, might support a return to a despotic form of government or might seek to corrupt the democratic constitutional order to the extent that it becomes ineffective

in Ukraine (Council of Europe, 2010), <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)044-e>.

[22] What is a Constitution?.., supra note 3.

[23] Ibid.

at restraining the behaviour of the elites (i.e. it is undermined).[24]

To achieve such inclusive bargains, elites and other traditionally dominant groups (if they are to be persuaded not to veto or undermine the transition to a democratic constitution) might have to be appeased in specific areas that concern their most vital interests. One way of achieving this appeasement is for the constitution to enshrine – or at least not to destroy – some of their existing privileges. In contemporary contexts, vested interests that might need to be accommodated typically include members of the old regime, economic oligarchs and those with links to the security sector. They might also include foreign actors such as powerful donor nations or large foreign investors. In such cases, the constitution can be regarded as an attempt to embed these compromises in the foundation of the new democratic constitutional order – enabling change to take place in relative safety, without fear of a counter-revolution. Such compromises can vary from immunity from prosecution for past crimes to, in some cases, a share of future policymaking.

In Chile, for example, the former authoritarian president, Augusto Pinochet, was a member of the Senate for life after the restoration of democracy – a position that gave him continued influence and immunity from prosecution. In Portugal, the Constitution of 1976 gave military officers extensive veto powers over the transition to democracy – powers that were not removed from the Constitution until 1982. However, if these compromises are too generous to vested interests, they can undermine the effectiveness and quality of the democratic constitutional order. For example, the US Constitution preserved the privileges of the Southern slaveholding aristocracy in 1787 despite the recognition by many of the moral abhorrence of this arrangement. Excessive appeasement to vested interests can prevent the state from achieving a democratic constitutional order; instead, an oligarchic system is produced (meaning that the few rule, that they are neither properly limited by, nor held accountable to, the people).

The resistance of elites to a democratic constitutional order is one of the greatest challenges facing constitution-builders. In some cases, competing elites will tire of self-destructive conflict among themselves, and will embrace democratic mechanisms as a way of moderating and containing that conflict. In others, elites may be fatally weakened by the transfer of land, wealth and organizational capacity to non-elites, and may in such circumstances decide that sharing power with non-elites offers the best way of preserving their most important interests. Sometimes, these processes occur in a complex and overlapping way: the

[24] What is a Constitution?.., supra note 3.

constitution, in such cases, can be regarded both as an inter-elite bargain and as a bargain between elites and non-elites. Through these bargains, power is shared across society.

Thus, it is self-evident that this understanding of a Constitution presents the issue of legitimacy in a new guise. It raises the important question of the conditions under which a community and its leaders from time to time will accept that certain rules have 'constitutional' status, so that they override all others and limit what can be done in the exercise of public power, not only now or next year, but over what might be a long period of time. The answer may depend on a range of factors: the authority of the Constitution; the process by which it was made; its substantive content; its effectiveness; whether or not legal continuity with the previous constitution has been maintained. The relevance of each of these factors the weight given, respectively, to them and the way to which they apply may vary between countries, constitutional traditions and over time. Once, for example, it was accepted that Imperial authorities could legitimately put Constitutions in place for their colonies, at least as a matter of law, because they represented the 'sovereign' power. Those times have long since gone. And when it comes to Ukraine, which is being through tough times, this Grund Norm should be revisited with utter responsibility and care, especially given the spread of ideas to adopt a new constitution, which is popular with the public and opinion leaders today.

Indeed, from the very beginning the Constitution of Ukraine, could not be considered a social contract, which the young state desperately needed. Back in 1996, it was at best an agreement between the political elites, but rather a compromise between the president and parliament. For the Verkhovna Rada it was a compromise between the communist majority and the national-democratic minority. Society had no real mechanisms to influence the process of the Constitution.

The Revolution of Dignity exacerbated the issue of concluding a new social contract in the form of a new Constitution for Ukraine or a new edition of the one in force. However, before launching the respective process of implementing a comprehensive reform of the Basic Law it is vital to decide what is legally correct and politically best – to adopt a new version of the constitution or to adopt a new Basic Law. A few, albeit controversial, decisions of the Constitutional Court mention the possibility of adopting a new version or a new Constitution of Ukraine, which means there are no insurmountable legal obstacles on way of this process. At the same time, one should remember, that the Parliament of Ukraine has no authority to adopt a new constitution, which naturally it may and should draft a new version of the one in force through the

adoption of two laws on introduction of amendments, one of which will concern titles I, III and XIII, and the second – the rest of the titles. Therefore the choice of the form of revision of the Basic Law is in the plane of the weighted socially appropriate.

On the one hand, a new edition of the Basic Law could mean an emphasis on continuity in our modern state, proclaimed on preserving constitutional values, the integrity of the national territory that exists on independence. On the other hand, a new Constitution would be a new start in social development and nation-building. However, it should not end up simply declaring a new "third" and "fourth" republic, but mean a genuine start, a rebirth of the nation, which is correlated with the essence of the Revolution of Dignity.