The original strategisation of constitutional writing (and re-writing)

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What do the constitutions say? Do they only say what they say? Can we, and indeed must we, read beyond the words they gather? Paraphrasing an article by David A. Strauss in the Harvard Law Review in 2015, one might ask *whether the constitution means what it says*?[1] All these questions imply answers that are of interest to the reading, and therefore the interpretation, of constitutional texts. They have been, since the first constitutional texts in history, the issues at stake in most political practices: the question is whether, under the text of the constitution, such or such authority can do or cannot do something, whether a judge, faced with an action or inaction that he or she considers contrary to the constitutional text, can actually know about it and, to prevent it, put an end to it, or pronounce a sanction. These practical issues are themselves backed up by theoretical issues raised by the existence of the constitutional text. The question thus arises as to whether the text imposes itself on the actors in an original sense that is necessary or must be discovered. The space of interpretation of the constitutional text and the nature of the act of interpretation are questioned. Now became "classical", these questions nevertheless remain without a common answer, neither among political actors nor among informed observers. If, for example, one adopts the so-called "realistic theory of interpretation"[2], then it must be agreed that the text takes on its meaning only through its interpretation and that there is therefore no theoretical misreading, but only authorities in a position to say whether a particular reading of the text is good or bad. Finally, the difficulties linked to the status of the text raise the question of its authority, compared with the authority of other phenomena: in constitutional matters, do practices - non-textual - have an authority that is superior, equivalent or inferior to the text? To say, for example, that there is a "material" constitution behind, or even beside, the "formal" constitution, i.e. beside the text, gives the possible proper force of a written constitution a certain limit. If it is possible to accept constitutionality without a text, the interest of the text is diminished, unless there are principles "above" constitutionality that regulate its principles and modalities. The discussion is possibly endless. The fact that the questions relating to the constitutional text are not final does not, however, in any way undermine their constant recurrence, which is the aim of their authors: the questions asked and the answers provided by political bodies or observers always betray one or more specific intentions: it is a question of being able to do, validate, prevent, sanction or, more prosaically, say something "in virtue of", in spite of or in connection with the constitutional

[1] David A. Strauss, *Foreword: Does the constitution mean what it says?*, *Harvard Law Review,* vol. 129, 2015, "The Suprem Court 2014 Term", p. 2.
[2] See for ex. Michel Troper, "Le réalisme et le juge constitutionnel" (*Realism and Constitutional Judge*), *Les Cahiers du Conseil constitutionnel*, 2007, n° 22, online, https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-realisme-et-le-juge-constitutionnel (in French).

text. At this point, through the infinite openness of questions and analyses, the reading of the constitution seems to matter more than its writing, which, by definition, has a finite and indisputable character: what is literally written imposes itself on everyone as what is written, contrary to the meaning to be given to it.

1. Why read, and therefore write a constitution?

If, therefore, the reading of the constitutional text concentrates the stakes of political and academic practice, it is surprising that a very famous American jurist, Richard Posner, at the same time judge, professor, major figure of the *Law and Economics* movement and supporter of an economic reading of the Constitution, declared in June 2016 on the site of the online magazine Slate, that he saw "absolutely no interest for a judge to spend decades, years, months, weeks, days, hours, minutes or seconds studying the Constitution"[3]. The fact that Richard Posner speaks of the American Constitution, and not of the constitution in general, is not such as to relativize the scope of his statement: on the contrary, it even concerns a text whose incantatory value has been notoriously established for decades, even beyond American territory. Even if it represents a political mistake[4], Richard Posner's declaration does not come by chance. The incantatory value of the American constitutional text is in fact one of the most successful illustrations of the fact that the existence of a written constitution has gradually become the cursor of acceptability of a given political organization, now on a global scale. Unless there are well-known exceptions - the United Kingdom in particular - the writing of a constitution is the condition for a regime to enter the concert of democratic nations. This can be seen at the political level, of course, and it has also given lasting structure to the field of "constitutional law" studies: the constitutionalist is one who works from written constitutions and, with few exceptions, leaves behind "unconstitutional" periods, i.e. when there was no constitutional text but only political practices, even relatively stable and organized. *The act of writing political institutions changed the understanding of constitutions and the value attributed to them*. In denying the value of reading the text of the constitution, Richard Posner appears to be denying its value in the law or the norms "that matter", contrary to what another member of the *Law and economics* movement, James Buchanan, had said, namely, *why do constitutions matter?*[5].

The interest shown by economists in constitutional questions can be assessed on the basis of the fact that, since it has been written, the constitution is no longer a given, it is a construct, which pursues a goal given in advance. If the word "constitution" has long been the name given to the actual arrangement of power, then when the constitutional narrative was the same as the narrative of the facts[6], the writing of constitutions has profoundly changed their nature, making them a *thoughtful, prepared and fixed account*.

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[3] Richard Posner : *I see absolutely no value to a judge of spending decades, years, months, weeks, day, hours, minutes, or seconds studying the Constitution*, "Law school professors need more practical experience", www.slate.com, June 24, 2016.

[4] In fact, he apologized for that sentence on the same site a few weeks later.

[5] Buchanan, "Why do Constitution Matter ?" in N. Berggren, N. Karlson & J. Nergelius (eds.), *Why Constitutions Matter?*, 2012, p. 12.

[6] Since antiquity, many authors have been able to describe "constitutions" according to the type of regime at work in a given place: from tyranny to oligarchy to democracy (long considered a bad regime, by the way). For example Aristote, *La Politique* (IVè s. av. J.-C.), and see Jacqueline de Romilly, "Le classement des Constitutions de

There is a clear *intentionality* in the writing of the constitution: until now, it has never been written by chance, and this is what seems to give it a particular value, a status that is proper and distinct from political practices. In his famous *Manuel de droit constitutionnel* published in 1949, Georges Vedel put the light on the reason why the first constitutions were written: so as not to allow a political organization to be built only on the basis of its own practices, whether customary or not. He then pleaded against the possibility of recognising the value of customs contrary to the constitutional text, because then it would be recognising that constitutional law could take "*its source as much in violations of the Constitution as in its prescriptions*"[7]. Georges Vedel pointed out a fact often denounced: even if a written constitution has been elaborated with the rigour of a watchmaker, it can be ignored, and its reading can be more or less biased by the different interpretations that can be given to it, to the point of making writing a secondary act. The Italian constitutionalist Constantino Mortati has, moreover, popularised the distinction between the formal constitution - that which is written - and the material constitution - that which derives more frankly from the account of the facts[8]. Based on the post-war Italian example, this distinction is not, as is often believed, a simple academic classification introducing first-year students to constitutional law. Even if the material constitution can be presented as a reading of the constitutional text, it gives theoretical and academic support to the idea that the practice of the text can thus complement, compete with or even ignore it, claiming it all the same, or not. If, therefore, constitutionalism, i.e. the fact of thinking the rules of political organization according to the logic of the written word because it alone would constitute a reliable support for the "surveillance" of the action of the political authorities, then the hypothesis of a material constitution is, as Georges Vedel thought in 1949, the sign of his defeat. For the principle of constitutionalism is that constitutions are not written "for nothing".

The circumstances and motives of constitutional writing deserve more attention than is traditionally accorded to it in the "life" of the constitutions and institutions that seem to derive their legitimacy from it. The constitution-writing movement since the 18th century has made it possible to forge a very strong symbolism about constitutions: the guarantee of rights, followed by the rule of law and democracy, are thus "values" to which a State would adhere if it rallied to the constitutional idea by writing a constitution whose content affirms their existence. In this sense the constitutionalist doctrine itself would be linked to these ideals of the guarantee of rights, democracy and the rule of law. Symbolism works very well - and is very well maintained - because it instruments, perhaps always, a strategy on the part of the actors.

2. Constitutional instrumentalization denounced

The "instrumental" uses of rules, and in particular of the constitutional rule, are thus commonly singled out. At the domestic level, in all the countries where opposition voices can undoubtedly be heard, it is not uncommon to see political opponents speaking of the instrumentalization of the constitution by the majority, just as it is less and less rare to find this vocabulary among academic observers of domestic legal and political life. With regard to the multiple revisions of the French Constitution since its adoption in 1958, Dmitri Georges Lavroff in 2008 explains the two contradictory themes "administered by the political power and part of the doctrine" in

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Hérodote à Aristote" (*The classification of the Constitutions from Herodotus to Aristotle*), *Revue des Etudes grecques*, 1959.

[7] Georges Vedel, *Manuel de droit constitutionnel*, Sirey, 1949, p. 121, I translate.

[8] Costantino Mortati, *La costituzione in senso materiale*, Giuffré, 1940.

which the observer must place himself: the first is the stability of the regime which is vaunted, "*the second is the instrumentalization of the Constitution by the political power whose expression is constitutional revisionism, which wants to give the impression of novelty that is justified by what is often called the necessary 'modernization' or 'democratization' of the Constitution*"[9].

At the international level, state organisations, especially European bodies, including states, and the constitutionalist doctrine, in various capacities, regularly "denounce" the "instrumentalization" of the constitution. Constanze Villar, in a study devoted to the East German constitutional discourse, unambiguously states that "by associating text and context, the constitutional discourse instrumentalises the law. It aims at shaping or even changing the face and shape of a nation"[10]. Today, political regimes such as Hungary or Poland are especially targeted in Europe. In this connection, mention may be made of the opinion delivered by the Venice Commission in 2013 on a 4th revision of the Constitution of Hungary (adopted in 2011), which includes a paragraph specifically entitled "*Instrumental use of the Constitution*"[11]. The opinion stated that "the Venice Commission had already expressed its concern about the constituent process in Hungary" and noted "with regret that it was impossible to find a consensus between political forces and within society at large to ensure the legitimacy of the constitution", implying that, in the absence of such a consensus, the constitution can only be the instrument of the actors it has promoted. If we find it in relation to Poland in particular also[12], the notion of the instrumentalization of the constitution is also recurrent in the case of African countries (as in the example of this doctrine article published in the journal *Jus Politicum* in 2013 with the evocative title: "La Constitution et son instrumentalisation par les gouvernants des pays arabes 'républicains' : cas de la Tunisie, de l'Égypte et de l'Algérie'[13], i.e. *The Constitution and its Instrumentalization by the Rulers of "Republican" Arab Countries: the Cases of Tunisia, Egypt and Algeria*, Asian countries[14] or Latin American countries[15], who

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[9] Dmitri Georges Lavroff, "De l'abus des réformes : réflexions sur le révisionnisme constitutionnel" (*Abuse of reforms: reflections on constitutional revisionism*), *Revue Française de Droit Constitutionnel*, 2008, n° 5, I translate.

[10] Constanze Villar, "L'instrumentalisation idéologique du droit : une analyse du discours constitutionnel allemande" (*The Ideological Instrumentalization of Law: An Analysis of German Constitutional Discourse*), *Politéia* 2004, n° 6.

[11] European Commission for Democracy through Law, Opinion on the Fourth amendment to the Fundamental Law, Opinion 720/2013, adopted on 14-15 June 2013, online, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2013)012-e

[12] For ex. Leszek Garlicki, "Pologne" (*Poland*), *Annuaire international de justice constitutionnelle*, 2017, p. 897.

[13] Abderrachid Abdessemed, "La Constitution et son instrumentalisation par les gouvernants des pays arabes « républicains » : cas de la Tunisie, de l'Égypte et de l'Algérie" (*The Constitution and its Instrumentalization by the Rulers of "Republican" Arab Countries: the Cases of Tunisia, Egypt and Algeria*), *Jus Politicum*, n°9 (2013), online, http://juspoliticum.com/article/La-Constitution-et-son-instrumentalisation-par-les-gouvernants-des-pays-arabes-republicains-cas-de-la-Tunisie-de-l-Egypte-et-de-l-Algerie-709.html.(in French)

[14] We can cite this Thai case where a group of professors (called "Nitirat", subtitled "Law for the People") was set up with the aim, among others, of "creating a true ideology of the rule of law in Thailand and contributing to the in-depth reform of Thai political life". At the origin of the grouping was the observation that "We had reached the common conclusion that the decisions handed down by the constitutional judges after 19 September 2006 had finally led to the validation of the coup d'état and all the legal norms that were adopted by the authorities that resulted from this coup d'état. This is a situation of instrumentalisation of the law for political purposes. In our comments on case law we criticised this reality, but we were powerless to do anything about it.". See also https://lepetitjournal.com/bangkok/piyabutr-saengkanokkul-membre-du-groupe-controverse-nitirat-61401(in French)

[15] For ex. Guy Mazet, "L'introduction de la modernité dans les Constitutions d'Amérique latine" (*The introduction of modernity in the Constitutions of Latin America*), in Jean-René Garcia, Denis Rolland, Patrice Vermeren (eds.), *Les Amériques, des constitutions aux démocratie*s, Maison des sciences de l'homme, 2015, p. 315, online https://books.openedition.org/editionsmsh/10649?lang=en.(in French).

would therefore also "instrumentalize" the Constitutions. Following that, Tom Ginsburg, a renowned American comparative scholar, and Alberto Simpser, a Mexican professor specializing in Law of Development, ask why, in the case of authoritarian regimes, *one takes the trouble to write constitutions*[16].

In many places where constitutional texts exist, texts that formally guarantee rights and affirm the idea of democracy, these ideals are therefore, as is often said, only "window dressing"[17]. But it appears that their affirmation through constitutional writing is necessary to establish the symbolism and to ensure - locally and sometimes internationally - the legitimacy of the political actors: thanks to the meliorative symbolism of the principle of constitutional writing, they nourish intentions and strategies that are both foreign and consubstantial with it. Foreign because the real aim of the actors is not the one induced by the constitutional symbolism; consubstantial because the writing has always been designed to achieve objectives set in advance, whether or not it succeeds in doing so. This means that, in spite of the ideals carried by part of the literature on constitutions, whether or not it is written by specialists, the writing of constitutions cannot in reality be assimilated or even associated with these ideals other than in terms of the symbolism that it generates in the history of ideas. Each writing - and rewriting - formal, concrete, historical, is the setting to music of intentions and sometimes of strategies specific to the men who are its actors.

Writing a constitution is always strategic, in the sense that strategy is a set of coordinated actions, skillful operations, manoeuvres to achieve *a specific goal*. The writing of a constitution or of a constitutional rule, like their rewriting, always responds to an ambition, and *this ambition is not always the same; on the contrary, it is substantially and each time different*.

According to the idea of the first drafters of political constitutions in the 18th century, the constitution is thus *a narrative construction whose ambition is to take note of or produce certain effects from the point of view of the organization of power*. A constitution is in itself neither democratic, nor a guarantee of the rule of law, nor anything else: it is a constitution only because it presents itself as an organization of power within a determined social organization, to serve, according to circumstances, a goal that is generally fixed in advance. The co-existing affirmation of the "great revolutionary ideals" (freedom, separation of powers and the guarantee of rights), and of those that have been added to them (democracy and the rule of law), at the same time as the constitution-writing movement was going on throughout the world, has nourished a symbolic imaginary that facilitates the implementation of the strategies followed by the constituents[18]. The narrative that makes the written constitutions be such is the support of an organization that goes beyond them: in the constitutional narrative must thus be read something that is not limited to an understanding of the institutional and regulated mechanisms that it organizes.

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[16] "*The final fundamental question with which the study of autharitarian constitutions must grapple is: Why are constitutions written?*", Tom Ginsburg et Alberto Simpser (eds.) *Constitution in authoritarian regimes*, Cambridge University Press, 2013, p. 12.

[17] See fr ex. G. Sartori, "Constitutionalism: A Preliminary Discussion", *American Political Science Review*, 1962, p. 867. The term "sham constitutions" is also used, see par ex. D. Law et M. Vertseeg, "Sham Constitutions", *California Law Review*, 2013, p. 863, or that of "constitutions without constitutionalism", T. Groppi, "Costituzioni senza costitutionalismo ? La codificazione dei diritti in Asia agli inizi del XXI secolo", *Politica del diritto*, 2006, p. 187. There is also talk of "abusive" constitutionalism, see David Landau, "Abusive constitutionalism" (2013), 47*, U.C.Davis Law Review*., p. 189.

[18] See Lauréline Fontaine, *Constitutional Imaginary Versus the Fiction of Constitutional Law*, online, https://www.ledroitdelafontaine.fr/the-constitutional-imaginary-versus-the-fiction-of-constitutional-law/

By reflecting on this originally strategic character of constitution-writing, one can seek to know what constitutions *really* say and tell, and thus *not tell too many stories about constitution-writing*: the constitutional narrative is instrumental *in its very principle*, as it is *in its content*, in its reading, or its non-reading. Each constitutional case in history and in the world can be analyzed in the light of this fact.

3. Original constitutionalism and strategies

Three examples can be put forward under the heading of the original strategization of writing - and of constitutional rewriting: one that has generally not been taken seriously up to now; another that, on the contrary, has always been identified as an example of the instrumentalization-strategization of constitutional writing; and another, finally, one of the most successful examples of the supposedly "virtuous" character of a too lightly assumed way of instrumentalizing the writing of a constitution. In order, therefore, the drafting of the American constitution in 1786, the drafting of Soviet constitutions in the 20th century, and the drafting of Eastern European constitutions from 1989 onwards in the post-communist era.

** The drafting of the American Constitution of 1787*

In 1913, Charles Austin-Beard, a historian who had become an icon in the United States, published a book entitled *An Economic Interpretation of the Constitution of the United State*s. Although he was not a jurist, his thesis is nevertheless still known today by all contemporary American constitutionalists, in spite of the fact that they generally reject it as likely to change the analysis of constitutional law[19].

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His thesis is relatively simple: as a realist, Beard believes that "*all sorts of vague abstractions dominate legal thinking*"[20] and that, to get out of it, it is necessary to look at the reality of the work that was done by the authors of the constitution when they wrote it: among their motivations were economic ones, which, Beard claims, played such a role as to support a possible economic interpretation of the text. It must be said that Beard generally believes in the indissoluble link between law and economics: "*Most of the law*, he says, *is concerned with the property relations*"[21].

Although the methods used and the body of data available to him in 1913 have since been the subject of successive rebuttals and rehabilitations, his idea seems in the end to be particularly serious. And he supports it very much from the writings of one of the "fathers of the constitution", James Madison, from which he will bring out for posterity his famous "No. 10", namely one of the writings constituting the so-called "Federalist" doctrine. Generally speaking,

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[19] See on this book my study co-written with Violaine Delteil, "Sur l'empreinte économique de la Constitution américaine, lecture croisée de Charles Beard" (*On the Economic Footprint of the American Constitution, Cross-Reading of Charles Beard*), to be published in Lauréline Fontaine (coord.), *Capitalisme, libéralisme et constitutionnalisme*, Mare et Martin, 2020. Charles Austin Beard's work - as well as the thesis he defends in it - translated into French only in 1987, remains largely unknown in Europe.

[20] "*All sorts of vague abstractions dominate most of the thinking that is done in the field of law*", Charles A. Beard, *An Economic Interpretation of the Constitution of the United States*, Mac Millan ed., 1913, p. 8 (References to the pages of the book are made here in the body of the text and from the electronic edition proposed by Gary Edwards in 2001: http://people.tamu.edu/~b-wood/GovtEcon/Beard.pdf)

[21] *Ibid.* p. 12.

Charles Austin Beard highlights the frank opposition between supporters of maintaining a confederal system and supporters of building a federal system, which is crystallised quite clearly *in the difference in the economies of the different states and in the types of property held by the members of the constituent convention*: traditional, land and agricultural for the supporters of confederation, capitalist and industrial for the supporters of the federal system. The aim was to ensure that the specific interests of the former could not be allowed to hinder the development of the latter. The Constitution was to serve this purpose, to avoid the tyranny of popular majorities.

If the question of popular government is central to constituent discussions, it can be interpreted, according to Beard, on the basis of the *tangible* intentions of the constituents, i.e., to protect specific economic interests from possible infringement by holders of separate or conflicting interests, as seems to emerge from this famous passage from Madison's "No. 10":

> *When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind*[22].

**** The writing of Soviet constitutions***

In a seminal article[23], Slobodan Milacic has shown very well how the Soviet constitution of 1977 contained 3 different and parallel discourses, illustrating the very clear intentionality of the constituents, based on the use of symbolism constructed for decades by the *Western world* on constitutional writing: in the same constitution, "3 clienteles, 3 types of motivation, 3 different discourses", notes Slobodan Milacic. He begins by analyzing the discourse to the Western world, which is implicit and suggestive, and in a way legitimizing: the very principle of writing the constitution and the references to democracy show implicit adherence to the Western constitutionalist register. Secondly, the discourse to *the socialist world* is analysed, which is explicit and directive, and which corresponds more to what is actually written in the Constitution. Finally, a discourse to *the Third World* is identified, as the Soviet regime, which is legitimated from several points of view, and is thus intended to constitute a discursive model from which to reflect on the economy and social justice.

It is therefore both the principle of writing and what is written that can be understood as being part of a strategy, political no doubt, but sometimes also geo-strategic or economic. As Brigitte Vincent points out in relation to Slobodan Milacic's analysis, the highlighting of the "ideological function" of the constitution "becomes a parameter for the analysis of political

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[22] Publius-Madison, *Federalist, No.10*, 22 November 1787.

[23] Slobodan Milacic, "La constitution soviétique du 7 octobre 1977 comme discours de politique internationale : de la constitution comme soutien idéologique de la stratégie internationale de l'URSS" (*The Soviet Constitution of 7 October 1977 as a discourse of international politics: from the constitution as ideological support for the USSR's international strategy*) , in *L'Union Soviétique dans les Relations internationales*, Economica, 1982, p. 129 et s.

regimes"[24], and this makes it possible not to remain at a distance from the realities that generate and sustain the constitutional phenomenon, which is therefore not the simple application of a liberal ideal every time at work. On the contrary, the writing of constitutions always aims at fulfilling one or more functions determined for the territory, the moment and the populations to which they are attached.

**** The writing of the constitutions of the "new" Eastern European countries from 1989 onwards.***

It is not so remarkable that the independence of all the countries which had hitherto been under the sovereignty or influence of the *Union of Soviet Socialist Republics* was accompanied by the drafting of new constitutions, but rather that the Union of Soviet Socialist Republics was very closely assisted by the countries and representatives of Western Europe and the United States. If the strong presence of the West alongside the new forces in the East reflects a hope of absorbing some of the lost influence of the communist system, the "bias" of the constitutional writing is not insignificant. Since the beginnings of European construction - the economic construction resulting from the Treaty of Rome of 1957 and the construction of democracy and human rights resulting from the Treaty of Paris of 1949 – "common" constitutional requirements have flourished, first highlighted by the famous Copenhagen criteria of 1993, followed by the Vienna Declaration of the Council of Europe in 2013. The affirmation of the principles of democracy and the rule of law by the constitution is presented there as a guarantee of belonging to the group of liberal democracies and a pass to join their grouping within the European communities which became the European Union in 1992 and within the Council of Europe. Thus, in order to encourage this linkage, the almost generalised use of experts in "European constitutional engineering", those whom the politician Renaud Dorandeu has called "constitutional pilgrims", has been encouraged[25] because they are the dispensers of the good constitutional word, has made it possible to produce constitutions that reflect the expectations of the European bodies. For the new member states, it was therefore necessary to show that they had *a constitutional "white paw"*. For each of the countries concerned, the primary objective in drafting the constitution was therefore to meet the standards set by Western Europe in order to legitimately claim membership of European organisations.

Among the constitutions adopted, the example of Romania is topical, because it was forced to introduce into its already drafted and adopted constitution a new provision intended to reassure the European Union, which was insufficiently reassured by the first version.

If Romania had enshrined in its constitution its commitment to international human rights standards[26], it has had, in the context of an informal dialogue with the European Union, specifically to show its very attachment to its own Constitution by introducing a provision

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[24] Brigitte Vincent, "Et la Fonction idéologique des Constitutions?" (*And the ideological function of the Constitutions?*), in *Démocratie et Liberté, Mélanges offerts à Slobodan Milacic*, Bruylant 2008.

[25] Renaud Dorandeu, "Les Pélerins constitutionnels" (*The Constitutional Pilgrims*), in Yves Mény (ed.), *Les politiques de mimétisme institutionnel, la greffe et le rejet*, 1993.

[26] Article 20 of the 1991 Constitution: "1. Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration on Human Rights and with other treaties and pacts to which Romania is a party.
2. In case of an inconsistency between domestic law and the international obligations resulting from the covenants and treaties on fundamental human rights to which Romania is a party, the international obligations shall take precedence, unless the Constitution or the domestic laws contain more favorable provisions".

initially not foreseen on the very supremacy of the Constitution: Article 51 entitled "Respect for the Constitution and the laws" therefore simply and soberly states that "respect for the Constitution, its supremacy and the laws is obligatory. Romania has also established the "constitutional prerequisites" of Western Europe by establishing a constitutional court with the competences set out in the constitution (Article 144), an institution for conciliation and defence of fundamental rights (Chapter IV) and by substantially enunciating the "fundamental rights, freedoms and duties" (Title II), in a more "perfect" form, even than the constitutions of the West.

The three examples of the writing of the American constitution, the writing of the Soviet constitution of 1977 and the "assisted" drafting of the constitutions of the countries of Eastern Europe in the 1990s and early 2000s provide an introduction to the idea of the *structurally* instrumental character of the constitutional narrative, and make it possible not to be falsely surprised that here and there the constitution is "instrumentalized", since this is the very principle of constitutional writing. To speak of the instrumentalization of the constitution as something negative therefore has no real meaning or relevance, since *it cannot be otherwise*, but certainly prevents us from thinking about this question profitably.

4. The poorly assumed instrumental register of constitutionalist thought

The reference to the instrumental use of the constitution has a very clearly pejorative connotation which may be all the more surprising since constituents, politicians and constitutionalists have always been aware of the problems: this is the very reason why they ask the now classic question "what is the purpose of a constitution?". This question can already be found in Jean de Dieu-Raymond de Boisgelin de Cucé, in his book *Considérations sur la paix publique*" (*Considerations on Public Peace*), addressed to the leaders of the Revolution[27]: "*But what good is the preliminaries of the law, what good is the whole constitution; if there is no law. What does it matter that the constitution is accepted, if the lack of a free sanction means that there is no law*"[28]

More recently, on the subject of the French *Conseil d'Etat*'s conception of the hierarchy of norms, Pierre Brunet also wonders what the constitution is for in the following way[29] : *"The 'requirements inherent in the hierarchy of norms' arising from article 55 of the Constitution justify the disregard of a law contrary to an international text, but not the application of a law contrary to the Constitution itself. It is therefore not enough for a constitution to be such in order to prevail over the law; it must also contain within it a provision establishing in principle its own superiority over that of the laws. But then what is the point of a constitution whose primacy is nevertheless ensured by means of a constitutionality review*"?[30].

We find the question formulated in the title of this study by the Belgian constitutionalist and politician Francis Delpérée: "*La Constitution, pour quoi faire ?*" (*The Constitution, what for?*)

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[27] Jean de Dieu-Raymond de Boisgelin de Cucé*, Considérations sur la paix publique adressées aux chefs de la Révolution* (S. l.,) : chez tous les marchands de nouveautés, 1791, p. 27.

[28] I translate ("*Mais à quoi servent les préliminaires de la loi, à quoi sert la constitution toute entière ; s'il n'y a point de loi. Qu'importe que la constitution soit acceptée, si le défaut d'une sanction libre fait qu'il n'y a point de loi*").

[29] Pierre Brunet, "Que reste-t-il de la volonté générale, Sur les nouvelles fictions du droit constitutionnel français" (*What Remains of the General Will, On the New Fictions of French Constitutional Law*), *Pouvoirs*, 2005, n°114.

[30] I translate.

drawn from an inaugural lecture he gave in Louvain on a chair he devoted to the proper use of the Constitution[31], and we find it in a recent book co-edited by Jordane Arlettaz and Julien Bonnet which includes a paragraph devoted to this theme[32].

Symbol of a supposed victory for constitutionalism, going hand in hand with the end of history heralded with the fall of the Berlin Wall, the *Venice Commission* was set up in 1990 by the Council of Europe with the aim of providing constitutional assistance to the states emerging from the break-up of the Soviet bloc: itself also established the instrumental character of the constitution at an early stage by organising, in 1992, a seminar entitled *Constitution-making as an instrument of democratic transition*, the proceedings of which were subsequently published under the same title in the Council of Europe collection "Science and Technic of Democracy"[33].

In the discourse of the Venice Commission and most European and state bodies in Europe, the writing of a constitution is the instrument specifically designed to achieve and guarantee democracy and the rule of law. *But the reality is that it has always been and can always be the instrument of something else, because, simply put, it is an instrument*. The above-mentioned opinion on the revision of the Hungarian constitution points to Hungary's instrumentalization of the constitution where earlier it had not disavowed this character.

The Norwegian professor of constitutional law Eivind Smith also very clearly states the principle of the constitution as an instrument of change, in a book that he coordinated in 2003[34]. For his part, American Professor Cass R. Sunstein, a representative of a fashionable contemporary legal thinking that combines constitutional and political law with the economic analysis of law, explicitly envisages the Constitution as a "pre-commitment strategy"[35], a term derived from military vocabulary and refers to the strategy that an agent can use to restrict the number of choices that can be made at the time of action. John Elster from the episode of Odysseus and the Sirens[36], had previously pointed out the imperfect structure on which the whole political edifice rests: Ulysses prepared wax balls so that the crew would not hear the sirens and had himself tied to the mast with the order not to untie it despite his pleas, which were in fact unheard by the sailors. According to Sunstein, this strategy of Ulysses is therefore the one that is destined to be repeated in the elaboration of the constitution in order to achieve the claimed concrete ends of perfecting democracy. Thus he says that "*The precommitment strategy permits the people to protect democratic processes against their own potential excesses of misjudgements, sometimes associated with group polarization*"[37].

The instrumental register is therefore not the privilege of countries that would be "illiberal", undemocratic or despotic: law in general and constitutional law in particular are thought out from this register, in a perfectly liberal perspective and under the banner of democracy. The fact is that part of the constitutionalist literature thinks that there is a *good* and a *bad instrumentalization*, without explicitly assuming the original instrumental character of the

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[31] Published in *Revue Belge de Droit Constitutionnel*, 1994.
[32] Julien Bonnet, Jordane Arlettaz (eds.), *Pouvoirs et démocratie en France*, CRDP of Montpellier (France), 2012.
[33] Council of Europe, *Constitution-making as an instrument of democratic transition*, Science and technic of democraty, 1993.
[34] Eivind Smith (dir.), *The Constitution as an instrument of change*, SNS Förlag, 2003.
[35] Cass R. Sunstein, *Designing Democracy. What constitutions do*, Oxford University press, 2001, p. 96.
[36] John Elster, *Ulysses and the Sirens: A theory of imperfect rationality*, *Information (International Social Science Council),* Volume: 16, 1977 ; *Ulysses and the Sirens*, Cambridge University Press,1979 ; *Ulysses unbound: studies in rationality, precommitment, and constraints***,** Cambridge University Press, 2000.
[37] Cass R. Sunstein, *Designing Democracy.., op. cit.,.*p.97.

constitution, nor finally the normativity of the approach that consists in qualifying or disqualifying texts and practices[38].

If on a case-by-case basis one will certainly not find a constitutionalist to deny that there are good and bad constitutions, *it almost never leads them to draw the consequences of this observation in terms of the structural instrumentality of the constitutional apparatus*.

5. The weakness of the political constitution on the market of contemporary societal strategies

Today there is more to be done than just "denouncing" the use of the Constitution here and there. There are two advantages to seeing the Constitution as the instrument that it is - even if we would like it not to be or not to be: firstly, to be more attentive to what happens with the practices of writing, rewriting and reading the Constitution in any country that has one. This would make it possible, for example, to realize that in Western countries today, constitutional law is not or no longer really taken seriously[39]. In the period of global health crisis in 2020, the doctrine can thus worry about the authoritarian excesses of the unravelling of constitutional law and law in general in certain countries (in Europe, Hungary again, or Bulgaria, but also and again China)[40], but it is less vigilant about worrying about the succession of legal events in traditionally constitutionalized countries[41]. Ignorance of the constitutional text, which seems "easy", can be a red flag[42], and confirm the other advantage of seeing the constitution as an instrument that it is, that of questioning, at each historical moment, and particularly for the contemporary period, its relevance in relation to *other tools* for achieving the same or other ends. Indeed, it is not insignificant today to realize that the political constitutional narrative is increasingly commonly regarded as *a weak source* or, quite simply, as no longer being a source at all for analyzing political and economic society. We talk about "constitution", constitutional norms and constitutionalism about normative phenomena that have little to do with the writing

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[38] It would appear that Anglo-Saxon constitutionalists, however, particularly American ones, who, like the Europeans, were very much present during the drafting of the constitutions of the countries of Eastern Europe, have much less difficulty with this approach, which they clearly identify. For example, Cass R. Sunstein, to whom I referred earlier, explains very explicitly that there are good and bad constitutions - without denying this character to the latter - and clarifies his intention by saying that it is not "descriptive" but "normative", in *Designing Democracy, What Constitutions do*, Oxford University Press, 2001, chapter 4, footnote 4.

[39] Lauréline Fontaine, "The (un)reason of contemporary constitutional law. Elements for a balance sheet », in *Mélanges en l'honneur du professeur Dominique Rousseau. Constitution. Justice. Démocratie*, éd. LGDJ-Lextenso, to be published on Novembre 2020, online, https://www.ledroitdelafontaine.fr/the-unreason-of-contemporary-constitutional-law/)
« La (dé)raison du droit constitutionnel contemporain. Eléments pour un bilan », in *Mélanges en l'honneur du professeur Dominique Rousseau. Constitution. Justice. Démocratie*, éd. LGDJ-Lextenso, à paraître, novembre 2020 (online: https://www.ledroitdelafontaine.fr/la-deraison-du-droit-constitutionnel-contemporain-elements-pour-un-bilan/)

[40] Cristiano Paixão & Juliano Zaiden Benvindo, "Constitutional Dismemberment' and Strategic Deconstitutionalization in Times of Crisis: Beyond Emergency Powers", *International Journal of Constitutional Law Blog*, Apr. 24, 2020, online, http://www.iconnectblog.com/2020/04/constitutional-dismemberment-and-strategic-deconstitutionalization-in-times-of-crisis-beyond-emergency-powers/

[41] Between 9 March and 22 April 2020 in France, nearly 200 texts were adopted, ignoring the constitution and substituting one law for another, substituting the state for a state, the state of health emergency.

[42] See for example the decision of the Constitutional Council, misrepresented as the "guardian of the constitution", of 26 March 2020 (n° 2020-799 DC) which, in a word, does not consider it necessary for the text to be complied with: "In view of the particular circumstances of the case, there is no reason to judge that this organic law was adopted in violation of the rules of procedure laid down in article 46 of the Constitution" ("*Compte tenu des circonstances particulières de l'espèce, il n'y a pas lieu de juger que cette loi organique a été adoptée en violation des règles de procédure prévues à l'article 46 de la Constitution*").

of a political constitutional text whose purpose is to bring together a group of individuals under the banner of a single community. Instead, rules for the functioning of the market (the *lex mercatoria*), large corporations that create supreme courts to enforce their laws, constitutions, i.e. constitutive rules, in all economic, social or even leisure communities. The vocabulary of "constitutionality" has spread everywhere. This new and/or parallel normativity is enhanced by the very fashionable theories of *global constitutionalism* and *societal constitutionalism*, both of which highlight the weakening of belief in the virtues of national political constitutions in favour of other origins and areas of normativity: either, in the case of global constitutionalism, it is a matter of thinking about the constitutional norm at the supra-national level and detaching it from the State; or, in the case of societal constitutionalism, it is a matter of asserting a local normativity, a sign of the fragmented society between several professional and social groups, each of which would thus produce *their own constitutional rules*. This is, for example, what the German jurist Gunther Teubner proposes in his constitutional fragments published in 2017[43]. Economic actors participate in both movements by constructing a global economic constitutional order, as seen by certain jurists who both observe and seem generally favourable to it, as in this book published in 2016 under the direction of Antoine Lyon-Caen, Jean-Philippe Robé and Stéphane Vernac, *Multinationals and the Constitutionalization of the World Power System*[44]. In any case, what is proposed as "constitutionalism" has *nothing to do with political constitutions*, i.e. with the documents that are intended to organize the exercise of so-called political power. It is interesting to point out in this respect that the register of constitution and constitutionalism is at the same time completely reinvested by jurists who, at the outset, are not experts in it: Gunther Teubner is originally a professor of civil law and a legal theorist, Antoine Lyon-Caen and Stéphane Vernac are specialists in labour law, and Jean-Philippe Robé is a lawyer who is a partner in a business firm and who has done a thesis in political science. Constitutionalism "within the reach of everyone", without specificity, without guarantees.

As a result, it can be said that, while formal political constitutions nowadays seem to play an increasingly secondary role in the actual unfolding of political societies - as the ceaseless renewal of so-called "states of exception" over the last three decades has illustrated - the approach of continuing to call "constitutional law" - which derives from formal political constitutions - is a form of blindness that has consequences. While studying "this" constitutional law, the various social and economic components weave their own constitutional norms, not out of sight, but with a biased view. By not ceasing to focus on the "formal" political constitutional narrative alone, and by pointing the finger at its instrumentalization, the European bodies, part of the constitutionalist doctrine and the political organs - which themselves have very precisely instrumentalized the writing and rewriting of the constitution for purely geopolitical purposes - have certainly contributed in this way to making it *the strategic alibi* for a real constitutional history that takes place *outside the constitutional text*.

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The existence of a constitution as a cursor of political acceptability certainly has quite tangible and identifiable consequences: provided that it is not incomprehensible and is in force, the constitution has a genuinely institutive value; with few exceptions, it establishes the bodies whose appointment it governs and to which it attributes powers, which are in fact the bodies

[43] Gunther Teubner, *Constitutional fragments. Societal Constitutionalism and Globalization*, Oxford University Press, 2012.
[44] Antoine Lyon-Caen, Jean-Philippe Robé et Stéphane Vernac (dir.), *Multinationals and the Constitutionalization of the World Power System,* Routledge, 2016.

that are found *in practice*. However, the purposes originally pursued by the constitutional instrument cannot be simply or solely reduced to the organization of democratic power: there is no necessary connection between the democratic purpose and the writing or rewriting of the constitution. The constitution is likely to fulfil all kinds of objectives - including authoritarian ones - and not necessarily the separation of powers, democracy or the guarantee of rights.

It is therefore not surprising to see today theories thriving over the top of political constitutional writing, but in almost perfect continuity by relating it to the ends pursued by a purely instrumental means, in the image of the behaviourist theory embodied by the "nudges" applied to constitutional law[45], or the military and managerial theory that sees constitutions as "*precommitment strategies*"[46]. Since it is mainly a matter of doing, all means are considered that soon put the traditional constitution "out of business". If the constitution set a framework, it is in fact a matter of adapting the rule to the objectives being pursued at a given time. If the political constitution does not allow it, one moves on to something else, elsewhere.

In 2016, a star astrophysicist in the United States, Neil deGrasse Tyson, published a tweet in which he called for the creation of a new country, *Rationalia*, in which the constitution would stand in one line: "*All policy shall be based on the weight of evidence*"[47]. Against the trend of normative inflation, and by the election of a single self-sufficient meta-principle, the writing and narration of the constitution would be reduced to its simplest expression. If a constitution still appears to be necessary to formulate what could be called a "meta-principle", it is only as necessary as it would enable it to fulfil the function of giving it full effect. In the history of the ideas and trajectories of political societies, *formal constitutions are the object of the strategies of the actors of the moment*. Admittedly, there is a certain continuum, which obliges both sides to take into account a set of constraints in the writing of constitutions: this continuum has so far allowed the symbolic to endure, and the strategizing of writing and rewriting to operate each time. But it is clear today that the symbolic increasingly appears to be null and void.

Lauréline Fontaine, 30 April 2020

[45] Richard H. Thaler et Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness,* Yale University Press, 2008. On the relationship between nudges and law, see for example Malik Bozzo-Rey et Anne Brunon-Ernst (eds.), *Nudges et normativités. Généalogies, concepts et applications*, éd. Hermann, 2018.
[46] Cass R. Sunstein, *Designing Democracy. What Constitutions do*, *op. cit*. p. 96.
[47] https://twitter.com/neiltyson/status/748157273789300736