

PART II
DEMOCRATIC TRANSITION AND
CONSOLIDATION – CONSTITUTIONS
IN ACTION

3 CENTRAL EUROPEAN DEMOCRATIC TRANSITION: THE PARADIGM OF A CONSTITUTIONAL REVOLUTION

Branko Smerdel

3.1 INTRODUCTION

The idea of a constitutional revolution had numerous proponents during the events initiated by the fall of the Berlin Wall, and a process of destruction of the communist regimes aimed at the “rebirth of democracy”.¹ Since the profound political changes in the majority of such countries were carried out through legal processes of competitive elections, some commentators preferred to talk about ‘the paradigm’. There have not been unambiguous answers to questions as to whether such revolutions have ever actually happened, whether such a paradigm has ever been established in social sciences and whether the process of Central European democratic transition contributes any arguments in favour of the theories of a constitutional revolution. My answer is definitely negative. The very notion which puts together ‘a revolution’ and ‘constitutionalism’ makes a *contradictio in adiecto*. The two decades which followed after the asserted constitutional revolutions of the last decade of the 20th century offer significant evidence to this assertion, in particular in the region which concerns us. The personal experience of my generation which has grown up under a revolutionary regime contributes strongly to my persuasion.² Constitutional orders have throughout history been established through particular combinations of violent struggles and accidents, whereas constitutionalists had attempted to make, in terms of Alexander Hamilton in “The Federalist” No. 2, a ‘reasoning and choice’ the dominant force in these processes. The scientific analyses of the process in Central and Eastern Europe generally confirm such a conclusion.³

1 B. Ackerman, *The Future of Liberal Revolution*, Yale University Press, Boston, 1992. See the discussion in a review by R. Posner, ‘East European Constitutional Review’, *Autumn*, Vol. I, No. 3, 1992, p. 35.

2 Those among us who have had their own experience of living under the revolutionary regime would remember the unelected communist leaders repeatedly reminding the population that “the revolution (still) flows” and that “the revolution is not part of normal everyday life”. The integral part of that was the instruction that “the law has to serve the supreme interests of the working class”.

3 T. Fleiner & L. Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalized World*, Springer, Berlin, 2009, pp. 484-507.

Consequently, it would have been enormously difficult to argue that ‘a paradigm of a constitutional revolution,’ has ever become widely shared within a community of social scientists in general and of constitutionalists in particular. In the philosophy of science, a paradigm denotes a generally accepted model of how ideas relate to one another, forming a conceptual framework within which scientific research is carried out and explanations are developed as a means of solving practical problems.⁴ Such a model does not exist, nor has it been created during the last two decades. Rather, it seems, as pointed out by Vincent Ostrom, that mankind at the closing of the 20th century is “not closer to a scientific approach to constitutional design than Alexis de Tocqueville in his books at the beginning of the previous Century”⁵

3.2 ORIGINS

The idea of ‘a constitutional revolution’ appears as an alternative during real violent revolutions in order to make sense of what happens and to what aims the actual violent actions should lead. The theory develops after the events, while the memories of violence and committed atrocities are still vivid, and the participants – as well as victims – try to figure out to what extent the achieved results correspond to the original aims as proclaimed in revolutionary manifestos or in the revolutionary slogans.⁶ The question remains as to what the actual social changes brought by a rapid and violent change of political regime were. If, as often noted, no profound change happens in the power relations, but only a new power elite controls the machinery of the state, the question arises: could it all have been done in a more civilized manner? Or, in a language of contemporary political scientists, could the collateral damages have been controlled and the expenses reduced?

The French classic author Maurice Duverger has compared the great French Revolution to a social earthquake of enormous dimensions. During the following developments, he distinguishes the two periods: the first was ‘a great shock’ from 1789 until 1799 – the aftermath thereof is a ‘search for compromise’, which he compares to the series of smaller aftershocks which usually follow the great earthquake; the second period is that after the Constitution of 1958 was adopted, and the author states that only then does he see gradual institutional stabilization. What is fascinating is the enormous disproportion between the two periods.⁷ This explains the attitude of constitutionalists

4 A paradigm as explained in T. Kuhn, *Structure of Scientific Revolutions*, University of Chicago Press, Chicago, 1962.

5 V. Ostrom, *Transformation of Institutions: Some Critical Reflections*, Institutional Change, Buenos Aires, 1991; *The Meaning of Democracy and the Vulnerability of Democracies: A Response to Tocqueville’s Challenge*, The University of Michigan Press, Ann Arbor, 1997, pp. 31-60.

6 The Google search engine presented to us about 35,000 results when searching for ‘constitutional revolution’ on 23 September 2012.

7 M. Duverger, *Institutions politiques et droit constitutionnel*, Vol. I, Themis, Paris, 1975, pp. 9-116.

towards revolutions. Britons named their great compromise of 1688 a ‘Glorious Revolution’. Americans insisted that the providence granted them a chance to establish their political institutions based on “reflection and choice” instead of “accident and force” by means of adopting the democratic constitution.⁸ Constitutionalists have learned from experience that prolonged periods of terror and violence cannot bring about the change needed and expected to establish the principle of the rule of law in the everyday operation of governments.⁹

Of course, no serious analyst would dare deny that such unbearable situations occur, in which radical political and social changes become, for the great majority, necessary at any cost. Proponents of political ideas of democratization and the rule of law attempt to portray the prevalent value of aims over means, and thus like to give sympathetic nicknames sometimes even to very violent political events. With this in mind, the first wave of democratization in Europe of the seventh decade of the 20th century began with “a crimson revolution” in Portugal, continued with “a monarchical revolution” in Spain and “a revolution of youth” in Greece. Similarly, the overturn of autocracies self-defined as “communism” at the beginning of the 1990s started with “a velvet revolution”, which was “a liberal one” and was later generalized into the idea of “a constitutional revolution”. The process continued by “an orange revolution” in Ukraine and the “revolution of roses” in Georgia. The fundamental idea had been to use legal instruments for the purpose of managing societies’ profound changes.¹⁰ If and when the ruling elite under the combination of internal and external pressures accepts the demand for competitive elections, the process begins by elaborating the constitution and the most important organic legislation. It is sought as a strategic plan for social, economic and political development for decades to follow, the assumption being that once the constitution and the legislation which follows it are in force, there is no further obstacle to the development of a liberal market and democratic society grounded upon the rule of law.¹¹

8 As expressed by Alexander Hamilton in the famous passage of *The Federalist* Number 2, V. Ostrom, *The Political Theory of a Compound Republic*, 2nd edn, University of Nebraska Press, Lincoln, 1987, p. 31.

9 ‘Everything happens differently!’ complained Milovan Djilas in his once widely-known book, *The New Class*.

10 To say the truth, the idea of ‘perestroika’ and ‘glasnost’ (restructuring and transparency) within the ruling intellectual elites of the fallen regimes has to do with similar ideas to using legal instruments in order to bring a rapid social change. M. Gorbachev, *Perestroika, New Thinking for Our Country and the World*, Harper Collins, New York, 1987.

11 The process of the ‘Arab spring’ which began in 2010 emphasizes the importance of such analyses, regarding the assumption of the similar aims of ‘establishing a democracy and the rule of law’ instead of the traditionally despotic regimes, both of revolutionary as well as of traditional origins. The process of “Arab spring” has demonstrated that different social circumstances too bring consequences which are very distant from the initial optimistic expectations of some analysts. While in Tunisia happens a substantial constitutional change, public rising in Egypt resulted in establishment of the military junta.

3.3 THE MEANING

In search of the true meaning, I have turned to two of the classics of liberal, legal and political science.¹² Harold Lasswell distinguishes “a transformation” from “reform” when analyzing the nature of the changes. He defines “a revolution” as the use of violence to bring about profound change. Otherwise, he refers to “a reform”. A revolution might be “political” or “social”. Accordingly, in his terms, a “constitutional revolution” is actually an attempt at a great and rapid “political transformation”.¹³ Has it achieved the expected consequences?

The distinguished British legal historian Harold Berman explores the issue in his *Law and Revolution* and presents the following systematization. Great revolutions have been marked by fundamental change, rapid change, violent change and lasting change. Legitimacy for the use of violence has been sought in fundamental law, a remote past and an apocalyptic future. Each eventually produced a new system of law, which embodied some of the purposes of the revolution, changed the Western legal tradition, and also remained within that tradition.¹⁴ Therefore, we should conclude that the very idea of a revolution contradicts the idea of constitutional order. That is the reason that reformist regimes should aim to re-establish stability of the legal system.

In theory, at the beginning of rapid constitutional development come the fundamental constitutional choices. They are made in various modes/by different means, from referendums to conventions, but all of them include a decisive expression of popular will, which is taken in the right “constitutional moment”.¹⁵ In the considerable number of ‘new democracies’, the most important of such decisions were the decisions on sovereignty and the right to self-determination which were taken by carrying out referendums. In Moscow, at one point, the constitutional conflict between the executive and legislative bodies turned into an artillery battle which resolved the conflict between President Jelcin and Parliament (*Duma*) in September 1993.¹⁶ Several armed conflicts followed in the name of constitutional revolutions, the best known being during the process of disintegration of the Yugoslav socialist federation.

12 Belonging to a generation from a socialist country, who had compulsorily studied a plenty of Marxist literature on the subject, my inclination is to avoid quoting such literature. But see also J. Elster, *Making Sense of Marx: Studies in Marxism and Social Theory*, Cambridge University Press, London, 1985.

13 H.D. Lasswell & A. Kaplan, *Power and Society: A Framework for Political Inquiry*, Yale University Press, New York, 1950.

14 H. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, Harvard University Press, London, 1983, pp. 18-19.

15 Those were not limited to a selection among proportional representation and a majority vote and between the parliamentary and presidential government as asserted by A. Liphart, ‘Constitutional Choices for New Democracies’, *Journal of Democracy*, Vol. I, No. 2, 1990, pp. 72-84.

16 The victory of the armoured troops over rebellious parliamentary deputies was greeted by Western politicians and mainstream press as an important contribution to the constitutional revolution in Russia.

The result was that new constitutions were grounded and fully determined by the fundamental decisions or choices as well as the mentioned processes. What should have followed in particular countries was a controlled constitutional process in accordance with the Constitution: a series of decisions on all levels, which are altogether aimed at implementing the constitutional principles, and thus at transforming the words on paper into a social reality. The constitutional moment which creates the new constitution should be followed by the process of its implementation in the legislation, jurisprudence/case-law and everyday life.¹⁷

Donald Lutz formulates the following purposes of the principles of constitutional design, making it in his words, 'a constitutional technology' which should 'bring together power and justice': first, the rule of law; second, democracy and third, maintenance of public good.

Those aims have been expressed by the American Founders as the inalienable right to "life, freedom and pursuit of happiness". But Donald Lutz emphasizes that the true purpose lays in the introduction of crucially important innovations into social life, which should serve for sustainable development encompassing the development of material goods as well as social morality.¹⁸

The theory of constitutional engineering is a theory on how to deal with crises. That is why it ever again returns from oblivion after the occurrence of conflicts and crises which bring about/create a new 'reactive' constitution. Specific constitutional decisions require informed insight and a wide array of expert knowledge, not limited to the field of legislation and case law. Thus, if we could compare fundamental choices to pieces of art, such as architectural projects, the process of devising solutions under the Constitution could be compared to a construction job, which the term *engineering* suits rather well. The Constitution is understood as a Grand Project, a strategic plan for sustainable social, political and legal development, founded on and dependable on the expectations for constant stable economic growth. Profound changes in society and the economy are expected to occur gradually, under the decisive influence of continuous reforms in the process of the establishment of a new legal system. The influence of science should prevail over the traditional domination of voluntarism on the part of often irresponsible political leaders. The principle of the rule of law should dominate all the decisions by rulers as well as those who apply and enforce the constitution and the law.

Briefly, this is not how the events developed in the region during the process of democratic transition, and the notion of 'a revolution' continues to exercise its negative influence on constitutional processes. In societies infected by a tradition of revolutionary thinking, it also justifies a tendency of the extensive use of repression in the area of the freedom of expression and to protest.

17 O. Vincent, *The Political Theory of a Compound Republic: Designing the American Experiment* (new chapters co-authored with Barbara Allen), Lexington Books, New York, 2008.

18 D.D. Lutz, *Principles of Constitutional Design*, Cambridge University Press, New York, 2006, p. 5.

3.4 PURPOSES

A revolution should open paths and provide the means for a sustainable social development grounded on the continuous application of the principle of democratic choice. Theories of institutional construction as a basis for accelerated social development have appeared under different titles which reflect the aspirations of their authors: constitutional architecture, constitutional design, devising institutions, constitutional modelling and even the crafting of democracies.¹⁹ Quite recently, some authors even put stress on the idea of ‘constitutional design’ and ‘fine institutional tuning’, and an advanced version has been provided by Donald Lutz.²⁰ From a historic perspective, it seems more plausible to use the classic term ‘constitutional engineering’ to describe the permanent and enlightened efforts made to steer political processes towards implementing the rule of law more. This is because while theory and research advance, their dissemination as well as application have been in pretty rough shape.²¹ As Tom Ginsburg asserts, “constitutional design is more an art than a science and there is always a myriad of factors that can interfere with the best-laid plans.”²² But, in my view, application is more a craft than an art.

We have actually not witnessed much precision in constitutional construction or application during the transitional process in the region. It is obvious that the political developments of the Great Transition are far from being scientifically controlled, if not completely “out of control,” as asserted early on by Z. Brzezinski.²³ It is important to note that this does not apply exclusively to the ‘post-communist’ systems in their efforts to close a developmental gap, but also to the democratic models they follow. The process of democratization has again certainly been proven reversible and the expectations of ‘the end of history’ have been naive, as his more acquainted critics had instantly warned.²⁴

It is important to emphasize, that the theory of constitutional engineering has been rather compromised because it might serve, and has indeed served, for many different purposes. But is this not the case with every theory? This requires us to be much more specific. We define “the constitution” in the proper sense, only and exclusively as a democratic document, which aims at promoting and protecting human rights and freedoms in relation to the state and all other authorities. Structurally, it has to be ensured by applying a separation of powers, and by imposing checks and balances upon power-holders in all the

19 G. Di Palma, *To Craft Democracies*, University of California Press, Berkeley, 1990; A. Reynolds (Ed.), *The Architecture of Democracy*, Oxford University Press, London, 2002.

20 Lutz, 2006.

21 For a realistic approach, see G. Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, Macmillan Press, London, 1994.

22 T. Ginsburg (Ed.), *Comparative Constitutional Design*, Cambridge University Press, New York, 2012, p. 5.

23 Z. Brzezinski, *Out of Control: Global Turmoil on the Eve of the 21st Century*, Scribner, New York, 1993.

24 R. Dahrendorf, *Reflections on the Revolution in Europe*, Random House, New York, 1990.

branches of the government. Thus, in the proper sense of the word-constitutional engineering should primarily serve to promote and strengthen those areas.

The arts of the *arcane* manipulation of political institutions, although considered as 'engineering' by their patrons and authors, cannot be considered as "constitutional" since their aims contradict the purposes of any true democratic constitution. Needless to say, constitutional documents of autocracies are excluded from the very notion of "a constitution". This also applies to the cunning manipulation by institutions via the use of techniques aimed at ensuring a lasting political monopoly of certain individuals or groups. The best-known instance is widely employed electoral engineering in democracies ranging from rude gerrymandering to sophisticated techniques of promoting certain political options and groups. The other important instance entails manipulating the systems of executive organizing according to the wishes of the power-holders.

Indeed, there have been numerous reservations as to what the theory actually means. But that is the case with any type of engineering. They say that military engineers make weapons, while civil engineers make targets. Experts for explosives excavate coal but also destroy cities. The American Founders wrote in *the Federalist* about governmental authority as a "means of evil which can be used to do good". Does this not justify the term "engineering" and its notion in the explained limited sense? The theory of institutional construction must be in the interest of the people! Constitutionalism is an expression of an attempt to use technology in order to combine power with justice.

3.5 AIMS

The rule of law is expected to develop gradually through the interaction of democratic leadership and enlightened citizenship grounded in the commonly shared understanding that constitutional order makes the environment safer and wealthier than any other system. However, the implementation of complex fundamental constitutional concepts, such as the rule of law and separation of powers, requires that citizens, governmental officials as well as commoners, take the constitution seriously. It could indeed be said that the longevity of successful constitutions rests upon such an *opinio constitutionis*, which some American authors have denoted as *constitutional faith* or even the worship of the Constitution.²⁵ Only people who trust their political institutions are ready to promote them, maintain them and, when necessary, fight for them and, in doing so, develop them over a period of time, which then outlive only one generation. Constitutional guarantees are there, as the

25 W. Wilson, *Congressional Government*, Princeton University Press, Princeton, 1967, p. 17, describes the American attitude towards the Constitution as "an undiscriminating and almost blind worship of its principles"; S. Levinson, *Constitutional Faith*, Princeton University Press, Princeton, 1988.

Preamble of the American Constitution reads, “for us and our posterity.” This leads us to the notion of *the living constitution*. As Arthur Schlesinger puts it, only “the life under the Constitution began to define the meaning of the Constitution”.²⁶

This means that the Constitution is expected to be implemented through (1) the elaboration of legislation; (2) the case law and review of judicial bodies; (3) the behaviour of the supreme governmental bodies in their mutual accommodation in the system of separation of powers and (4) most importantly, the actions of citizens who regard the constitution as a fair framework in which to seek protection and respect for their rights and a chance to promote their interests.

Of course, this means a political process and a political struggle fought by constitutional means and within the constitutional framework which has to be enforced by an effective system of constitutional review. Political parties obey the Constitution under the strict institutional control of the democratic public in an open society. To remain on the safe side, judging from the situation into which we have the best insight, we must say that this is far from how the political process has actually developed in Croatia.²⁷

The living constitution is, in Charles Beard’s words, “what living men and women think it is, recognize as such, carry into action and obey”.²⁸ In a more modern language of political science, it comprises “the entire network of attitudes, norms, behaviors, and expectations among elites and publics that surround and support the written document”.²⁹ Thus, according to Herman Pritchett, “the constitutional system is not separate from the political system, but a necessary part of it, performing the vital function of giving order and structure to the process of policy formation”.³⁰

Where such wide acceptance and internalization of constitutional norms does not exist, constitutions remain mere instruments of current policies. There exists a peril of quasi-revolutionary tendencies to destroy the democratic constitutional order. Corruption of politics contributes particularly to such tendencies. Its consequence is widespread public support for the idea of cleaning up the scene and once again constructing the legal order. Such circumstances often lead to a sequence of revolutions, accompanied by new constitutions, which no one takes for more than the words on paper in service of the current government. This creates a serious obstacle to the development of the rule of law as well as to

26 A.F. Schlesinger Jr., *Imperial Presidency*, Houghton-Mifflin, Boston, 1973, p. 18.

27 B. Smerdel, ‘Characteristics of the Croatian Constitutional Order on the 20th Anniversary of the Christmas Constitution’, in D. Foretic (Ed.), *The Constitution of the Republic of Croatia*, 16th edn, Novi Informator, Zagreb, 2010, pp. 82-155.

28 C.A. Beard, ‘The Living Constitution’, *Annals of the American Academy of Political and Social Sciences*, Vol. 185, 1936, p. 34.

29 W.D. Burnham, ‘The Constitution, Capitalism, and the Need for Rationalized Regulation’, in R.A. Goldwin & W.A. Schambra (Eds.), *How Capitalistic Is the Constitution?*, American Enterprise Institute for Public Policy Research, Washington D.C., 1982, p. 78.

30 H. Pritchett, *Constitutional Law, International Encyclopedia of the Social Sciences*, Tome 3, 1968, p. 298.

the realization of other crucial constitutional concepts. This is why I deem it important to put stress on the alternative: constructing the constitutional structure needed to promote the rule of law.

The idea of applying social sciences to constitutional choices has appeared, disappeared and reappeared regularly at the critical junctures of modern history. The American Founding Fathers have made a serious effort to explain the theory of constitutional choice to the people of the thirteen American states in a collection of essays published in newspapers, today known as “The Federalist”.³¹ They expected “reflection and choice” to become a historical alternative to “accidents and force”, which have dominated processes establishing human political orders,³² and in particular to avoid the repetition of the European history of permanent warfare. The same might be said for the democratically oriented Croatian social scientists of the closing of the 20th century.

3.6 EXPERIENCE

After 22 years, limiting ourselves primarily to the Croatian experience, we must conclude that there has been no rapid or radical transition towards the rule of law in the political and legal culture underlying the legal system. The patterns of political behaviour contrary to the strict observance of the Constitution have demonstrated an unexpected durability under the rule of different political parties.³³

Legal philosopher Lon L. Fuller has formulated a list of eight ‘routes to failure for every legal system’. They are the following: (1) the lack of rules of law, which leads to ad-hoc and inconsistent adjudication; (2) failure to publicize or make known the rules of law; (3) unclear or obscure legislation that is impossible to understand; (4) retroactive legislation; (5) contradictions in the law; (6) demands that are beyond the power of the subjects and the ruled; (7) unstable legislation – daily revisions of laws; and (8) divergence between adjudication/administration and legislation.³⁴

It is easy to conclude that all of the above phenomena not only occur in a variety of combinations in almost all the modern democracies, but they also cumulatively dominate legal systems of many countries, and in particular of the so-called transitional states. Longer-term failure of the legal system has regularly resulted in a serious social crisis, thereby leading to threats of dictatorships.

31 This was the best-known attempt at popularizing constitutional ideas in history. The Slovenian parliament’s attempt to present the Constitution in a cartoon underlines the importance of such efforts in order to promote the living constitution: <www.dz-rs.si/wps/portal/home/politicnisistem/urs/ustavavstripu>.

32 F. Fukuyama, *The Origins of Political Order: From Pre-human Times to the French Revolution*, Profile Books, London, 2011.

33 B. Smerdel, *O ustavima i ljudima [On constitutions and men]*, Novi informator, Zagreb, 2012.

34 L.L. Fuller, *The Morality of Law*, Yale University Press, Boston, 1969, pp. 33-38.

In Croatia, the scientific approach to constitutional engineering has been almost completely neglected. What worries us even more is that apparently the same goes for the European Union (EU). The critical and final test of viability of any constitutional system is in situations of serious crises when real power relations overshadow the niceties of the constitutions and constitutional treaties. During the longest negotiation process on accession in the history of the EU, both foreign experts and Croatian negotiators took what might be named an 'elementary school' approach. The most optimistic expectation is that once the legislation is in place, development would irreversibly follow. Thousands of pages of the European *acquis communautaire* have been duly translated and urgently adopted by the Parliament in hundreds of laws, which were subsequently amended according to further requirements of the other individual experts. There is at the moment a huge *corpus juris* which still needs to be implemented – or abandoned. The legal system is in dire need of consolidation.

The problem is that many among such solutions do not serve the intended purposes, but quite often have unexpected effects by enabling a selective application of the positive legislation. An enormous quantity of new norms has been produced daily, whereas the hierarchy of legal instruments ceases to exist, whilst so-called expert cleared texts tend to replace the positive legislation. It is important to emphasize that foreign experts are not to blame for institutional weaknesses and failures that we have readily included into our legal system. Foreign advice might be of much help, but only if checked and double-checked by domestic experts who know the situation – the social arena in which the solutions are expected to work. The blame is completely on domestic policymakers and their instruction to the negotiating teams to fulfil any demand and never to claim the unconstitutionality of any proposal, in order to achieve the political aim which was declared long ago as the one and only with no alternative.

It was also present during the efforts of the last decade to establish a proper constitutional framework for the European Union, and was particularly visible in the proceedings of the eventually unfortunate European Constitutional Convention from 2001 till 2004.³⁵ The failure of that effort, which was expected to achieve results comparable to the American Constitutional Convention of 1787, was especially discouraging. But it was caused by excessive rather than sober expectations.³⁶

If we dare to consider the issue of a human nature, which has determined the nature of political activities and which has not and will not be changed, the attempts of

35 B. Smerdel, *Convention on the Constitution of Europe and the Process of Constitutional Choice*, The Federal Trust, London, 2005, at <www.fedtrust.co.uk/uploads/constitution>; P. Norman, *The Accidental Constitution: The Story of the European Convention*, EuroComment, London, 2005.

36 Jon Elster has compared the beginning of postcommunist transition to "repairing the boat on the open sea". The recent editorial of *The Economist* magazine compares the current European Union's attempts to "repairing an airplane in midair".

constitutional planning can make much more sense. The failure of the European Constitution was at the first place a consequence of the excessive political expectations and ambitions of the leaders of the time. They expected to lay the foundations of a new federation against the best experiences and the warnings of the classics that imposing a federation would bring into jeopardy the compound system as such. After seven years, it seems that the EU has returned to the traditional means of making strategic decisions through informal, rather than legally provided channels. Theoretically, it means that ‘the constitutional engineers’ have failed to provide some important structural elements during their construction process. In the older political theory, this used to be called ‘voluntarism.’

3.7 CONCLUSION

Legal historian Harold Berman a quarter of a century ago, diagnosed a serious crisis of the Western legal systems, which since has continuously threatened with a new revolutionary overturn of the legal order.³⁷ It seems that those and other scientific caveats have not influenced political decision making even in the most developed countries in the world. Naturally, the seriousness of the situation replicates in the countries in transition with their precarious experience with the very idea of the rule of law.

We might thus conclude with the British historian Peter Acroyd:

When we look over the course of human affairs we are more likely than not to find only error and confusion. I have already explained, during the course of this narrative, that the writing of history is often another way of defining chaos. There is in fact a case for saying that human history, as it is generally described and understood, is the sum total of and unintended consequence [. . .] The wisest historians admit that their speculations may be displaced and their interpretations incorrect.³⁸

The theory of a constitutional revolution is a result of an effort to offer the alternative to chaos which would be based on a scientific choice. It is also an attempt to advise politicians on how to deal with crises caused too often by failures of presumed constitutional revolutions. That is why it ever again returns from oblivion after conflicts and crises. Pessimistic evaluations of the mid-20th century that “the Constitution has not fulfilled

37 H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, London, 1983, p. 16.

38 P. Acroyd, *The History of England, Tome I, The Foundation*, Macmillan, London, 2011, pp. 442-443.

what was the most important expectation, to bring the social order safe from shocks and crises”³⁹ actually demonstrate how enormously excessive expectations had been nurtured by the Western constitutionalists in the aftermath of World War II. They have been emulated by the extremely optimistic ideas at the beginning of the 21st century that this very Constitution might bring answers to open questions on the future of civilization.⁴⁰

39 K. Loewenstein, *Constitutional Government and Political Process*, University of Chicago Press, Chicago, 1957, p. 161.

40 *The World of the Constitutional State*, essays in honour of Peter Häberle presented at a colloquium for his 65th birthday, Nomos Verlagsgesellschaft, Baden-Baden, 2001.