METHODOLOGICAL PRINCIPLES OF CONSTITUTIONAL REVISION BASED ON OVERLAPPING CONSENSUS

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> «Verfassungsgebung und Verfassungsinterpretation, zeitlich, sachlich und personell einander näher gerückt, stehen in Wechselwirkung, sogar in Teilidentität, zueinander: Momente konstituierender Verfassunggebung im weiteren Sinn finden sich auch in der tagtäglichen Verfassungsinterpretation, und: Vorgänge und Verfahren der Verfassungsinterpretation finden sich auch in der Verfassungsgebung, sie ereignet sich in offenen Gesellschaften nicht gleich einem „Ur-Knall", beginnt nicht auf einer „tabula rasa" in der Stunde Null, sondern sie interpretiert auch».
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> (PETER HÄBERLE, *Verfassungsinterpretation und Verfassungsgebung*, 1978).

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1. THE RATIO OF A METHOD FOR CONSTITUTIONAL REVISION

A comparative overview of constitutional texts world-wide demonstrates that the revision of all contemporary constitutions is subject to special conditions and more specifically, either to the observance of specific procedures, which are more complex in comparison with the normal legislative process, or also to the prohibition of revising specific constitutional provisions[1]. In certain constitutions the process of revision requires the mediation of elections[2] or the carrying out of a referendum[3], in order to emphasize the democratic legitimization of constitutional revision.

The ratio of every revisionary process is related to the functions of the constitution in modern pluralistic democracies; more specifically, in modern pluralistic democracies constitutions aim at standardizing the elements composing a specific society. In this context, the constitution is no longer a mechanism for codifying, reproducing and imposing a prevailing ideology, but tends to function as an «open system of values» that incorporates overlapping consensus formed in society; in other words, the constitution should incorporate a form of consensus that transcend the compromise between competing powers and opinions and arise as a result of a dialogic processing of the elements relevant to common values[4].

The formation of a nexus of common fundamental rules and values for the organization and function of the state presupposes openness and dialogue in the «open society of constitutional revisionists», i.e., between all active subjects and agents of power who can influence decision-making by the competent organs. The consensual nature of the constitution depends on the success of a communicative process to shape opinion and decision-making on the basis of rational and convincing arguments. The consensual formation of a constitution in modern pluralistic democracies therefore proves to be indissolubly linked to the method of argumentative justification of the revisionary process. Overlapping consensus primarily constitutes consensus based on the strength of arguments. Within the context of a pluralistic society, where authority is diffused to various institutions and groups, and where conflicts are not identified with social and class

[1] In Europe constitutions prohibiting the revision of certain constitutional provisions are the constitutions of Germany (article 79 §3), France (article 89 §5), Italy (article 139), Portugal (article 288) and Greece (article 110 §1). Constitutions which do not include a «core» of provisions that cannot be revised are the Belgian, the Danish, the Dutch, the Spanish and the Luxemburgian.

[2] See for example the Belgian and the Greek constitution.

[3] See for example the Danish and under certain conditions also the Italian constitution.

[4] On the concept of overlapping consensus see J. RAWLS, *Political Liberalism*, New York, 1993.

stratifications, the achievement of overlapping consensus constitutes the appropriate background for defining the process of constitution-drafting. Moreover, the consensual nature of constitution-drafting guarantees respect for cultural differences, plurality of opinions and equal co-existence of various groups.

However, achieving consensus does not imply de-ideologising the dialogue for the revision of the constitution. The quest for consensus concerning the fundamental issues of an organized society, in other words, concerning the rules of the political game, is a predominantly political process. Nevertheless, this process is oriented towards the identification of fields where overlapping consensus can be achieved. Consensus through a dialogic process in an «open society of interpreters»[5] of the constitution is, after all, a condition for the legitimization of the revisionary process and the ability of the «new» constitution to perform its integrational function.

Based on the afore-mentioned views, the following hypotheses will be examined: Is the revision of the constitution a process defined only in a «negative-defensive» way, i.e., through the consolidation of restrictions for the revisionary legislator, thus considering the identification of the «correct» content of the constitution under revision a purely political matter? Or, on the contrary does the enactment of a constitution presuppose the clarification of the positive-creative side of the revisionary process, which entails the systematic formation of principles, rules and criteria applicable during the process of constitution-drafting?

2. CONTINUITY, CONSENSUS, TRANSPARENCY AND SELF-RESTRICTION AS FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL REVISION

A) The relation between constitution and time

Constitutional revision results neither in the enactment of a new constitution nor in its rediscovery. In the analysis of C. Schmitt concerning the limits of constitutional revision, the revisionary process is clearly differentiated from four categories of constitutional deviations[6]: The «overthrow» of the constitution (*Verfassungsvernichtung*), the «superseding» of the constitution (*Verfassungsbeseitigung*), the «violation» of the constitution (*Verfassungsdurchbrechung*) and the «suspension» of constitutional provisions, either according to the procedure provided for in the constitution or regardless of it (*Verfassungssuspension*). As C. Schmitt points out emphatically, the commonly accepted term «constitutional revision» (*Verfassungsänder-*

[5] See P. HÄBERLE, «Die offene Gesellschaft der Verfassungsinterpreten», *JZ*, 1975, pp. 297 ff.

[6] See C. SCHMITT, *Verfassungslehre*, Berlin 1957, pp. 102 ff.

ung-Verfassungsrevision) is inaccurate to the extent that it does not specify that it does not concern a reformulation of the entire constitution but only of specific provisions[7].

From this acertainment, the principle of continuity and unity of the constitution can de deducted, a principle in conformity with its fundamental character[8]. The innovations brought about by consitutional revision cannot overthrow fundamental constitutional values, but are oriented to adapt constitutional provisions to historical development and to the constantly changing social, political and ideological alliances and conditions.

Seen in this light, the revisionary process essentially constitutes a singular interpretative process, since the political will of the revisionary legislator and the decisionary/volontaristic elements existent in any interpretation are subordinated to exisiting fundamental consitutional principles and «reintrepret» them. From a different viewpoint, in the revisionary process the central role of the «interpreter as subject of a decision who claims power» is further enhanced[9].

The principle of continuity of the constitution is ensured through the obligation of the revisionary legislator to conform to fundamental constitutional principles and procedures, thus determining the relation between constitution and time[10].

The guarantee of unity and identity of the constitution are aspects of the principle of continuity. The standardization of the revisionary process in most constitutional texts implies that historical evolutions can affect the content of the constitution only to the extent set by the constitution itself, through the prohibition of revision of certain provisions and principles. The introduction of revocatory changes or rifts to the constitutional organisation of a state, particularly as far as the system of governance is concerned, is not the task of the revisionary legislator by means of *in vitro* exercises but rather a historical process emanating from rifts within society, deep crisis or through the collapse of the political system.

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[7] C. SCHMITT, *Verfassungslehre*, *op. cit.*, p. 99, where it is noted that «das Wort Verfassungsänderung (Verfassungsrevision) ist ungenau, weil es sich nicht um Änderungen der Verfassung selbst, sondern nur verfassungsgesetzlicher Bestimmungen handelt».

[8] P. HÄBERLE, «Verfassungsinterpretation und Verfassungsgebung», in P. HÄBERLE, *Verfassung als öffentlicher Prozess*, Berlin 1978, pp. 185 ff.; B.-O. BRYDE, *Verfassungsentwicklung. Stabilität und Dynamik im Verfassungsrecht der Bundesrepublik Deutschland*, Baden-Baden 1982, pp. 47 ff.; H. EHMKE, «Verfassungsänderung und Verfassungsdurchbrechung», in *same author*, *Beiträge zur Verfassungstheorie und Verfassungspolitik*, Königstein 1981, pp. 142 ff.; E. TOSCH, *Die Bindung des verfassungsändernden Gesetzgebers an den Willen des historischen Verfassunggebers*, Berlin 1979, pp. 105 ff.

[9] P. KONDYLIS, *Macht und Entscheidung*, Stuttgart 1984, pp. 105 ff.

[10] Concerning the relation between constitution and time see P. HÄBERLE, «Zeit und Verfassung. Prolegomena zu einem "zeitgerechten" Verfassungsverständnis», in *same author*, *Verfassung als öffentlicher Prozess*, Berlin 1978, pp. 59 ff., especially pp. 87 ff.

The adaptation of the constitutional text to new social, economic, political and ideological conditions is necessary in order for it to retain its regulatory force and its ability to function as the supreme regulatory rule of social cohabitation, yet it takes place within a binding framework of non-temporality, which is the consequence of its establishment as a quasi-transcending condition for an order of absolute certainty and security of law. If the historicity of the constitution is accepted, and, by extension, the historicity of its interpretation, we could maintain that when interpretative tools prove inadequate or could endanger security of law, it becomes necessary to resort to the «constitution-making interpretative process» of revision.

The tasks of the revisionary legislator can, therfore, be classified as twofold: First, in preserving the unity and the identity of the constitution adapting it to the demands of contemporary reality and, second, ensuring balance between the basic values of the consitution and the political views prevailing at a given moment. The revisionary legislator is bound by the fundamentalconstitutional principles, which guide him to adapt the constitution to historical development and at the same time preserve intact its «core» and protect its unity.

B) The consensual structure of the revisionary process

The consensual structure of the revisionary process emanates from the fundamental character of the constitution, which implies that besides the provisions which are not subject to revision, the revisionary legislator is restricted by specific procedural guarantees.

The principle of consensus governing the revisionary process is not concluded only from the «safety valves» set by the constitution, but also from the function of the constitutional text as the foundation of the legal order and the regulatory context of state action and social co-existence. The role of the constitution is not limited to consolidating a «fundamental legal order» (*rechtliche Grundordnung*) but also to forming a «political unity» (*politische Einheitsbildung*)[11]. At the same time, the constitution, besides guaranteeing a procedural framework for political decision-making, codifies the basic moral-political principles of a society, the essential commitments and the programmatic guidelines for state action, thus functioning as the legitimising foundation of political power in modern pluralistic democracies.

[11] See K. HESSE, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, Heidelberg 1991, p. 5; U. SCHEUNER, «Konsens und Pluralismus als verfassungsrechtliches Problem», in G. JAKOBS (Hrsg.), *Rechtsgeltung und Konsens*, Berlin 1976, pp. 30 ff.; H. VORLÄNDER, *Verfassung und Konsens*, Berlin 1981.

The expediency of achieving consensus concerning the content of the constitution derives directly from the afore-mentioned assumptions. The definition and legitimisation of political power through the constitution, as a perception that prevails as a global claim[12], undoubtedly presupposes both its adaptation to historical evolution as well as the achievement of consensus over its content.

The historicity of constitutional provisions bears the risk of causing their interpretative adulteration or distortion under new conditions and in such terms the intervention of the revisionary legislator becomes necessary. Both the interpretative approach and the revision of the constitutional provisions —as a singular, «constitution-making interpretative process»— presuppose the understanding of their historicity and of the historical demands they implement.

The adaptation of the constitution to historical evolution is necessary in order to preserve its organizational, stabilising, legitimising, symbolic and integrating functions. This adaptation, however, is not compatible with the fundamental character of the constitution or with its functions, if it is not protected by widely accepted guarantees as to the content of revision. In this sense, the principle of consensus becomes a central component of the revisionary process.

The principle of consensus in the revisionary process is defined by each constitution and does not mean that the agreement of all or of a wide spectrum of political powers is a necessary precondition for the success of the revision. Such an approach would make the revisionary process even less flexible, literally precluding the opportunity to submit radical proposals or making this dependent on petty political confrontations between opposing political parties. In contrast, the principle of consensus is specified in each constitution through concrete provisions and serves as a guideline for their implementation. The principle of consensus serves as a condition for the legitimisation of the constitution and its political-symbolic effectiveness[13] as its content cannot be dependent on the eventual political will of each

[12] See D. TSATSOS, «Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen. Eine Einleitung», in BATTIS/MAHRENHOLZ/TSATSOS, *Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen*, Berlin 1990, pp. 9 ff.; P. HÄBERLE, *Verfassungslehre als Kulturwissenschaft*, Berlin 1998, pp. 90 ff., 342 ff., 1132 ff.

[13] Concerning the functions of the constitutions and the conditions for their legitimation see W. HENNIS, *Verfassung und Verfassungswirklichkeit*, Tübingen 1968, pp. 20 ff.; W. MAIHOFER, «Die Legitimation des Staates aus der Funktion des Rechts», in *Legitimation des modernen Staates* (Hrsg. N. ACHTERBERG/W. KRAWIETZ), Wiesbaden 1981, pp. 15 ff.; H. DREIER, «Staatliche Legitimität, Grundgesetz und soziale Bewegungen», in J. MARKO/A. STOLZ (Hrsg.), *Demokratie und Wirtschaft*, Wien et.a. 1987, pp. 139 ff.; U. SCHEUNER, «Konsens und Pluralismus als verfassungsrechtliches Problem», *op. cit.*, pp. 196 ff.; H. VORLÄNDER, *Verfassung und Konsens, op. cit.*, especially pp. 357 ff.; G. HAVERKATE, *Verfassungslehre. Verfassung als Gegenseitigkeitsordnung*, München 1992, pp. 9 ff.

parliamentary majority, but instead is formulated on the basis of achieving the widest possible consensus.

The process of constitutional revision is primarily aimed at guaranteeing the strict nature of the constitution and consensus on any addition, amendment, abolition or authentic interpretation of constitutional provisions. Even if a constitution is approved only by a unilateral parliamentary majority, the respect of the procedural rules which specify the principle of consensus constitutes a factor of legitimisation and legality of the new constitutional text. In other words, an essential component of constitutional revision is the cooperation of all political powers or at least the provision of an opportunity to all political powers to cooperate during the revisionary process and furthermore, the guarantee that the result of the revision will not reflect an opportunistic political alliance.

Seen in this light, the principle of consensus could function as an interpretative criterion in favour of the view that in constitutions where the joint action of two successive parliaments is required, these bear equal responsibility and should agree both concerning the provisions to be revised, as well as concerning the guidelines of the revision[14]. It could nevertheless be maintained that it would be expedient to converge and synthesize the opposing arguments and views concerning the content of the provisions under revision.

Every constitutional text affirms a specific interelation of power. Constitutional revision attempts to adapt the constitution to the rearrangement of this interelation and not to impose the will of dominant powers on its content. Consequently, the principle of consensus ultimately derives from an understanding of the constitution that recognises its function as a domain for balancing opposing interests.

C) The argumentative dimension of the revisionary process

The principle of argumentative transparency is complementary to the principles of continuity and consensus that govern the revisionary process. According to this principle, the subjection of the revisionary process to fundamental constitutional principles and the observance of the procedural guarantees provided for by the constitution do not ensure by themselves the legitimisation of the revisionary process. Additionally, the specific justification of this process becomes imperative.

More specifically, the revisionary legislator must identify the legal and real reasons, which make imperative the amendment of the existing consti-

[14] The role and the responsibility of two successive parliaments in the revisionary process, according to article 110 par. 2-4 of the Greek Constitution, has been the subject of ardent debate in greek constitutional theory.

tutional provisions, must highlight the advantages and disadvantages related to each revisionary proposal and must prove the absolute supremacy of the former as a result of a specific rational exercise[15], which does not aim at ensuring the 'correctness' of the proposed solution, since it is not often possible for the argumentation in favour of the different views to lead to an uncontestably correct interpretative solution. Criteria of correctness with «political neutrality» or clear and unquestionable justification in an «open system of values» that emanates from the constitution of a pluralistic democracy are much the less identifiable within the decisionary/volontaristic context of the «constitution-making interpretative process» of revision.

Nevertheless, the identification of the reasons, the arguments and the criteria that prove the need to revise a series of constitutional provisions on the one hand, and to the choice of a specific revisionary proposal on the other, does not cease to be imperative as a measure of credibility and legitimization of the revisionary process. The principle of argumentative transparency of the revisionary process imposes, therefore, a clear statement of the starting points of each revisionary proposal and more specifically, for each constitutional provision under revision.

The argumentative transparency of the revisionary process depends on the articulation of the reasons, arguments and criteria that justify it in «units», corresponding to the three basic components of constitutional policy, namely, to the identification of the targets of the revision, to their specification through the quest for solutions and to the textual reformulation of the provisions. These components are co-articulated systematically so that constitutional policy can retain its cohesion and guarantee results. In all three «units» the confirmation of the argumentative character of the revisionary process is required.

A revision in accordance with the constitution does not only impose compliance with the restrictions and limitations provided for in the constitutional text, but also the justification of every revisionary proposal by means of arguments and criteria that claim validity. To the extent that methodological starting points are not politically neutral but instead interweave with values and political perceptions, different cognitive motives, ideological backgrounds or sociopolitical commitments, the implementation of a specific methodology for justifying the proposals of the revisionary legislator must be filtered and guided by explicit and stated views pertaining to the constitution itself. In this way the cohesion of values and the interpretative consistency of the revisionary process can be controlled at any time.

[15] See F. VASSILOGIANNIS, *Constitutional uses of the argument of security of law* (Ph. D. Thesis), Athens 1996 (in Greek), p. 206, also M. KRIELE, *Einführung in die Staatslehre*, Opladen 1990, pp. 145 ff.

D) The self-restriction of the revisionary legislator

The principle of self-restriction of the revisionary legislator is *prima facie* connected to the afore-mentioned principle of continuity. Taking for granted that the amendments to the constitutional text primarily aim at adapting it to the changing social, political and ideological alliances and to historical evolution, without overthrowing the basic structural features of constitutional order, there is no doubt that the revisionary process is restricted by the constitutional limits and it would be non-legitimate to allow revocatory changes in the constitutional system[16].

However, the principle of self-restriction of the revisionary legislator does not simply constitute an expression of the principle of continuity. If the principle of continuity emanates primarily from the fundamental character of the constitution and reflects the commitment of the revisionary function to fundamental constitutional provisions, on the other hand, the principle of self-restriction is linked mainly to the elliptic nature and the duration of the constitutional text.

The general, abstract and elliptic wording, which characterises the entirety of constitutional provisions, constitutes a condition for the endurance of the constitution as a text fostering social consensus and harmonisation of conflicting interests in modern pluralistic democracies[17]. The innate characteristic of historical longevity of the constitution, as expressed by ellipticity and elasticity of the constitutional provisions, especially provisions consolidating rights *lato sensu*[18], provides to the implementor of the constitution the possibility to adapt constitutional interpretation to the changing social reality. The strict character of the constitution implies that it must guarantee security of law and basic legal principles, regardless of the fluctuations in the circumstances and the will of majorities.

A further aspect of constitutional revision, linked to the principle of self-restriction of the revisionary legislator, is the request for preservation and confirmation of the increased normative density of the constitutional provisions, i.e., of their undisputed nature as legally binding provisions. The constitution codifies fundamental rules, basic moral and political principles of a society and the areas of state action, thus shaping a fundamental «legal order» and a «political unity»[19]. Even though the issue of the

[16] E. TOSCH, *Die Bindung des verfassungsändernden Gesetzgebers, op. cit.*, pp. 115 ff.

[17] See K. HESSE, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, op. cit.*, pp. 12 ff.; H. VORLÄNDER, *Verfassung und Konsens, op. cit.*, pp. 180 ff., especially pp. 192 ff.; U. SCHEUNER, «Konsens und Pluralismus», *op. cit.*, pp. 196 ff.

[18] On the distinction between rights stricto and lato sensu see R. ALEXY, «Theorie der Grundrechte», Frankfurt a.M. 1986, pp. 400 ff.

[19] See W. HENNIS, *Verfassung und Verfassungswirklichkeit, op. cit.*, p. 20; K. HESSE, *Grundzüge des Verfassungsrechts, op. cit.*, p. 5.

binding force of the constitution has already been resolved in constitutional theory, nevertheless the reservations concerning the extent to which provisions dealing with relatively new forms of action of the modern state should be included in the constitutional text have not disappeared[20]. In other words, there is a risk that an excessive expansion of the constitutional material might have an impact on its normative density, thus potentially affecting its credibility[21]. The introduction of new, detailed provisions in the constitution, especially an abundance of rights, might gradually lead to their undermining.

The previous thoughts lead to the conclusion that the principle of self-restriction of the revisionary legislator does not only affect his commitment to the structural features of constitutional order, but it concerns three specific domains; First, to safeguard the elliptic nature of the constitutional text, as an element linked with the suggestiveness and ambiguity of its wording, a fact which renders the task of the interpreter more difficult but also more creative[22]. Second, to ensure security of law and the longevity and endurance of the constitutional provisions. Third, to elaborate the provisions under revision in such a manner so that its legally binding nature is not endangered.

The principle of self-restriction of the revisionary legislator is based on the concept that the quest for «regulatory completeness» of the constitution cannot be achieved through the revisionary process, but remains a task for constitutional interpretation[23]. Assigning the task of consolidating new constitutional provisions to the revisionary legislator, with a view to achieving an absolute «regulatory completeness» of the constitutional text, would lead to adulteration of its fundamental and diachronic nature and to the excessive restriction of the implementor.

The obligation to justify the constitutional choices could be highlighted as a specific consequence of the principle of self-restriction of the revisionary legislator. Besides what was maintained while dealing with the principle of argumentative transparency, the invocation of the principle of self-restriction of the revisionary legislator implies by itself the obligation to

[20] See D. GRIMM, *Die Zukunft der Verfassung*, Frankfurt a.M. 1991, pp. 390 ff.; A. BENZ, «Verfassungsreform als politischer Prozess», *DöV*, 1993, pp. 881 ff.; B. JESSOP, «Veränderte Staatlichkeit», in D. GRIMM (Hrsg.), *Staatsaufgaben*, Baden-Baden 1994, pp. 43 ff., and the contribution in the volume: D. GRIMM (Hrsg.), *Wachsende Staatsaufgaben-sinkende Steuerungsfähigkeit des Rechts*, Baden-Baden 1990.

[21] See P. BADURA, *Die Verfassung des Bundesstaates Deutschland in Europa, op. cit.*, p. 25. The relevant discussion has been dealt with in german theory concerning the consolidation of social rights in modern constitutions.

[22] G.-F. SCHUPPERT, «Rigidität und Flexibilität von Verfassungsrecht. Überlegungen zur Steuerungsfunktion von Verfassungsrecht in normalen wie in "schwierigen Zeiten"», *AöR*, 1995, pp. 32 ff.

[23] See R. DWORKIN, *Bürgerrechte ernstgenommen*, Frankfurt a.M. 1990.

formulate convincing arguments related to the necessity to amend, shrink or enrich the constitutional text in a specific way for every individual provision under revision. The self-restriction of the revisionary legislator does not imply a «psychological exhortation», but instead a purely argumentative dimension and aims exactly at fully justifying his choices.

3. PHASES AND JUSTIFICATION OF THE REVISIONARY PROCESS

A) Phases of constitutional revision

Taking into account the previously mentioned principles that govern the revisionary function, it could be argued that the revisionary initiative presupposes the clarification of its peculiarities, as a «constitution-making interpretative process», and the formulation of the analytical phases of the revisionary process.

The flexibility of the content of constitutional provisions according to historical evolution constitutes, first of all, an outcome of its political character[24]. Constitutional revision is the result of historical evolution and the reorganisation of the interelation of powers it consolidates. The assessment of the development and distortion of the constitutional concepts and the identification of the necessity for revision presuppose the interpretation of the constitutional provisions in force. This interpretative process should be fragmental, but presupposes the examination of the consequences of revising each provision in the context of the constitutional order[25].

Seen in this light, constitutional revision is a complex process, which can be analysed in the following interrelated phases: The first phase covers the interpretation of the provisions in force and the identification of the conceptual limits, the gaps and the contradictions in the constitutional text. This means that it is imperative to justify the reasons for the revision, referring both to constitutional reality and constitutional practice as well as the specific social, political and institutional changes. The second phase focuses on justifying specific proposals to reformulate the constitutional provisions under revision inspired by constitutional reality and taking into consideration the consequences of the proposals for the constitutional order. This phase can be further analysed in the identification of the targets

[24] See B.-O. BRYDE, *Verfassungsentwicklung, op. cit.*, pp. 27 ff., especially 81 ff.; C. GUSY, *Verfassungspolitik zwischen Verfassungsinterpretation und Rechtspolitik*, Heidelberg 1983, pp. 10 ff.; M. BLANKENAGEL, *Tradition und Verfassung. Neue Verfassung und alte Geschichte in der Rechtsprechung des Bundesverfassungsgerichts*, Baden-Baden 1987, pp. 176 ff., 400 ff.

[25] See H. EHMKE, *Grenzen der Verfassungstheorie und Verfassungspolitik*, Bonn 1981, pp. 21 ff.; P. BADURA, «Verfassungsänderung, Verfassungswandel, Verfassungsgewohnheitsrecht», in J. ISENSEE/P. KIRCHHOF (Hrsg.), *HdbStR Bd.*, VII, Heidelberg 1992, pp. 57 ff.

of the revision, their specification and the textual reformulation of the provisions. The justification of the proposals is based on the formulation of arguments deducted mainly from fundamental constitutional principles.

The interrelation between the phases of the revisionary process presupposes specific positions of constitutional policy, which are guided by an explicit constitutional theory[26]. The vague invocation of the need for institutional modernisation cannot provide ground for a convincing proposal for constitutional revision. Positions of constitutional policy are necessary as well as their specification through concrete arguments adequately justifying the proposal for revision of constitutional provisions.

The argumentation in favour of alternative options for reformulation of each constitutional provision under revision must be based on specific perceptions with regard to the purpose and function of the said provision within the constitution. The statement of positions of constitutional policy adds transparency and cohesion to the revisionary process and can prove useful in a way analogous to the use of the ratio of a provision in the process of its interpretation. It is obvious that the margin for identification of positions of constitutional policy are clearly broader than the interpretative limits determining the ratio of a provision in force, to the extent that the «decisionary/volontaristic» element of the revisionary process, is more limited within the context of interpreting constitutional law in force. This does not mean, however, that positions of constitutional policy can be formulated arbitrarily. On the contrary, they must be based on a systematic approach of constitutional law in force and constitutional theory.

B) The function of the institutions as an argument for constitutional revision

The application of the constitution in praxis is undoubtedly the most significant indicator determining the necessity for its revision. The weaknesses that have been made evident during the application of the constitu-

[26] For the necessity of a constitutional theory as aprerequisite for constitutional revision see K. EICHENBERGER, «Richtpunkte einer Verfassungsrevision», *ZSR N.F.*, 1968, pp. 441 ff.; K. HESSE, «Grenzen der Verfassungswandlung», in *FS für U. Scheuner*, Heidelberg 1973, pp. 123 ff.; D. GRIMM, «Verfassungsfunktion und Grundgesetzreform», in *same author*, *Die Zukunft der Verfassung*, Frankfurt a.M. 1991, pp. 313 ff., where it is noted that «die Reform des Grundgesetzes läßt sich sinnvoll erst erörtern, wenn zwei Vorfragen beantwortet sind. Es handelt sich um die Fragen, was Verfassungen sollen und was Verfassungen können. Sie hängen freilich eng miteinander zusammen, weil einerseits das Ziel nicht ohne Rücksicht auf die Realisierungsmöglichkeiten bestimmt, andererseits aber die Realisierungspotenz nur in Kenntnis des Ziels geprüft werden kann». On the problem of a choice of a constitutional theory see R. H. FALLON Jr., *How to Choose a Constitutional Theory*, California Law Review 1999, pp. 535 ff.

tion, constitutional gaps, interpretative difficulties and the lack of consensus among the interpreters all constitute motives for the revisionary legislator to proceed with additions, improvements or clarifications.

The adaptation of the constitution to the political and social evolution is not achieved necessarily through revision, but depends on the limits of constitutional interpretation[27]. The intepretative identification of the weakness of a constitutional provision to regulate adequately relevant social or political material implies resorting to the revisionary process. Circumventing or changing the regulatory content of the constitutional provisions in a non-standardized way, as a result of their incongruity towards social and political evolution, is either aphenomenon of constitutional pathogeny or an atypical form of evolution of the constitution that must be taken into consideration by the revisionary legislator[28].

More specifically, in non-standardized forms of constitutional changes, cases of distortion of the constitution, constitutional custom, the concept of the «living constitution» and constitutional practice are included. These are mechanisms for adapting the constitution to historical evolution due to discrepancy between constitution and reality. These mechanisms, circumventing the revisionary process, are classified as constitutionally non-standardized and are unclear.

The interpretation and implementation of constitutional provisions either lead to non-explicit, atypical constitutional amendments or endanger security of law or identify gaps, deficiencies or contradictions in the constitutional text, thus constituting «points of reference» with particular gravity in the justification of the proposals of the revisionary legislator. Even when the distortion of the constitution is legitimate, in other words, when it evolves in the context of the set constitutional limits[29], intervention on the part of the revisionary legislator could be considered imperative, or at least useful. The question put to the revisionary legislator is to what extent constitutional practice, which appears as a precedent and demonstrates a tendency for its repetition can be considered an expedient motive for revision.

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[27] See B.-O. BRYDE, *Verfassungsentwicklung, op. cit.*, passim; C. GUSY, *Verfassungspolitik zwischen Verfassungsinterpretation und Rechtspolitik, op. cit.*, pp. 32 ff.; W. SCHMITT-GLAESER, «Rechtspolitik unter dem Grundgesetz. Chancen-Versäumnisse-Forderungen», *AöR,* 1983, pp. 337 ff.; P. HÄBERLE, «Zeit und Verfassung», *op. cit.*, pp. 88 ff.; K. HESSE, *Grundzüge des Verfassungsrechts, op. cit.*, pp. 32 ff.

[28] See B.-O. BRYDE, *Verfassungsentwicklung, op. cit.*, pp. 111 ff.

[29] K. HESSE, «Grenzen der Verfassungswandlung», in *FS für U. Scheuner*, Berlin 1973, pp. 123 ff.; H. EHMKE, «Verfassungsänderung und Verfassungsdurchbrechung», *op. cit.*, pp. 149 ff.; W.-R. SCHENKE, «Verfassung und Zeit — von der "entzeitteten" zur zeitgeprägten Verfassung», *AöR,* 1978, pp. 566 ff.; E. SCHMIDT-JORTZIG, «Außerkrafttreten von Gesetzen wegen "völliger Veränderung der Verhältnisse?"», *Rechtstheorie,* 1981, pp. 395 ff.

Through constitutional practice an interpretative version is applied[30]. The revisionary legislator is called upon to judge to what extent it is expedient to ratify this interpretative version or to refute it or to leave to the interpreter the responsibility to define and specify the content of the constitutional rule. For instance, the formulation of a constitutional practice in a way so as to render difficult or inadequate its theoretical justification, or the imposition in the future of a different practice, without causing constitutional or political controversy, results in the indirect redefinition of the constitutional rule and must be dealt with, transparently, within the framework of the revisionary process, in order to prevent the risk of disruption in the smooth function of the system of government.

To the extent that the starting point of the revisionary process is the function of the institutions, the revisionary legislator must justify the revisionary proposal in the «real constitution». The «real constitution» is the product of encounter between the formal constitution and «actual, historical reality»[31]. The concept of the «real constitution» synthesises various interpretative versions of the various political subjects and agents of power which form the «open society of interpreters» resulting in a structure that is useful as an interpretative tool which combines constitutional interpretation with the reality of the political system[32]. In this sense, the «real constitution» can become par excellence a point of reference for the revisionary process. This does not mean, however, that individual practices or jurisprudential precedents are placed outside the field of intervention of the revisionary legislator. It cannot be *a priori* ruled out that the revisionary legislator can attempt to change standing jurisprudence or practice through the revision of the critical constitutional provisions.

The revisionary process and the concept of the «real constitution» are by definition indissolubly linked with the concept of the historicity of the constitution. The acceptance of the historicity of the constitution and the exploitation of the concept of the «real constitution» express the viewpoint that the constitution, and law in general, do not possess self-existing value, but perform certain functions. The «real constitution» is an indicator and a

[30] B.-O. BRYDE, *Verfassungsentwicklung, op. cit.*, pp. 139 ff.; D. MAUS, «La Constitution jugée par sa pratique», *RFSP*, 1984, pp. 875 ff.

[31] K. HESSE, *Grundzüge des Verfassungsrechts, op. cit.*, p. 16: «Erst indem das Verfassungsrecht durch dieses (menschliches Handeln) und in diesem verwirklicht wird, gewinnt es die Realität gelebter, geschichtlicher Wirklichkeit formender und gestaltender Ordnung und vermag es seine Funktion im Leben des Gemeinwesens zu erfüllen».

[32] H. RITTER, «Die Verfassungswirklichkeit. Eine Rechtsquelle?», *Der Staat*, 1968, pp. 352 ff.; H. H. RUPP, «Kritische Bemerkungen zum heutigen Verhältnis von Verfassungsrecht und Verfassungswirklichkeit», in *FS für K. Carstens*, Köln 1984, pp. 773 ff.; D. GRIMM, «Verfassung», in *same author, Die Zukunft der Verfassung*, Frankfurt a.M. 1991, pp. 11 ff.; F. ROTTER, *Verfassung und sozialer Wandel*, Berlin 1974, pp. 40 ff.; K. HENNIS, *Verfassung und Verfassungswirklichkeit, op. cit.*, pp. 17 ff.

limit for the revisionary legislator, and especially a barrier against a mechanistic approach of the constitution. The «real constitution», as a theoretical tool that the revisionary legislator makes use of, corresponds to a specific interpretative approach and political praxis, which aims to apply the constitutional text in a manner leading to the reproduction of the legal and political power of the constitution, resulting at the same time in solutions in compliance with the fundamental principles of the legal order.

C) The elaboration of a comprehensive constitutional policy

The attempt to identify the purpose and function of each constitutional provision, deficiencies and weaknesses, the justification of their reformulation, constitute necessary preconditions in order for the revision to not weaken the legal and political functions of the constitution. The relation of the constitution with historical reality is also reflected in the position of the various political powers towards the constitution, towards the function of the institutions, towards the delineation of the competencies of various organs, towards the interpretation that is presupposed by the application of the constitutional provisions by the common legislator, the administration, the courts and the other state organs and towards any eventual need to revise the consitution. At the same time, the attempt to define the content of each constitutional provision is also the starting point for formulating the positions of constitutional policy used as the *ratio* for its revision[33].

The revision of the constitution, as a component in the function of the system of government, is inviolably connected to the basic structural elements of the latter. The study of the revisionary process is, first and foremost, a study of the system of government. The revisionary process must constitute a product of constitutional policy with explicit targets. The term constitutional policy incorporates also the views of the «open society of interpreters»[34], and especially the views of state organs regarding the role and function of the constitution, the regulatory role and the purpose, scope, content, frequency and procedural limits of a revisionary process[35]. The

[33] See C. GUSY, *Verfassungspolitik zwischen Verfassungsinterpretation, op. cit.*, pp. 15, where it is noted that «die Einbeziehung der Realität in das Verfassungsverständnis ermöglicht Verfassungspolitik».

[34] See P. HÄBERLE, «Die offene Gesellschaft der Verfassungsinterpreten», *op. cit.*, pp. 297 ff.; *same author*, «Verfassungsinterpretation als öffentlicher Prozess — ein Pluralismuskonzept», in P. HÄBERLE, *Verfassung als öffentlicher Prozess*, Berlin 1978, pp. 121 ff.; E. BLANKENBURG/ H. TREIBER, «Die geschlossene Gesellschaft der Verfassungsinterpreten», *JZ*, 1982, pp. 543 ff.

[35] See D. GRIMM, «Verfassungsfunktion und Grundgesetzreform», *op. cit.*, pp. 315 ff.; K. EICHENBERGER, «Richtpunkte einer Verfassungsrevision», *op. cit.*, pp. 442 ff.; H. Ehmke, *Grenzen der Verfassungstheorie, op. cit.*, pp. 22 ff.; R. STEINBERG, «Verfassungspolitik und offene Verfassung», *JZ*, 1980, pp. 385 ff.

identification of specific positions guiding and defining the revisionary process constitutes a precondition for certainty, cohesion and credibility.

The formulation of positions of constitutional policy must transcend the level of petty political conflicts as the revision of the constitution can be neither a means to deal with political difficulties or to cover up responsibilities nor a move in political tactics. The elaboration of specific positions regarding the extent and content of the constitutional revision is related to the political philosophy and the political platform of each political party, although it must not be reliant on short term political expediencies.

Any revisonary process must reflect a transparent constitutional policy before identifying the issues that comprise its object and the proposed reforms. The elaboration of positions of constitutional policy presupposes the interpretation of constitutional law in force.

4. COMPARISON OF LAW AS A NECESSARY ELEMENT OF CONSTITUTIONAL REVISION

Every legal text, particularly every text with constitutional quality, evolves constantly, broadening its scope, being enriched or modified, having as a starting point its theoretical processing and intepretation through jurisprudence. According to Prof. Häberle[36], constitutional texts evolve within the context of a common European institutional culture (*gemeinsame Rechtskultur Europas*). The constitution is not simply a legal text containing rules for the organisation and limitation of state authority, but constitutes at the same time an expression of a specific level of cultural development and a depiction of the cultural heritage of a country[37].

The common European legal culture is composed, according to Häberle, of a number of legal principles, which define the type of constitutional state: The constitutional legislator, (constitutional) jurisprudence and discipline constitute in Europe a common legal ensemble (*gemeinrechtliches Ensemble*), which includes the essential elements of the type of constitutional state and especially human dignity and pluralistic democracy, human rights and fundamental freedoms, the rule of law and social justice, local government and subsidiarity, tolerance and the protection of the minorities, regional organisation or federal structures[38].

Constitutional theory assigns a further dimension to the concept of European constitutional culture, maintaining that it binds the contemporary

[36] P. HÄBERLE, *Europäische Rechtskultur*, Baden-Baden 1997, pp. 9 ff.

[37] See P. HÄBERLE, *Verfassungslehre als Kulturwissenschaft, op. cit.*, pp. 19 ff.; *same author, Die verfassungsgebende Gewalt des Volkes, op. cit.*, pp. 59 ff., 84 ff.

[38] See P. HÄBERLE, «Gemeineuropäisches Verfassungsrecht», in *same author, Europäische Rechtskultur*, Baden-Baden 1997, pp. 33 ff.

constituent legislator. According to this view, in the modern constitutional state, the constituent power is not autonomous from historical events and the existing legal culture[39].

This view could also be used in the field of the revisionary process. In order to bring a specific example from the european continent, one can refer to the qualitative transformation of the aims and function of national states and constitutions on the basis of the European orientation of the member states of the European Union and the political dynamics of European integration. Consequently, the revisionary process in the European states can not remain indifferent towards the European institutional culture that is currently under formation. Both the interpretation of the constitution and its revision are directly influenced bythe fact that national legal orders in the European Union are gradually adjusted to the institutional structure of the European Union.

European integration results in a gradual loss of the institutional autonomy of the national states[40]. The constitution is confronted with the broader competencies of the Union and the dynamics of the developing European law. Seen from a different viewpoint, this means that beyond extensive revisions of the constitutions of the member-states, the autonomy of determining the «core» of national constitutions is put in question[41]. At the level of constitutional interpretation the creation of a European Union order requires enriching the interpretation of law in general and in particular the interpretation of the constitution, with a cognitive process that would bring it up to the needs of the new historical reality of Europe. The interpreter must therefore examine the influence of European law on the content of the rule under interpretation, taking into consideration the broader system of European legal culture[42]. According to the afore-mentioned views the revisionary process, as a singular «constitution-making interpretative process», is subject to the «european-friendly» approach when revising constitutional material[43].

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[39] See D. TSATSOS, *Constitutional Law*, vol. II, *op. cit.*, p. 210.

[40] D. TSATSOS, «Die europäische Unionsgrundordnung», in *same author*, *Verfassung-Parteien-Europa*, Baden-Baden 1999, pp. 579 ff.; W. HERTEL, *Supranationalität als Verfassungsprinzip*, *op. cit.*, pp. 25 ff.

[41] See W. HERTEL, *Supranationalität als Verfassungsprinzip, op. cit.*, pp. 106 ff.; M. HILF, «Die Europäische Union und die Eigenstaatlichkeit ihrer Mitgliedstaaten», in HOMMELHOFF/KIRCHHOF (Hrsg.), *Der Staatenverbund der Europäischen Union*, Heidelberg 1994, pp. 75 ff.

[42] D. TSATSOS, *Constitutional Law*, vol. II, *op. cit.*, pp. 288 ff.; *same author*, *Contentious notions of the European Union institutional system* (in Greek), *op. cit.*, pp. 20 ff.

[43] Concerning the term «european-friendly» interpretation (europafreundliche Auslegung) see D. TSATSOS, «Integrationsförderung und Identitätswahrung. Zur europäischen Dimension der Verfassungsfunktion», in *FS für M. Kriele zum 65. Geburtstag*, München 1997, pp. 139 ff.; P. HÄBERLE, «Gemeineuropäisches Verfassungsrecht», *op. cit.*, pp. 34 ff.; *same author*, «Diskussionsbeitrag zum Thema: Der Verfassungsstaat als Glied einer europäischen Gemeinschaft», *VVDStRL*, 50 (1991), pp. 156 ff.

The «step by step analysis» of law, especially concerning texts of constitutional quality constitutes a part of the process of formulation of a common European institutional culture. Particular significance within the context of redefining the content and reformulating the constitutional texts is given to the comparative method, since the process of «step by step analysis» (*Textstufenanalyse*) is understood in the light of a comprehensive European cultural process. As Prof. Häberle points out, «only through this approach to the texts does constitutional theory become a science of legal texts and culture»[44]. Constitutional revision cannot use the comparative method with the traditional rationale, that is simply in order to draw examples from other European constitutional orders, but is subject to the «obligation» to draw elements and cognitive presuppositions for justifying the revisionary proposals based on fundamental concepts and principles that have been promulgated by national constitutional cultures of European states.

The restriction of national sovereignty in view of European integration, but also in view of globalisation and the reinforcement of the institutions of international law, ordains the adaptation of national constitutions through the revision of their provisions and through the abandonment of the narrow and nationally-orientated approach to the constitutional text, both by the implementor as well as by the revisionary legislator. The revisionary process can no longer be justified exclusively in terms of the traditional state and constitutional phenomena. Seen in this light, the comparison of law constitutes a necessary means for the formulation of constitutional policy and the justification of the revisionary process[45].

[44] See P. HÄBERLE, «Gemeineuropäisches Verfassungsrecht», *op. cit.*, pp. 35 ff.

[45] See P. HÄBERLE, «Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat. Zugleich zur Rechtsvergleichung als "fünfter" Auslegungsmethode», in *same author*, *Rechtsvergleichung im Kraftfeld das Verfassungsstaates*, Berlin 1992, pp. 27 ff.