Unfinishing Legislation

Constituent Performativity in the *Charter for Europe*

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The *Charter for Europe* is the attempt to initiate a potential constituent process in Europe. Its aim is to operate as a critique of and a counterproposal to the disposition of the politico-economic union of Europe. In order to do so, the Charter develops positions regarding our current political situation. Work on the *Charter for Europe* began at the conference *The New Abduction of Europe: Debt, War, Democratic Revolutions,* which took place in Madrid from February 27 to March 1, 2014.[1] In five different working groups, conference participants – mostly artists and activists – worked out the conception of the charter and a preamble. A first version of the charter was released following the conference, and then disseminated, discussed, and further developed over Skype, Mumbles, and a wiki. During *The Art of Being Many* in September 2014, the charter was presented and discussed in the panel *Real Fictions*. This publication includes the charter in its current state as of November 15, 2015. The charter consists of a preamble and five sections in which the following themes are discussed: democracy, income/debt, commons, governance, and citizenship/borders.

In what follows, I would like to read the charter as a contribution to a constituent process in Europe. Taking the concept of *real fiction* as a starting point, I will deal less with the concrete contents of the charter and more with

1 http://www.museoreinasofia.es/en/activities/new-abduction-europe, accessed October 10, 2015.

the performative aspects of the text itself. The expression *real fiction* relates reality and fiction to one another but also reveals a tension between them. It refers to the role of the imaginary in every experience, and to the real effects of every fiction: A *real fiction* is only invented and yet completely real. According to Jacques Rancière, the real must be fictionalized so that it can be thought. He explains that »the ›logic of stories‹ and the ability to act as historical agents go together. Politics and art, like forms of knowledge, construct ›fiction‹, that is to say *material* rearrangements of signs and images, relationships between what is seen and what is said, between what is done and what can be done« (Rancière 2004: 39). The reality-changing potential of fiction is significant here as well. The *Charter for Europe* gives itself the form of a charter, and thus evokes associations with state and international legal dimensions. At the same time, however, it lacks legal obligation and legitimation, as well as any power of enforcement or validity. Below, I consider this strategic pretense and its *real fiction,* the presentation of the *Charter for Europe* in relation to the sphere of politics and the political. The aim is to reflect on the role of aesthetics in the political of constituent and constituted acts. With Walter Benjamin, I will differentiate lawmaking and law-preserving acts, a distinction Jacques Derrida both resumes and undermines. The blurriness of both acts leads to the necessity of a legal practice that can be described with Antonio Negri as a continuous constituent process, which allows for the possibility of a continuous renegotiation and thus has the potential to politicize.

In what follows, the role of fiction and the potentials of art as a practice of fiction will be of particular interest. I will begin with a brief introduction into the genealogy of the form of the charter itself and then address the issue of the preamble, which is placed before the law and, for reasons of the general validity of the law, tells the story the law itself may not contain.

THE FORMAT OF THE CHARTER

The term ›charter‹ designates fundamental documents of state and international law; in a broader sense, it also refers to the bylaws or commitments of non-governmental organizations. The early medieval form of the *charta* can be distinguished from the *notitia*: The charter is a dispositive certificate, it applies new legislation through the *traditio cartae,* in the moment of the

transfer of handwriting, while the *notitia* is a record that confirms the enforcement of a legislative act (Brunner, 1880: 20-21).[2] In the *notitia,* or record, the time of action precedes that of documentation, while in the dispositive charter, the time of action cannot be differentiated from that of recording, to the extent that such dispositive documents are called »acts« (cf. Taylor 1988: 459). Thus, as a rule, the charter is formulated in the first person, present tense, while the *notitia* is formulated in the third person, past tense. The performative textual strategy that underlies the charter's textual form creates the impression of presence and eventful implementation, not only documenting the event but simultaneously inventing it through an action. As a result, the charter in its traditional form is better described as a lawmaking document, rather than a document that preserves legislation.

In keeping with the charter's customary form, the *Charter for Europe* is written in the first person (in the plural in this case, not in the singular), and the present tense dominates. Yet the »we« that speaks is explicitly defined as unfinished and process-related. Descriptive sentences present a way of reading the current crisis in Europe that often contradicts the hegemonic presentation of this situation. Performative statements are used in an illocutionary manner, thus carrying out an action: »We rise up against all this« (*Charter for Europe,* 2. section). Self-contradictions can also be found in the wording of the charter, e.g. holding fast to a concept that is on the one hand to be newly invented, and on the other hand meant to be transformed (»Hold on to this concept. Hold on to its reinvention. Hold on to its transformation«, *Charter for Europe,* 4. section) – adhering to change. The *Charter for Europe* does not institute, it does not determine, instead it remains unfinished in its form, imagining a permanent constituent process that will not be coopted by a constitutional fixing. Here, the *Charter for Europe* breaks away from its legislative character. In the next section, with Walter Benjamin and Jacques Derrida, I will differentiate more precisely between lawmaking and law-preserving acts.

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2 »Because the originator of a carta makes an ordinance with it, and finalizes a legal action, he introduces himself into the document as speaking and acting in the present, with an ego vendu, etc. The notitia, which is merely recorded for the purposes of evidence, has the tone of historical narration, of a report.« (Brunner 1931: 463. Translated by Sage Anderson) On the history of the charter cf. Kramer 2011: 112 and Breslau 1912-1915.

LAWMAKING AND LAW-PRESERVING VIOLENCE

Conceptual tensions in Benjamin's work between the violence (*Gewalt*) of making and preserving laws are significant in this context as they relate to questions of legitimacy and sanctioning that also play a role in the charter. These concepts – and their tensions – can also be carried over to the relationship between performativity and institutions.

In his 1921 essay »Critique of Violence«, Walter Benjamin (1986) considers how violence, law, and justice stand in relation to each other. Benjamin defines violence as intervention into people's ethical and moral affairs. The concepts of law (*Recht*) and justice (*Gerechtigkeit*) define the sphere of ethical and moral affairs. They are indissolubly intertwined. Benjamin distinguishes lawmaking violence from law-preserving violence. Repeatedly and institutionally, courts and police exercise law-preserving violence in order to maintain the binding force of the law vis-à-vis the people whom they govern. Lawmaking violence introduces a legal order. This act of legislative creation is not legitimized by another, existing law; the conditions for legitimizing procedures are self-produced. Retroactively, so to speak, it posits that something »will have been law«. Law-preserving violence and lawmaking violence are thus closely tied up with each other, propelled by one and the same mechanism, because legislation is only upheld in that it is asserted again and again as binding: The legislative act must be repeated along with every law-preserving act, because the violence of the law must always anew fend off other forms of violence. Benjamin calls this legal violence mythical: »The mythical manifestation of immediate violence shows itself fundamentally identical with all legal violence«. (Benjamin 1986: 296) With Benjamin's essay in mind, it is possible to pursue the inquiry into the constituent process. In a specific societal system, how does an alternative, democratic power emerge that facilitates a break in, or antagonism to, the existing political order without perpetuating the arbitrariness and violence of implementation and the history of sovereignty?

The distinction between lawmaking violence and law-preserving violence is further deconstructed by Derrida. In his reading of Benjamin and the »mystical foundations of authority«, Derrida characterizes the inherent violence of every foundation:

> Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are a violence without ground. […] They exceed the opposition between founded and unfounded. (Derrida 1992: 14)

The establishment of law is itself a violent act that cannot be self-substantiated. It is only accessible retroactively, in the mode of mythical narration as carried out from within the present order. This argument is particularly strong in Derrida's reflections on the Declaration of Independence of the United States of America (Derrida 2002). The act of the declaration of independence (and every constitutional lawmaking act) is not solely descriptive or declarative; it rather accomplishes what it announces. »The declaration that founds a constitution or a state already includes the binding pledge of the signatory« (ibid: 122)[3]. An institution must make itself independent from the empirical individuals who have brought it forth, while at the same time preserving the act of foundation – act as archive and act as performance. The people in whose name the signature is made does not exist before the declaration; through the signature, this people brings itself into the world as free and independent subject. »The signature invents the signatory« (ibid: 124). It is only the signature that authorizes one to sign: The representative will be legitimized only after the fact. A coup that founds legislation, that brings a law into the world (ibid: 125). To approach the performative character of this, we can revert to the aesthetic practice of theatre: Then, this act can also be described as a staging technique. The subjects (the people to come) speak themselves into being, and for this, they require certain conditions of success. The subjects of the performance are first of all produced by its frame. A fiction thus resides at the core of every legislation; it is always illegitimate and fictional. Yet through this assertion, the fictional may potentially establish itself as fact.

Both a declaration of independence and a charter may obtain legal force (for example the *Charter of Fundamental Rights* of the EU), but a charter frequently takes the form of a statement of intent. The indistinguishability between a performative and a constative structure, which according to Derrida is essential to the effect of the declaration of independence, is also laid out in the form of the charter, in which the act of creating legislation cannot be distinguished from the documentation (Derrida 2002: 124).

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3 This quote and the following ones translated by Sage Anderson.

The *Charter for Europe* has editors who are writing it, but no one who signs; additionally, the number of editors is potentially endless. The ›we‹ means something other than the signatories, yet it remains open and performative – no declaration ›in the name of the people‹, no representative structure. The ›we‹ exists only *with* the declaration, and, describing itself as unfinished, it self-effectively produces itself as a new, unprecedented ›we‹: one that is on the way, that tries to think itself from its own borders, from its own exclusion (»Challenging citizenship in Europe is perceiving it ›from the border‹ itself«, *Charter for Europe,* 19. section). Such a ›we‹ relates to the question of the few and the many: The charter presupposes ratification by the many; the many are the auto-fiction of the few, who in the future will have proven themselves as the many (or not).

THE CHARTER AS CONTRIBUTION TO A CONSTITUENT PROCESS

The categories of lawmaking violence and law-preserving violence as differentiated by Benjamin become indistinguishable in Derrida's writing. Antonio Negri, who grapples intensively with constituent power in several works, makes it clear that this indistinguishability can lead to a new conception of *pouvoir constituant*.[4]

Antonio Negri developed the concept of »constituent power« in his 1992 book, *Insurgencies: Constituent Power and the Modern State.* According to Negri, constituent power is the force that propelled the modern Euro-American revolutions (for example the US-American, French, Russian revolutions), an aspect they have in common despite their ideological disparity. This force is to be differentiated from constituted power, the power that is already factually established. In his investigation, Negri shifts his view from the constitution and the passing of the constitution to an unlimited process. Constituent power brings about a new order of legitimation, which in earlier times would have been established with reference to divine power or power based

4 The distinction between *pouvoir constituant* and *pouvoir constitué* goes back to Abbé Sieyès. Cf. his text from the beginning of the French Revolution, »Qu'est-ce que le tiers état« (Sieyès: 2002).

on ancestry. While constituent power is frequently seen solely as a temporally limited process and as legitimation for newly constituted power, Negri sees possibilities for constituent regulation of societal constitutions that could keep a continuous constituent process running, even after the supposed end of revolutionary events. The idea of a continuous constituent process can also be described in Derrida's vocabulary as a practical consequence of the indistinguishability of lawmaking violence and law-preserving violence (which is already laid out less explicitly in Benjamin). If legislation is to persist beyond the instance of constitution, it must posit over and over again the law that is to be upheld; lawmaking violence must become law-preserving violence. With his conception of constituent power, Negri distances himself from the juridical conception (Negri 1999: 1): His definition of constituent power is opposed to the becoming of the constitution. Negri refers to the French philosopher and politician of the Enlightenment and Revolution, Jean Antoine Condorcet. Condorcet's statement, »One generation does not have the right to bind a future generation by its laws, and any form of hereditary office is both absurd and tyrannical« (Condorcet 1994: 61), found its way into the revolutionary constitution of 1793. Negri takes this challenge literally and thus goes far beyond the former meaning of *pouvoir constituant.* (Negri 1999: 209). On the one hand, constituent power has the capacity to emerge not only from constituted power, while on the other hand it also does not forcibly institute constituted power (cf. Raunig 2007).

Every constituent power always remains limited and produces exceptions. And every constitution solidifies specific relations of power and sovereignty. A constituent process must make these exceptions and limitations visible again and again, without relinquishing the goal of concrete changes and the search for possibilities of modifying existing power structures. To this end, factually established power provides only few, limited options and instruments; yet the constituent process must aim to reach beyond the established system of governance rather than choosing between these available means (cf. Lorey 2008). In its preamble, the *Charter for Europe* responds to this problem of a constituent power.

PREAMBLE

To conclude the interpretation of the performative in the *Charter for Europe*, I will look at the preamble that determines the conditions of the reading of the charter. Preambles are introductions that are placed before legal texts. They have no immediate legal force; rather, they assist in the interpretation of a constitution, law, or contract. Premises are delineated, motives described, and historical context recalled; thus they contain something that the law itself is not permitted to contain, because the law only gains its authority when it is »without history, without genesis, without possible derivation« (Derrida 2006: 49). In this way, preambles are barriers that keep historicity and narration outside of the law and mediate access to the law (Vismann 2000: 39).

The preamble is the constitutive ›before‹, the stage direction ahead of the performative that sets the conditions under which the speech act can be felicitous. In the *Charter for Europe* it sets up a specific way of reading the following text, a reading that makes it possible to think of a political reality that is composed differently. The ›we‹ that shows itself here as constituent power is not nationally rooted, it has no sanctioned agency, but instead it is developed by those who fight for codetermination. This ›we‹ defines itself in a performative process, in moments of encounter.

CONSTITUENT PROCESSES BETWEEN FACTUAL INSTITUTION AND ART

What is it that we make decisions about in the democratic process, the instrument of our collective self-determination? What is up for negotiation, and what is already fixed in place? Which decisions are even located in the sphere of the political, and what is withdrawn from politics? In short: How is our constituent capability composed? With a view to actual political practice, the concept of constituent power seems to be far removed from the current disposition and *Realpolitik*. In representative and direct democracy, free elections or votes play an important role, and still there is growing resentment about the deficit of representation (cf. Blühdorn 2013: 14), symptoms of crisis are increasing (sinking voter turnout, less control over markets and enterprises [cf. Crouch 2008 and Agamben et al. 2012]). The administrative unit

of Europe confronts us with political conditions that are no longer consistent with the schemata of lawmaking and law-preserving, or constituent and constituted. Important components of polity are further excluded from the constituent process (for example in relation to the institutional democratic deficit of the EU[5], or through contracts of international law like TTIP, which introduce investment arbitration that can be bypassed by the courts in unverifiable ways). The EU is constituted without constituent process (»We have faced a radical transformation of the EU which now has become clearly the expression and articulation of capitalist and financial command.« *Charter for Europe, Preamble 2.*).

How are constituent processes possible at all in this respect? It seems that in the first place we must produce the conditions that we need in order to come together and communally assess how we want to live, and how we can communally implement these decisions: the conditions for politics. Christoph Menke defines politics as an action in which collective self-government is accomplished. With the emergence of capitalist economy in particular, political power is taken away from wide areas of society; communal self-governing is not possible. Politicization is action meant to produce the possibility of the political in the first place. Menke does not look for this process in the coup of a revolution or in the declaration of independence, but on a smaller scale. He relates it to art as the production and the positing of a fictional world that is seemingly self-sufficient and removed from *Realpolitik*.[6] If art,

5 Mandates are transferred from member states to European Communities; yet these Community-level mandates are applied by institutions other than the European Parliament, even though before the transfer the national parliaments had the mandate to pass laws in the affected areas. The Council of Ministers of the European Union consists of members of the respective national governments. On the Council, the division of power between (supranational) legislative and (national) executive is not guaranteed. With the formation of a sufficient majority coalition, national governments can be put into position to introduce EU laws without national parliamentary control (cf. Toussaint-Report 1988 [PE DOC A 2276/87]).

6 With Menke, one could ask whether the form of constituting that he sees in art can coexist with already constituted legal systems. Further, one could ask whether it is possible to read Negri in such a way that the constituent within the constituted is an aesthetic practice, which, coming from what is particular in the field of art, could be effective again in the field of *Realpolitik*.

according to Menke, is not a medium in which we can communally govern or lead ourselves, it can still be an instrument of politicization and the production of the possibility of political action. Politicization cannot only aim to be successful; it is not only a means to an end or mere tactics, just as little as politics can be solely ethics, a distant ideal. Here, the fictionality of lawmaking takes a positive turn as an act of political emancipation. Every act of politicization must therefore »contain within itself a pretension, an uncovered claim: the pretension to already be politics; the uncovered claim to already actualize the freedom of political self-governing, here and now.« (Menke 2006: n.p.)[7] The *Charter for Europe* can be read as such a pretension.

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7 Translated by Sage Anderson.

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