The Identity of Europe's Constitution(s)

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The Identity of Europe's Constitution(s)*

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1. Introduction

In this essay I reflect on conceptual aspects of the theme of identity and constitutions in Europe, and apply to the question what could make for a *European* constitution.

When we reflect on constitution(s) and identity, three different but closely interrelated questions arise, that each concern one dimension of the theme:
What identifies a constitutional order?
What is the identity of a constitutional order?
What identity does a constitution confer?

The first question concerns the dimension of what makes for a "constitution"; in other words, what is typical for a constitution in terms of what a constitution does. It is about when we can recognize what it does as, at least in this functional sense, a "constitution".

The second question is about the kinds of constitutions one can distinguish in Europe.

And the third question concerns the issue of the distinct identity that a particular constitution may confer on a political community.

In this essay I focus in particular on the second question, but not without going into the others briefly as well.

I take my cue in the two very different, and at first sight somewhat puzzling responses which the national electorates of France and the Netherlands respectively gave to the question whether a European Constitution is essential to the construction of Europe, immediately after the defeat of the Treaty establishing a Constitution for Europe[1].

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* This paper relies on some of the thoughts first developed in *The Notion and Nature of the European Constitution after the Lisbon Treaty* in: *European Constitutionalism beyond Lisbon*, Jan Wouters, Luc Verhey, Philipp Kiiver (eds.), Uitgeverij Intersentia, 2009, pp. 261-281. Contribution for the Proceedings of the VIII Annual Conference of Diritti Comparati "Costituzione e identità nella prospettiva europea/Constitution and Identity in the European Perspective", University of Roma 3, November 10th 2022.

[1] OJ 2004, C 310/1.

2. Is a Constitution essential for the further development of European integration?

As is generally known, the Constitution for Europe Treaty was rejected first in France with nearly 55% of the vote on 29 May 2005, and with nearly 62% of the vote on three days later in the Netherlands. An Eurobarometer opinion poll took place in both France and the Netherlands in the days immediately after the vote.[2] One of questions concerned the voters' view on the importance of an European Constitution for the future development of European integration. The question was in both countries the same:

"*Do you tend to agree or to disagree with the statement "The European Constitution is essential in order to pursue the European Construction"?*".

In France, no less than 90% of those voters who had voted *in favour* of the Constitutional Treaty agreed that a Constitution was essential, as is understandable. Also two thirds (66%) of those who voted *against* the Treaty found that a Constitution was essential. In both groups of voters, therefore, a large majority found that a Constitution would be essential for further building towards European integration. In the aggregate, 75% of all the French voters in total found that a Constitution is essential for pursuing the project of European integration, only 21% found it is not[3].

In the Netherlands, to the contrary, of those who voted against, two thirds (66%) found that a Constitution was *not* essential – so that means, they found that also *without* a Constitution it would be possible to pursue the European construction. Perhaps more surprisingly, of those who were in favour of the European Constitution, more than a quarter (27%) found a Constitution was *not* essential to the European construction. In the aggregate, every second Dutch citizen (50%) does not think that the European Constitution is essential in order to pursue European construction, and a smaller number (41%) thinks it is[4].

In summary, the clear majority in France found that Europe needs a Constitution if it wants to develop European integration further. In the Netherlands, the opposite is true: half of the voters – a relative majority – finds that also without a Constitution the European Union can further develop. This is an intriguing finding. The only explanation is that there is a fundamental difference in understanding of what constitutions do, and also a different understanding of the concept of a constitution itself.

3. What identifies as a constitution?

Many approaches are possible as to what makes for a constitution. From a functional point of view one may say that constitutions do three things:

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[2] *The European Constitution: Post-referendum survey in France*, 30-31 May 2005, Flash Eurobarometer 171; *The European Constitution: post-referendum survey in The Netherlands*, 2-5 June 2005, Flash Eurobarometer 172.

[3] Flash Eurobarometer 171, p. 23.

[4] Flash Eurobarometer 172, p. 21.

- They have an institutive (or constitutive) function: a constitution constitutes the institutions of the body politic (or it may recognize pre-existing institutions together being constitutive for the body politic);
- They have an attributive function: a constitution attributes the institutions with powers; it empowers them;
- They have a regulative function: they regulate how the powers that are attributed to the institutions of the body politic must be exercised.

Usually this is not considered enough. Among other features which are required before one speaks of a constitution is a certain breadth of scope of the powers wielded by the instituted institutions. Moreover, a certain autonomous power centre is entailed, to decide its ultimate fate – sovereignty and constituent power are the classic names of this power. A related element in what makes for a constitution is that it determines and often regulates explicitly or implicitly the claim to the monopoly of the legitimate use of violence, although this brings the notion of the constitution and that of the state into close affinity. Culturally, this understanding of constitutions as pertaining exclusively to states is more widespread on the European continent than in countries in the periphery of Europe, as I shall presently explain.

4. What is the identity of constitutions; or, what kind of constitutions can we identify?

At the risk of oversimplifying, it may be helpful to distinguish European constitutional traditions on the basis of two ideal-types: the evolutionary and revolutionary traditions, in order to understand differences in the meaning attributed to "constitutions"[5]. I must emphasize that this distinction abstracts from historical developments, which makes the application of the distinction on historical realities somewhat difficult. Yet, caricatures bring out significant features of what is depicted. That may suffice as a justification for the purpose of this paper.

Typical features of the revolutionary type of constitutions are their ambition of the constitution as a blueprint for society. They are to a very large extent the product of political disaster, such as the "contrasting experience" of a devastating war, a famine, tyranny, an all-out revolution that breaks with the past. The constitution takes as an approach to such a formative event, that it somehow has the (sometimes hidden) desire to create a "clean slate", with the temptation of an "end of history", or future without history. Those cataclysmic events at the basis of revolutionary constitutions often acquire the role of "motivating myth", the "imagery" that informs the constitutional order. In these "revolutionary" constitutions, the "constitutional moments" are of great importance, an

[5] Famously, the theme of "constitutional moments" in Bruce Ackermann's work makes the "revolutionary" nature of constitutional change a central aspect. In a certain sense, therefore, the distinction made in this paper borrows from this body of literature, even though the distinction we draw here, diverges on a number of points from what someone like Ackerman would find legitimate, for reason of its abstraction from concrete historical developments.

within their traditions the constitutional notion of the *pouvoir constituant originaire* tends to take a prominent place.

The evolutionary type of constitution tends to be based not on the idea of the constitution as a blueprint, but rather a reflexive model. Constitutional history is viewed as incremental process which is viewed as the accumulation of historico-political wisdom. Of course political disasters occur, even revolutions, but these are taken up into the longer term constitution, the *longue durée*. In these evolutionary constitutional traditions, there often is no identifiable *pouvoir constituant originaire*: for the British the question which is their "original constitution" is meaningless and a question that cannot really be answered. There is no identifiable *pouvoir constituant originaire*, and also sovereignty is viewed as applicable only to the sphere demarcated by the constitutional framework itself; it is not absolute but relative.

If we would make an attempt to categorize existent constitutional traditions on the basis of this binary distinction, then I would say that examples of "old" historic, evolutionary constitutions are typically the British constitution, but also (most) Nordic, Swiss and Dutch constitutions. Examples of the "modern" revolutionary constitutions are typically the US and French constitutions, but also the German (with its unwritten motive *Nie wieder*), the Italian and Irish constitutions. As regards the European Union, the evolutionary constitutions we tend to find more in the geographical periphery of the Union than the revolutionary, which dominate the continent.

5. What constitution for Europe for what kind of European Union?

If we want to reflect on the type of "constitution" which the European Union has, we first need to ascertain, at least in a preliminary manner, that indeed a case can be made for speaking of the European Union as having a "constitution" at all. This would, at least at this preliminary stage, only be possible if we disengage the concept of a "constitution" from the "state". A justification to do so, I submit, is by taking our cue from the nature of the power that is exercised by the Union, in light of the three typical functions of constitutions identified above. I take the view that the powers exercised by the Union are in their nature no different from those of the state. The powers the Union exercises on a day-by-day basis over subjects (natural persons, citizens, and public and private corporations) is the exercise of in essence unilateral power. The lawfulness of each exercise of the Union's powers is not conditional on and independent from the consent of a subject with that exercise of power in particular cases; those powers can be enforced against the will of subjects. In other words, obedience is presumed, just as is the case with state authority being exercised over subjects.

The constitutive documents of the European Union, and the law governing them, moreover, have the three functions that constitutions have: they constitute the institutions, empower them, and the exercise of those attributed powers is subject to norms regulating their use (in particular, but not only, fundamental rights and other fundamental norms of primary law, including general principles like proportionality).

If we would categorize the Union's constitutional order, understood in this sense, in terms of the distinction between the two constitutional traditions distinguished, the European Union easily ends up in the category of the "evolutionary" constitutions.

The original "motivating myth" of the EC was closely related to the experience of the disasters of the Second World War and the fascist and nazi experiences leading up to them. At any rate the earlier stages of European integration must be understood in terms of the post-war peace project. People like Jean Monnet were animated by the idea of overcoming the historical mutual animosity between France and Germany, that lies at the root of so many earlier devastating wars in Europe, including WW II.

Perhaps, though, it is right to say that, pretty much from the start, European integration was not only a peace project only, but also a political project aimed at securing democracy as the basic principle of European political culture and civilization. Not only there were the various invocations of democracy as the spirit of the European project in the various documents at the basis of European integration[6], but also in political practice, where e.g. applications for membership or association of Spain and Portugal under their fascist regimes were for that very reason rejected[7].

In a sense, this turn from peace to democracy as the motive of European integration has subsequently been confirmed by the accession of precisely these two countries and Greece after their re-establishment as liberal democracies. The round of accessions of Central and Eastern European member states in 2004 reconfirmed this, even though the formative "contrasting experience" was 40 years of a totalitarian experience that was different from the nazi and fascist experience[8].

The differentiation of founding experiences is even more pronounced with the accession of the UK, Austria, Denmark, Sweden and Finland. To the extent that it was a shared experience, WWII lay too far into the past to be able to have motivating force. For the UK this was probably most particularly the case. No contrasting experience informed the desire to participate in the project of European integration[9]. It was, one can say, a motive of economic politics (or political economy) that made it opportune for these states to become a member of the EC. This was the case as well with the other member states intended here.

These differentiated and diverse motives create the need for reflection on the nature of "constitutional motives" in the constitutional development of the Union, also in light of the phenomenon of pretty large-scale constitutional backsliding in some of the member states, which the Union seems to be unwilling to tackle seriously, if we judge by the inaction of the Council in particular on the triggering of the mechanism of Article 7 TEU.

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[6] Notably the preambles of the Statute of the Council of Europe, 1949, and the European Convention of Human Rights, 1950.

[7] Convincingly R. Janse, *The evolution of the political criteria for accession to the European Community*, 1957-1973, in *European law journal: review of European law in context*, 2018, vol. 24 (1), p. 57 ff.

[8] This applies also to Romania and Bulgaria, but not to Malta and Cyprus.

[9] The experiences between these states differed of course. For Austria, for instance, the experience was dramatically different from that of the others, and informs its constitutional motive of "eternal neutrality" in a way that makes the motive for joining the Union a primarily economic one.

This casts a shadow of doubt on the centrality of the motive of guaranteeing liberal democracy in Europe.

This doubt is not dissipated by the reduction of the phenomenon of "backsliding" to a "rule of law" problem. This reduction identifies the problem insufficiently as a problem of democracy. I do not think that the constitutional problem really is one which mainly concerns a problem with the judiciary and legal certainty. Describing the rule of law problem as a judicial problem which threatens mutual recognition and mainly constitutes a problem for the functioning of the internal market[10], is denying the political nature of the problem.

Doubts as to the Union's commitment to democracy are neither dissipated by making Ukraine a candidate member state. Yes, it is quite clear that it is a war fought since 2014, is a response to a severe and violent threat to the democracies of Europe, and that this threat can only be removed by restoring Ukraine's territorial integrity and its internationally recognized borders. Under the present circumstances creating a prospect for linking Ukraine to the West, which should show the highest degree of political and practical solidarity with the Ukraine against Russian aggression, is politically most understandable, and geo-politically an important move. But let's not deceive ourselves in thinking Ukraine has been a democratic state for the simple reason that its presidents from after the Maidan Revolution have been democratically elected. This would be closing one's eyes to the entrenched role of oligarchs across the political spectrum and the context of a totally corrupt parliament also after that revolution; nor the fact that the executive has held unfailingly held to the standard of refusing to carry out the judgements of the European Court of Human Rights, leading the latter to strike out and to transmit to the Committee of Ministers no less than 12158 cases concerning a failure by Ukraine to comply with its judgements[11]. Speaking of "back-sliding" is inappropriate because it is not as if Ukraine has had a political system that can be said to live up to standards of a democracy under the rule of law that the membership of the EU is to guarantee. So yes, the European Union and democratic states should do all they can to strengthen the rule of law, the judicial system and democracy in an Ukraine at war; the deeply entrenched corruption not only in economics but firmly rooted in politics must be combatted in a way different manner from the half-hearted attempts of the past; transparency must become a general constitutional principle and an actual practice of government; compliance by public authorities to court judgments, and other preconditions of democracies must be created if Ukraine really wants to become a democracy at some stage so that it might become a member of the Union.

[10] Vice-President Timmermans, in the context of (non-)observance of the rule of law in Poland as regards the judicial independence, called the rule of law a «prerequisite for the proper functioning of the internal market», and of the "mutual trust" that is needed for «an investment and business friendly environment» LIBE Committee meeting 21 March 2017, On the Rule of Law in Poland: state of play *europarl.europa.eu* at 9 minutes, 17 seconds and 58 minutes, 8 seconds. In nearly identical terms, repeating the argument as to the importance of judicial independence for the functioning of the internal market three times over, in the EP plenary debate of 14 December 2016, *europarl.europa.eu*, at 16:18':01". No link was made to broader constitutional backsliding or democracy. See *Talking about European Democracy*, Editorial, *European Constitutional Law Review*, 13(2), June 2017, p. 207 ff.

[11] See ECtHR, 12 October 2017, *Burmych and Others v. Ukraine* (applications nos. 46852/13 et al.).

But it is unlikely that the war is the most propitious environment to do so, unless it creates a constitutional moment for the Ukraine itself as a turning point to real democracy under the rule of law.

6. Constitutional moments and *pouvoir constituant originaire*

Apart from doubts about constitutional *motives* for European integration, also doubts concerning the "constitutional *moments*" of the Union can be raised. Certainly, its constitution is the result of incremental piecemeal development like in evolutionary constitutional orders. It is this precisely this evolutionary nature of the Union's constitution which relativizes the importance of constitutional moments. There is no clearly defined moment that is *the* constitutional moment. It is rather a series of moments that explain the incremental constitutional development. This is reflected in the events as they have been unfolding in the decades after the abortive Constitutional Treaty. The Union seems to stumble from crisis to crises – as it actually always has, with well-known highlights from the empty chair to the Fall of the Wall.

The Union not merely stumbles from one crisis to another crisis. It seems to learn as well. The gross mistakes made in coping with the banking *cum* financial *cum* fiscal crisis from 1008 onwards have not been repeated in the crisis resulting from the pandemic. The failure to seize the moment for reform of the Union's monetary, financial and economic governance structures might, as a consequence at some stage create sufficient constitutional moment not only to rethink the economic constitution of Europe, but also to amend it precisely on the point of its political governance. So constitutional moments can occur, but not necessarily in the revolutionary sense given it by Bruce Ackerman.

This point is not unrelated to that of the difficulty of identifying a *pouvoir constituant originaire* of the Union. One can say that the constituent power belonged to the original member states. This is the view of the *Bundesverfassungsgericht* in its *Lisbon* judgment: «The peoples of the Member States are the holders of the constituent power»[12]. But to me this seems unsatisfactory, in as much as this language is too much a retranslation of the treaty making power into constitutional language of constitutional making. Did the *original* constituent power belong to the six original member states to which the latter acceding states simply acceded as in constitutional amendment through a *pouvoir constitué* or should we conceive of the Union at each accession as a newly constituted entity?

Both views are unsatisfactory. The usual Accession Treaties indeed created transitory regimes into the framework that was actually established by the previous member states. Only the moment in time of the enlargement of 2004 coincided with the

[12] Cf. BVerfG *Lisbon* judgment, Press Release 30 June 2009, Urteil vom 30. Juni 2009 2 BvE 2/08, nr 1, last paragraph; original German version: «*Die Völker der Mitgliedstaaten sind Träger der verfassungsgebenden Gewalt*». Interestingly, this wording does not recur in that form in the judgment itself. The closest to this comes para. 235: «*Der unübertragbaren und insoweit integrationsfesten Identität der Verfassung (Art. 79 Abs. 3 GG) entspricht die europarechtliche Pflicht, die verfassungsgebende Gewalt der Mitgliedstaaten als Herren der Verträge zu achten*».

process of the constitutional convention drafting the Treaty establishing a Constitution for Europe in which the candidate member states participated. It was this Treaty in which also these future member states participated that, after the rejection of that Treaty, with relatively few fundamental changes eventually materialized in the Lisbon Treaty. This may have been the only occasion on which one can say that all the (eventual) member states co-created on a more or less equal footing in the establishment of the newest version of the Union's founding documents – albeit the *amendment* of founding document. But this is only temporarily so; as soon as another member state would accede, this would simply have to accept the constitutional *acquis* established by the previous member states. So the conclusion must be that the whole doctrine of constituent power which was developed in French revolutionary does not to apply to the Union.

Can we do without a strong concept of an identifiable constituent power which is at the origin of the polity? Can we do without single identifiable constitutional motives and moments? The existence of effective constitutional orders which do without - the ones we called "evolutionary" - proves it is indeed possible. It is a matter of accepting a different kind of constitution, one around which it may be more difficult to rally than the revolutionary ones. But this need not stand in the way of its effectiveness and general loyalty and legitimacy, as the existent "evolutionary" constitutions of several of the member states prove.

7. Constitution and Identity

Although it is not my intention to delve into the question what the identity is that is conferred by a constitution for Europe, I make some general remarks. These do not so much regard the question what the EU identity is, in the manner in which one could pose the question: what is the constitutional identity of France that makes it distinctly French? Not that this identitarian question is totally irrelevant at all times. The Court of Justice has embarked on this kind of exercise, for instance in the infamous *Opinion 2/13*, setting out the distinct and unrescindable constitutional features of the European Union[13,14].

In order to avoid going into issues that are the object of contributions of other papers, I would merely like to stress two points. One is the autonomy claimed by constitutional orders, and the other is the distinction of the Union from states, which to my mind resides in its lack of claiming a monopoly to the legitimate use of violence.

[13] Paras. 166 ff.

[14] Whereas in this Opinion the aim was to set the EU apart as an international organisation which from the perspective of public international law cannot be considered a state, and the identity of the Union in terms of its particularities, in particular the ECJ's autonomy and primacy, its statement in its parallel judgments on Hungary's and Poland's actions for annulment of the Regulation on Conditionality, had a different intention, to wit, to declare the Union as one common legal order with the member states orders: here it declared the founding values of Article 2 TEU to express «the very identity of the European Union as a common legal order». See Case C-156/21, ECLI:EU:C:2022:97, 16 February 2022, and case Case C-157/21, ECLI:EU:C:2022:97, 16 February 2022, respectively the identical paragraphs 127 and 145.

To begin with the last point, it is a generally excepted feature of states that they claim the monopoly of violence[15]. The Union does not. It leaves that claim to the member states. This necessarily implies that the Union is not a state. I leave aside here to what extent the fact that the Union needs the member states to enforce Union law is a consequence of not claiming a monopoly of violence, or of the dual nature of the Union's form of "federalism" (which may itself arguably be a consequence of the lack of claiming a monopoly of violence). In my opinion the lack of a claim to the monopoly of violence is the most decisive reason to say the Union is not a state, even if, in the way we stated above, the nature of the powers it exercises is no different.

And yet, this point may be gradually slipping away. This is due to the fact that the legitimate use of violence is not only a matter of using the strong arm of the police and military forces, precisely because the claim concerns the *legitimate* use of violence. In a state under the rule of law this requires lawfulness of the use of violence, which is increasingly determined by EU legislation concerning its enforcement, in particular concerning sanctions in case of non-compliance. This may not itself shift the monopoly of violence to the European Union, but it does restrict the autonomy of member state authorities in determining the cases in which the use of violence is legitimate. If lawfulness of the use of violence is ultimately decided by the Union and no longer by member states, this seems to shift the monopoly away from member states. Although there is a clear difference between physical violence and the law. One may say that physical violence is not what the Union itself has the instruments for, yet the Union borrows these from the member states who then can be said to act on behalf of the Union, using force that is lawful in terms defined by Union law. So at least as regards one of the two elements of the "legitimate use of violence", i.e. its lawfulness, the monopoly does not reside with the holders of the instruments of physical power, but with the Union[16].

This brings us to the point of autonomy, and the question what kind of autonomy could be proper to the European constitution. Constitutions are the embodiment of the claim of the autonomy of the body politic it constitutes, empowers and regulates. This autonomy creates a sphere of independence within which a political community decides its own laws. This is also a claim that has been made by the Court of Justice concerning the nature of the European Union since *Van Gend & Loos*. In *Opinion 2/13* this took the extreme form of a claim used to refuse the submission of the Union, and more in particular the Court itself, to the authority of the European Convention on Human Rights and its European Court of Human Rights (and Committee of Ministers that supervises compliance with the latter's judgments). From an ideological point of view, this seemed like the *hubris* of sovereignty that the project of European integration was intended to overcome. Viewed thus, *Opinion 2/13* not only undermined the Court's own authority, and did a tremendous disservice to this project by undermining its the very logic. It failed where European states had failed though in the latter case with far more dramatic consequences due to the fact that they physically wielded the violence they each monopolized – a physical

[15] Max Weber, *Politik als Beruf*, 1919, p. 4-5; *Wirtschaft und Gesellschaft*, I, I, § 17, in *textlog.de*.

[16] The definition of the object of the monopoly as "legitimate" use of violence of course implies that not only legitimacy in terms of "lawfulness" is required, but also legitimacy in terms of democracy.

monopoly that is not held by the Union or wielded by its Court. Since the establishment of the Union, the member states have overall shown to have learnt that their own claim to autonomy is an autonomy within their own field of competence only, and has thus, precisely because of European integration (but also by other features of globalization) learnt to understand their claim to autonomy to be a claim to relative autonomy only. Precisely this is like the understanding of sovereignty in "evolutionary" constitutions.

8. Conclusion

Although the origin of the European Union lies in the tragedies of the Second World War and the murderous ideologies and authoritarianisms from before and after, this is no longer the revolutionary "constitutional moment" that informs the European Union as its single and unifying "motivating myth" for all member states. Much rather it has absorbed a whole series of larger and smaller crises into an incremental process of constitutional development, from an political organization guaranteeing peace to one consolidating democracy – and there ugly cracks in in its reputation and role as guarantor of democracy. The present constitution of Europe does not have a *finalité* that provides a blueprint that pretends to usher in the "end of history", on the basis of an act of a singularly identifiable *pouvoir constituant*. Europe's constitution is bound to be one of the "evolutionary type". These have proven to be often singularly effective and successful.

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ABSTRACT: Three different questions can be posed about identity and constitutions in Europe and the European constitution: What identifies a constitutional order? What is the identity of a constitutional order? What identity does a constitution confer? As the last question is discussed in greater detail in separate contributions, I focus mainly on the first two questions, and of these, in particular on the second question: the identity of a constitutional order. I take my cue in the two very different, and at first sight somewhat puzzling responses of the national electorates of France and the Netherlands to the question of whether a European Constitution is essential to the construction of Europe. This difference reflects a difference in understanding the meaning of constitutions/Constitutions. I reflect on two ideal types of constitutions we can identify in Europe, and how these relate to the constitutional order of the European Union. Central in this pursuit is the question: what kind of constitutional order is the European constitution?

KEYWORDS: constitution – identity – constitutional order – European constitutional law – European constitution

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